EXHIBIT 1

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 & Communications Association, on behalf of their respective members, Plaintiffs,

v.

Letitia A. JAMES, in her official capacity as the Attorney General of New York, Defendant.

2:21-cv-2389 (DRH) (AKT)

United States District Court,
E.D. New York.

Signed 06/11/2021

Background: Trade associations, whose members provide broadband internet service, filed motion for a preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband Act, which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings.

Holdings: The District Court, Denis R. Hurley, Senior District Judge, held that:

(1) providers adequately demonstrated imminent irreparable injury;

(2) providers adequately demonstrated likelihood of success based on conflict prevention;

(3) providers adequately demonstrated likelihood of success based on field prevention by the Federal Communications Act of 1934;

(4) providers adequately demonstrated balance of equities and the public interest favored a preliminary injunction; and

(5) Court would exercise its discretion to decline to require providers to post a bond.

Motion granted.

1. Injunction ⚷1252

To obtain preliminary injunction against government enforcement of statute, plaintiff must establish that it is likely to succeed on merits, that it is likely to suffer irreparable harm if injunction is not granted, that balance of equities tips in its favor, and that injunction serves public interest.

2. Injunction ⚷1106

Party moving for preliminary injunction must first demonstrate that irreparable injury is likely before other requirements for issuance of injunction will be considered, for imminent, irreparable injury is single most important prerequisite for issuance of preliminary injunction.

3. Injunction ⚷1106

In context of preliminary injunction motion, irreparable harm must be actual and imminent, not remote, not speculative, and not capable of remedy should court wait until end of trial to resolve matter.

4. Federal Courts ⚷2377
Injunction ⚷1114

If redressable through monetary damages, injury ordinarily will not justify preliminary injunctive relief, unless Eleventh Amendment precludes recovery of monetary damages. U.S. Const. Amend. 11.

5. Telecommunications ⚷1338

Broadband internet service providers adequately demonstrated imminent irreparable injury, largely due to the monetary harm they would suffer, as required to obtain preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband Act (ABA),

which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings; providers would suffer decreasing revenue as well as increased costs from requirement that they make "reasonable efforts" to advertise the ABA's offers, many providers would furnish broadband service at ABA-mandated rates at a loss, state had potential Eleventh Amendment immunity from monetary damages, and noncompliance could lead to possible initiation of dissolution proceedings. U.S. Const. Amend. 11; N.Y. General Business Law § 399-zzzzz.

6. Federal Courts ⚷2377

Injunction ⚷1114

Though monetary damages would usually supply an adequate remedy at law negating the availability of preliminary injunctive relief, the harm takes on special import where the Eleventh Amendment precludes redressability, as where damages cannot be later collected because the defendant enjoys Eleventh Amendment immunity, the damages become irreparable. U.S. Const. Amend. 11.

7. Injunction ⚷1052

In deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available federal legal remedies.

8. Injunction ⚷1104

The law does not demand absolute prescience when predicting future harm for purposes of a preliminary injunction.

9. States ⚷18.11

The purpose of Congress is the ultimate touchstone in every state law preemption case.

10. States ⚷18.13

A court's preemption analysis begins with the assumption that the historic police powers of the States are not to be superseded by federal law unless that was the clear and manifest purpose of Congress.

11. Municipal Corporations ⚷53

If a local government regulates in an area where there has been a history of significant federal presence, a purported exercise of historic police powers is not afforded deference in preemption analysis.

12. States ⚷18.9

Federal regulations have no less preemptive effect on state law than federal statutes.

13. States ⚷18.3

A statute or regulation with plausible alternative preemption readings requires a court to accept the reading that disfavors preemption of state law.

14. States ⚷18.5

Federal law must prevail over state law pursuant to doctrine of conflict preemption if compliance with both state and federal law is impossible or if state law stands as obstacle to accomplishment and execution of full purposes and objectives of Congress.

15. Telecommunications ⚷611

Under the Federal Communications Act of 1934, Title II "telecommunications services" entails common carrier status, while Title I "information services" do not. Communications Act of 1934 § 3, 47 U.S.C.A. §§ 153(24), 153(51), 153(53).

16. Telecommunications ⚷1338

Broadband internet service providers adequately demonstrated likelihood of success based on conflict prevention, as required to obtain preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband

Act (ABA), which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings; ABA was rate regulation, a form of common carrier treatment which conflicted with the implied preemptive effect of both the Federal Communication Commission's (FCC's) order, choosing Title I "information service" treatment for broadband internet and deciding to treat broadband services as a common carrier, and the Federal Communications Act of 1934, which prohibited common-carrier treatment of "information services." Communications Act of 1934 § 3, 47 U.S.C.A. § 153(51); N.Y. General Business Law § 399-zzzzz.

17. Telecommunications ⚷1321

Information-service providers are not subject to mandatory common-carrier regulation under Title II of the Federal Communications Act of 1934, though the Federal Communications Commission (FCC) has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

18. Administrative Law and Procedure ⚷1104, 1112

In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

19. Carriers ⚷12(.5)

Rate regulation is a long-accepted method of regulating common carriers.

20. Carriers ⚷4

"Common carrier status" does not turn on provider's offered service being practically available to entire public.

21. Carriers ⚷10

A regulation may impose common carrier obligations even if a service is of practical use to only a fraction of the population as a result of the obligation limiting its benefits to those eligible; the key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.

22. States ⚷18.7

Field preemption reflects congressional decision to foreclose any state regulation in area, irrespective of whether state law is consistent or inconsistent with federal standards.

23. States ⚷18.7

Where federal law occupies field of regulation so comprehensively that it has left no room for supplementary state legislation, it may not only impose federal obligations but also confer federal right to be free from any other state law requirements.

24. Telecommunications ⚷1338

Broadband internet service providers adequately demonstrated likelihood of success based on field prevention by the Federal Communications Act of 1934, as required to obtain preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband Act (ABA) which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings; ABA regulated within the field of interstate communications, and thus triggered field preemption. Communications Act of 1934 § 2, 47 U.S.C.A. § 152; N.Y. General Business Law § 399-zzzzz.

25. Telecommunications ⚷615

The key to the Federal Communications Commission's (FCC's) jurisdiction,

the line between inter- vs. intrastate, is the nature of the communication itself rather than the physical location of the technology or the consumers served. Communications Act of 1934 § 2, 47 U.S.C.A. § 152(a).

26. States ⚷18.81

Telecommunications ⚷609

Federal Communications Act of 1934's broad scheme for regulation of interstate service by communications carriers indicates intent on part of Congress to occupy field to exclusion of state law. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

27. Federal Courts ⚷2218(2)

States ⚷18.3

Complete preemption is distinct from ordinary or defensive preemption, which includes express, field, and conflict preemption.

28. Federal Courts ⚷2218(2)

States ⚷18.3

"Complete preemption" is where certain federal statutes are construed to have such extraordinary preemptive force that state-law claims coming within scope of federal statute are transformed, for jurisdictional purposes, into federal claims.

See publication Words and Phrases for other judicial constructions and definitions.

29. Telecommunications ⚷615

The "impossibility exception" gives the Federal Communications Commission (FCC) jurisdiction where it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation. Communications Act of 1934 § 2, 47 U.S.C.A. § 152.

30. States ⚷18.11

A federal law's express preemption clause does not immediately end the preemption inquiry, because the question of the substance and scope of Congress' displacement of state law still remains.

31. States ⚷18.5, 18.7

Preemptive intent may be inferred if scope of statute indicates that Congress intended federal law to occupy legislative field, or if there is actual conflict between state and federal law.

32. Injunction ⚷1246

The balance of equities and public interest factors for granting a preliminary injunction merge when the Government is the opposing party.

33. Telecommunications ⚷1338

Broadband internet service providers adequately demonstrated balance of equities and the public interest favored a preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband Act (ABA), which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings; while the stated purpose of the ABA was to expand access to broadband internet, several federal programs allocated billions of dollars to achieve that same end, and there was evidence the ABA may not achieve its desired effect and in fact reduce Internet access statewide due to cancellation of expansion projects based on costs. N.Y. General Business Law § 399-zzzzz.

34. Injunction ⚷1653, 1658

District court has wide discretion to set the amount of a preliminary injunction bond, and even to dispense with the bond requirement where there has been no proof of likelihood of harm. Fed. R. Civ. P. 65(c).

35. Telecommunications ⚷1338

District Court, when granting broadband internet service providers' motion for

a preliminary injunction barring New York State Attorney General from enforcing the Affordable Broadband Act, which would require them to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings, would exercise its discretion to decline to require providers to post a bond; state defendants had not requested one, nor was there any proof of a likelihood of harm to the state that could result from granting the injunction. N.Y. General Business Law § 399-zzzzz; Fed. R. Civ. P. 65(c).

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Validity Called into Doubt

N.Y. General Business Law § 399-zzzzz

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MEMORANDUM AND ORDER

HURLEY, Senior District Judge:

INTRODUCTION

On May 6, 2021, the captioned Plaintiffs, a group of trade associations whose members provide broadband internet service to New Yorkers, moved this Court under Federal Rule of Civil Procedure 65(a) for a preliminary injunction barring New York State Attorney General Letitia A. James from enforcing the Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz, which would require them by June 15, 2021 to offer qualifying low-income customers high-speed broadband service at or below certain price ceilings. For the reasons set forth below, Plaintiffs' motion is GRANTED.

BACKGROUND

Internet access has transcended beyond mere luxury to modern necessity. So integrated has the Internet become with contemporary American life that our nation adapted to—if not survived—the COVID-19 pandemic by relying on how easily it facilitates access to our fundamental needs: *e.g.*, healthcare ("telehealth"), education ("remote learning"), employment ("work from home"), camaraderie ("social networking"). Def. Mem. in Opp. at 5 [DE 19] ("Def. Opp."). But the Internet's promise of access is only as promising as its accessibility – which depends in part on whether individuals can afford it.

The New York State Affordable Broadband Act's (the "ABA") stated purpose is to ensure all New Yorkers have access to affordable Internet. Signed into law April

16, 2021, the ABA regulates every New York "broadband service," defined as

> [a] mass-market retail service that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service provided by a wireline, fixed wireless or satellite service provider, . . . [excluding] dial-up service.

N.Y. Gen. Bus. Law § 399-zzzzz(1). The ABA covers every broadband service provider operating in New York except those serving "no more than twenty-thousand households" whose compliance, as determined by the New York State Public Service Commission (the "PSC"), "would result in unreasonable or unsustainable financial impact." *Id.* § 399-zzzzz(5). Plaintiffs are trade associations whose members provide "wireline, fixed wireless, or satellite broadband service"; they are "broadband service" providers. Compl. ¶¶ 12–18, 26.

The ABA mandates such providers offer, by June 15, 2021, all qualifying low-income households at least two Internet access plans: (i) download speeds of at least 25 megabits-per-second at no more than $15-per-month, or (ii) download speeds of at least 200 megabits-per-second at no more than $20-per-month. N.Y. Gen. Bus. Law §§ 399-zzzzz(2)–(4). A household qualifies if it:

> (a) is eligible for free or reduced-priced lunch through the National School Lunch Program; or (b) is eligible for, or receiving the supplemental nutrition assistance program benefits; or (c) is eligible for, or receiving Medicaid benefits; or (d) is eligible for, or enrolled in senior citizen rent increase exemption; or (e) is eligible for, or enrolled in disability rent increase exemption; or (f) is a recipient of an affordability benefit from a utility.

Id. § 399-zzzzz(2). These qualifications cover approximately "[7] million New Yorkers and 2.7 million households,"[1] the latter of which exceeds one-third of all New York State households.[2]

Providers may raise prices only according to a statutory formula and only once every five years (for the $15 monthly plan) or two years (for the $20 monthly plan). *Id.* §§ 399-zzzzz(3)–(4). These Internet plans must be offered "on the same terms and conditions . . . as for the regularly priced offerings for similar service[s]" and on a standalone basis, *i.e.*, separate from any "bundled cable and/or phone services." *Id.* §§ 399-zzzzz(3), (5). Providers must "make all commercially reasonable efforts to promote and advertise" the plans. *Id.* § 399-zzzzz(7). The ABA empowers the New York State Attorney General, Defendant Letitia A. James, to seek injunctive relief against and civil penalties up to a $1000 per violation from any noncompliant providers. *Id.* § 399-zzzzz(10).

Plaintiffs brought this action on April 30, 2021, [DE 1], and on May 6, 2021 moved for a preliminary injunction barring Defendant from enforcing and giving effect to the ABA, Pls. Mem. in Support [DE 16] ("Pls. Mem."). Declarations from six executives at Plaintiffs' member organizations accompany Plaintiffs' briefs. *See* Declaration of Jim Baase ("Empire Tele. Decl."), Ex A. to Pls. Mem. [DE 16-1]; Declaration of Matthew Kramer Coakley, ("Verizon

1. Press Release, Governor Cuomo Signs Legislation Establishing First-in-the-Nation Program to Provide Affordable Internet to Low-Income Families (Apr. 16, 2021), https://on.ny.gov/2QZqDtl.

2. U.S. Census Bureau, QuickFacts: New York, https://www.census.gov/quickfacts/fact/table/NY/HSD410219 (last accessed June 11, 2021) (7,343,234 households).

Decl."), Ex. B. to Pls. Mem. [DE 16-2]; Declaration of Glen Faulkner ("Heart of the Catskills Decl."), Ex. C to Pls. Mem. [DE 16-3]; Declaration of Jennifer Manner ("Hughes Network Decl."), Ex. D to Pls. Mem. [DE 16-4]; Declaration of Jason Miller ("Delhi Tele. Decl."), Ex. E to Pls. Mem. [DE 16-5]; Declaration of Mark T. Webster ("Champlain Tele. Decl."), Ex. F to Pls. Mem. [DE 16-6].

Defendant opposed on May 17, 2021 and advised that the PSC scheduled a hearing for May 19, 2021 to address pending exemption applications. Def. Opp. at 10. At the hearing, the PSC granted "temporary exemption[s] to allow for the orderly review and evaluation of the exemption requests" to several companies, four of whose executives submitted declarations in support of Plaintiffs' motion. Order Granting Temporary Exemptions attached to Def.'s May 20, 2021 Ltr. [DE 21] ("PSC Order"). The PSC issued a "Notice Soliciting Comment" on May 28, 2021, inviting public comment "on the criteria and factors that may be considered by the [PSC] in evaluating" the ABA's "unreasonable or unsustainable financial impact" exemption criteria. Ex. B to Pls. June 1, 2021 Ltr. [DE 24-2].

Plaintiffs submitted their Reply brief on May 21, 2021. Pls. Reply in Support [DE 23] ("Pls. Reply"). Oral argument was held on June 3, 2021.

DISCUSSION

[1] "To obtain a preliminary injunction against government enforcement of a statute, [a plaintiff] must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm if the injunction is not granted, (3) that the balance of the equities tips in its favor, and (4) that the injunction serves the public interest." *SAM Party of New York v. Kosinski*, 987 F.3d 267, 273–74 (2d Cir. 2021).

[2] First, the Court will address irreparable injury. "[T]he moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered," *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007), for imminent, irreparable injury is "the single most important prerequisite for the issuance of a preliminary injunction." *Yang v. Kosinski*, 960 F.3d 119, 128 & n.32 (2d Cir. 2020)

Second, the Court analyzes Plaintiffs' likelihood of success on the merits, despite Plaintiffs' availment also of the alternative "serious questions" standard. Pls. Mem. at 6–7, 24. The Second Circuit "ha[s] repeatedly stated that the serious-questions standard cannot be used to preliminarily enjoin governmental action," *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019), *rev'd on other grounds sub nom., Trump v. Mazars USA, LLP*, ––– U.S. ––––, 140 S.Ct. 2019, 207 L.Ed.2d 951 (2020), and the ABA is the product of New York State's legislative process, *see Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (instructing not to apply serious-questions standard to "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes [because they] are entitled to a higher degree of deference and should not be enjoined lightly").

Third, the Court balances the equities and weighs the public interest. *Pharaohs GC, Inc. v. U.S. Small Bus. Admin.*, 990 F.3d 217, 225 (2d Cir. 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The Court finishes by addressing Federal Rule of Civil Procedure 65(c).

I. Imminent, Irreparable Harm

[3, 4] In the context of a preliminary injunction motion, irreparable harm must

be "actual and imminent," not "remote," not "speculative," and not capable of remedy should "a court wait[ ] until the end of trial to resolve" the matter. *Grand River Enter. Six Nations, Ltd.*, 481 F.3d at 66. If redressable through monetary damages, an injury ordinarily will not justify preliminary injunctive relief, *Moore v. Consol. Edison Co. of New York*, 409 F.3d 506, 510 (2d Cir. 2005) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)), unless the Eleventh Amendment precludes recovery of monetary damages, *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam).

A. Parties' Arguments

Plaintiffs ground irreparable harm in a "Hobson's choice" whereby they suffer injury whether or not they comply with ABA. Should they choose noncompliance, they face civil penalties and the Governor's "promise" that they "will lose [their] franchise in the State of New York." Should they comply, the ABA will "likely" require them to provide these services at a loss, raise advertising expenditures, impose administrative costs due to providers' need "to develop a system for validating customers' eligibility," force them to cancel preexisting business plans for upgrades to, and expansion of, their broadband networks, and inflict reputational harm. Pls. Mem. at 18–20.

Defendant counters that Plaintiffs "speculate" with "conclusory arguments" about "possible" future events, whose effects may be "long term" and not "imminent." Def. Opp. at 8–10. Defendant says Plaintiffs fail to consider the "benefits" providers "are likely to gain from the ABA," such as new customers and increased goodwill. *Id.* Defendant also notes an uncertainty as to whether or not certain of Plaintiffs' member organizations must comply with the ABA, considering the specific services they offer and the availability of exemptions. *Id.* With respect to the latter, Defendant notified the Court that the PSC granted four organizations whose executives submitted declarations "temporary exemption[s] . . . pending complete review of individual exemption applications." PSC Order at 7.

B. Analysis

[5–7] Plaintiffs have adequately demonstrated imminent irreparable injury largely due to the monetary harm they would suffer. Though monetary damages would usually supply an adequate remedy at law negating the availability of preliminary injunctive relief, the harm takes on special import where, as here, the Eleventh Amendment precludes redressability. *See United States v. New York*, 708 F.2d at 93–94; *e.g.*, *UnitedHealthcare of N.Y., Inc. v. Vullo*, 2018 WL 4572243, at *2 (S.D.N.Y. Sept. 21, 2018). "Where [monetary] damages cannot be later collected because the defendant enjoys [E]leventh [A]mendment immunity, the damages become irreparable."[3] *N.Y.S. Trawlers Ass'n v. Jorling*, 764 F. Supp. 24, 25–26 (E.D.N.Y.), *aff'd*, 940 F.2d 649 (2d Cir. 1991); *e.g.*, *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 572 n.6 (S.D.N.Y. 2009) (plaintiffs "unable to collect a judgment for monetary damages" due to "sovereign immunity under the

3. At oral argument, Defendant pointed to the availability of state remedies, notwithstanding the Eleventh Amendment. Tr. of Oral Arg. at 24:10–14. Yet "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies." *United States v. New York*, 708 F.2d at 93–94 (emphasis in original) (citing *Petroleum Expl., Inc. v. Commissioner*, 304 U.S. 209, 217 & n.8, 58 S.Ct. 834, 82 L.Ed. 1294 (1938)).

Eleventh Amendment" may have irreparable injury "presumed" because "the only relief available ... is injunctive."); *Am. Soc. of Composers, Authors, & Publishers v. Pataki*, 930 F. Supp. 873, 880 n.15 (S.D.N.Y. 1996). "[A]t least three circuits have held that unrecoverable damages may be irreparable harm, without reference to the amount of the loss." *Regeneron Pharms., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 2020 WL 7778037, at *4 (S.D.N.Y. Dec. 30, 2020) (citing *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010); and *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996)).

Beginning June 15, 2021, Plaintiffs will suffer unrecoverable losses increasing with time, and the enormity of the matter—six plaintiffs with multiple member organizations attacking a statute affecting one-third of all New York households—portends a lengthy litigation. *See, e.g.*, *Regeneron Pharms., Inc.*, 2020 WL 7778037, at *4 (quoting *Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d Cir. 1995)). The bulk of these losses will stem from lost income. Three of Plaintiffs' declarants estimate the ABA will reduce annual net income by at least $1 million each. Empire Tele. Decl. ¶ 8 ("net income loss of approximately $2 million per year"); Heart of the Catskills Decl. ¶ 17 ("top-line revenue will decrease by $1,364,000, and net cash flow will decrease by $1,031,000,"); Delhi Tele. Decl. ¶ 7 ("net income loss of about $1 million per year (or $90,000 per month)"). While a telecommunications giant like Verizon may be able to absorb such a loss, others may not: the Champlain Telephone Company, for example, "estimates that nearly half [approximately 48%] of [its] existing broadband customers will qualify for discounted rates," with each such customer "caus[ing] a monetary loss." Champlain Tele. Decl. ¶¶ 4, 6–7.

Beyond decreasing revenue, the ABA will increase costs. Providers must "make all commercially reasonable efforts" to advertise the ABA offers, N.Y. Gen. Bus. Law § 399-zzzzz(7), an ad campaign estimated to cost one provider (Verizon) between $250,000 and $1,000,000, Verizon Decl. ¶ 10. These advertising costs, like lost income, will continue in perpetuity. And the ABA also imposes upfront, one-time administrative costs – namely, those necessary to develop an eligibility verification system (as New York State has not provided one of its own) estimated to start at $125,000, *id.* ¶ 8 – to say nothing of administrative costs to check on a participant's continuing eligibility, likely a perpetual obligation as well. Because providers will begin to face these consequences (revenue losses, additional costs) and bear these responsibilities (advertising logistics, eligibility determinations) on June 15, 2021, Plaintiffs' harms are therefore imminent.

Defendant impugns Plaintiffs' figures by arguing "none are supported by financial records of any sort." Def. Opp. at 8. Defendant cites no cases identifying the form of Plaintiffs' evidence as a problem, and courts have long granted preliminary injunctive relief by relying on affidavits supplying specific financial figures to demonstrate the magnitude of irreparable monetary injury. *E.g.*, *Nationwide Auto Transporters, Inc. v. Morgan Driveaway, Inc.*, 441 F. Supp. 755, 760 (S.D.N.Y. 1977); *see Regeneron Pharms., Inc.*, 2020 WL 7778037, at *4–5; *see also Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) ("[H]earsay evidence may be considered by a district court in determining whether to grant a preliminary injunction."). Moreover, the declarants provide these figures under the penalty of perju-

ry, *see* 28 U.S.C. § 1746, which their positions qualify them to assert, Empire Tele. Decl. ¶ 1 (Chief Operating Officer); Verizon Decl. ¶ 1 (Executive Director of Home Segment Marketing); Heart of the Catskills Decl. ¶ 1 (President and General Manager); Hughes Network Decl. ¶ 1 (Senior Vice President for Regulatory Affairs); Delhi Tele. Decl. ¶ 1 (Vice President/General Manager); Champlain Tele. Decl. ¶ 1 (Controller). Plaintiffs have met their burden of proof.

[8] To the extent Defendant faults Plaintiffs' declarants for predicting these harms as "likely," Def. Opp. at 8 & n.5, the law does not demand absolute prescience. The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22, 129 S.Ct. 365 (emphasis in original). Further, to the extent Defendant contests irreparable harm by relying on the purported "benefits" some providers "are likely to gain from the ABA," Def. Opp. at 9, these "benefits" actually *exacerbate* Plaintiffs' harms. Plaintiffs' declarants aver, and Defendant does not dispute, that many providers will furnish broadband service at ABA-mandated rates *at a loss*, meaning every "new customer" who takes advantage of the offer pushes a provider closer to (if not deeper in) the red. *E.g.*, Heart of the Catskills Decl. ¶ 15; Hughes Network Decl. ¶ 6.

The availability of exemptions similarly offers little in refute at this juncture. Once the ABA goes into effect, later exemption requests "do[ ] not relieve [a provider] from its obligations under the [ABA] until such time as the request is granted by the Commission." PSC Order at 4, 6. The granted temporary exemptions to some, but not all, of Plaintiffs' member organizations do not guarantee that such organizations will avoid irreparable injury. The temporary exemptions merely give the PSC more time to decide (viz. potentially deny) the requests, pursuant to "criteria and factors" not yet identified. *Id.* at 5; N.Y. Gen. Bus. Law § 399-zzzzz(5). Providers serving fewer than 20,000 households are *eligible* for, *not entitled* to, an exemption and require the PSC to find "compliance" would "result in unreasonable or unsustainable financial impact." N.Y. Gen. Bus. Law § 399-zzzzz(5). *How* the PSC makes determination will remain unknown until after June 25, 2021 – the deadline to submit public comment to the PSC on the issue. Ex. B to Pls. June 1, 2021 Ltr.

Accordingly, when considered alongside the obvious downsides to noncompliance, which include possible initiation of dissolution proceedings,[4] Plaintiffs have demon-

4. At an April 7, 2021 press conference, Governor Cuomo indicated that the failure to comply with ABA would result in the loss of the provider's franchise in the State of New York. The Court notes that the New York Attorney General has long wielded the power to dissolve businesses which, "by the abuse of [their] powers contrary to the public policy of the state[,] ha[ve] become liable to be dissolved." *See People by Abrams v. Oliver Sch., Inc.*, 206 A.D.2d 143, 147–48, 619 N.Y.S.2d 911 (4th Dep't 1994) (citing *People v. Buffalo Stone & Cement Co.*, 131 N.Y. 140, 29 N.E. 947 (1892) and *People v. N. River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890)).

This is not to suggest a violation of law should go unremedied. Rather, it lends credence to Plaintiffs' asserted "Hobson's choice" through which they face irreparable injury via the destruction of the business regardless of their choice to comply or not to comply. Dissolution constitutes irreparable harm because it threatens the viability of a provider's business. *See Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 38 (2d Cir. 1995); *John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc.*, 588 F.2d 24, 28–29 (2d Cir. 1978).

strated the ABA going into effect on June 15, 2021 compliance will result in irreparable injury absent preliminary injunctive relief.

II. Likelihood of Success

Plaintiffs' likelihood of success depends on the strength of their preemption arguments, namely whether the ABA (a) conflicts with federal law by standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("conflict preemption"), or (b) invades a field of regulation entirely occupied by federal law, with no room left for state law ("field preemption").

A. Preemption Generally

[9–11] "The purpose of Congress is the ultimate touchstone in every preemption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). Accordingly, a court's analysis begins "with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Id.* at 77, 129 S.Ct. 538 (alteration in original) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). However, if "a local government regulates in an area 'where there has been a history of significant federal presence,'" a purported exercise of historic police powers is not afforded deference. *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (quoting *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)).

[12, 13] "Federal regulations have no less preemptive effect than federal statutes." *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007) (internal quotation marks omitted) (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)). A statute or regulation with plausible alternative preemption readings requires a court "to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

There are two types of preemption asserted here: conflict preemption and field preemption. The Court begins with conflict preemption.

B. Conflict Preemption

[14] "[F]ederal law must prevail" over state law pursuant to the doctrine of conflict preemption if "'compliance with both state and federal law is impossible' or [if] 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S.Ct. 1591, 191 L.Ed.2d 511 (2015) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)).

[15] Before addressing the merits, it is necessary to review broadband service under the Federal Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 151 et seq., as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Federal Communications Commission (the "FCC") has classified broadband internet under the Communications Act as either a Title I "information service" or a Title II "telecommunications service." The two classifications are mutually exclusive. 47 U.S.C. §§ 153(24), (53) ("The term 'information service' . . . does not include any use of any such capability for . . . the management of a telecommunications ser-

vice."). "These similar-sounding [classifications] carry considerable significance: Title II [telecommunications services] entails common carrier status," whereas Title I information services do not. *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (per curiam); *see* 47 U.S.C. § 153(51) (permitting treatment "as a common carrier ... only to the extent that [an entity] is engaged in providing telecommunications services").

Prior to 2015 the FCC classified, and since 2018 has classified, broadband internet as a Title I "information service." 2015 Order ¶ 308;[5] 2018 Order ¶¶ 2, 26.[6] In the interim between 2015 and 2018, the FCC classified broadband as a Title II "telecommunications service." Its present "information service" status prevents the FCC from imposing common carrier obligations on providers. 2018 Order ¶¶ 26–64; *see Mozilla Corp.*, 940 F.3d at 17 (" '[I]nformation services' are exempted from common carriage status and, hence, Title II regulation.").

1. Parties' Arguments

Plaintiffs contend the ABA conflicts with Congress's purposes and objectives in the Communications Act, as interpreted by the FCC and embodied in the FCC's 2018 Order. The ABA, they say, "subjects the same broadband service that the Communications Act says should not be subject to common-carrier obligations to a form of *per se* common-carrier regulation: rate regulation." Pls. Mem. at 12. Plaintiffs compare the 2018 Order, in which the FCC announced a policy to "further[ ] its goal of making broadband available to all Americans" and exempted broadband from common carrier treatment, with the ABA, in which New York purported to reach the same goal through contradictory means. *Compare* 2018 Order ¶¶ 86–87, *and* 2015 Order ¶¶ 382, 451 ("[W]e do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future ...."), *with* N.Y. Gen. Bus. Law § 399-zzzzz.

Defendant casts the ABA not as common carrier rate regulation, but as an "accessible pricing scheme." Def. Opp. at 17–18. By choosing a Title I classification, she says, the FCC does not deregulate broadband internet but, rather, "disclaim[s]" authority to regulate it altogether. Def. Opp. at 23; *see also* Hr'g Tr. at 65:16–23, *ACA Connects v. Becerra*, No. 18-cv-2684 (E.D. Cal. Feb. 23, 2021), Ex. H to Pls. Mem. [DE 16-8] ("*Becerra* Tr.") ("[R]einterpret[ting] broadband Internet as an information service covered by Title I ... place[s] it outside the FCC's regulatory ambit ..., a decision by the FCC that it lacked authority to regulate in the first place."). She reads the Communications Act's prohibition of common-carrier treatment of "information services" not to limit states, *see* 47 U.S.C. § 153(51), and argues that finding Congress intended preemption of state law there contravenes the express manner in which it did so elsewhere in the statute, Def. Opp. at 20 (citing 47 U.S.C. § 160(a)). Defendant contends the FCC's 2018 Order fails to express a policy preference strong enough to overcome New York's "historic police powers." Def. Opp. at 17–18.

2. Analysis

[16–18] Plaintiffs have demonstrated a likelihood of success on the issue of conflict preemption. The Court rejects Defendant's contention that the FCC disclaimed

5. Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 25 (2015) ("2015 Order").

6. Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶ 21 (2018) ("2018 Order").

"its authority to regulate broadband at all." Tr. of Oral Arg. at 17:15–17. In reclassifying broadband internet as a Title I information service, the FCC made the affirmative decision not to treat it as a common carrier. The FCC's affirmative decision is different from an abdication of jurisdiction writ large, even though Title I may not confer as expansive of powers as, say, Title II and its grant to impose common-carrier obligations. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) ("The Court has previously recognized that where failure of … federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation." (internal quotation marks omitted)); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947) (holding federal nonregulation was not an "administrative concession that the nature of these appellants' business put" the particular subject matter "beyond reach of federal authority"). "Information-service providers … are not subject to mandatory common-carrier regulation under Title II, though the *Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction* to regulate interstate and foreign communications." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (emphasis added); *Am. Libr. Ass'n v. FCC*, 406 F.3d 689, 692–93 (D.C. Cir. 2005) (The FCC's "general grant of jurisdiction under Title I … encompasses 'all interstate and foreign communication by wire.'") (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968)). "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing *which* jurisdictional base and *which* regulatory tools will be most effective in advancing the Congressional objective." *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 212 (D.C. Cir. 1982) (emphasis in original) (quoting *Phila. Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966)). The FCC's 2018 Order chooses Title I "information service" treatment for broadband internet and, in doing so, does not tender jurisdiction to the States to regulate interstate broadband providers as common carriers. Rather, the FCC binds itself to the confines of Title I jurisdiction, cementing its long-standing policy choice concerning the propriety of imposing common-carrier rate regulations upon broadband internet service.[7] The ABA stands as an obstacle to the accomplishment and execution of the FCC's reasoned decision to assure interstate broadband providers that no common-carrier rate regulations await them beyond the horizon.[8] *Crockett Tel. Co. v.*

7. Previous to the 2015 Order, the FCC treated broadband internet as a Title I information service for "almost twenty years." 2018 Order ¶¶ 1–2. And even though Title II gave it the power to impose common-carrier rate regulations on broadband internet between 2015 and 2018, the FCC expressly decided against doing so. 2015 Order ¶¶ 382, 451 ("[B]ecause we do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future, we forbear from applying sections 201 and 202 to broadband services to that extent.").

8. The FCC reclassified broadband internet service under Title I "due to concerns that the [FCC] could reverse course in the future and impose [pursuant to Title II] a variety of costly regulations on the broadband industry—such as rate regulation." 2018 Order ¶ 101.

FCC, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates." (internal citation omitted)).

To be clear, the ABA is rate regulation, and rate regulation is a form of common carrier treatment. In Defendant's words, the ABA concerns "Plaintiffs' pricing practices" by creating a "price regime" that "set[s] a price ceiling," which flatly contradicts her simultaneous assertion that "the ABA does not 'rate regulate' broadband services." Def. Opp. at 1, 6, 14, 18 (capitalization omitted). "Price ceilings" regulate rates. *E.g.*, *AT&T Co. v. FCC*, 974 F.2d 1351, 1352 (D.C. Cir. 1992) ("The FCC issued an order adopting a new method *for regulating the rates* charged by AT&T ... that *established* a 'price cap index,' that serves as *a price ceiling* for each of three "baskets" of AT&T services." (emphasis added)); *see, e.g.*, *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 758–60, 768, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (recognizing the Federal Power Commission, "for purposes of rate regulation," devised a "rate structure" by setting "two area maximum prices," using the "legislative power to create price ceilings" (internal quotation marks omitted)); *see also, e.g.*, *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 486–87, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) ("The regulatory response in some markets was adoption of a rate-based method commonly called 'price caps,' as, for example, by the FCC's setting of maximum access charges paid to large local-exchange companies by interexchange carriers." (internal citations omitted)).

[19–21] And rate regulation is a long-accepted method of regulating common carriers. *E.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231–32, 234, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) ("[T]he [Communications] Act establishes a *rate-regulation*, filed-tariff system for *common-carrier* communications." (emphasis added)); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 119, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ("The ICC *regulates* interstate transportation by motor *common carriers* to ensure that *rates* are both reasonable and nondiscriminatory." (emphasis added)). Defendant resists by noting the ABA is "limited to a discrete subset of customers," whereas common carriers offer service to the public indiscriminately and on general terms. Def. Opp. at 18. But "common carrier status" does not turn on a provider's offered service being "practically ... available to the entire public." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). A regulation may impose common carrier obligations even if a service is "of practical use to only a fraction of the population" as a result of the obligation "limit[ing]" its benefits to those "eligible[ ]." *Id.* at 642. "The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use." *Id.*

Putting it all together, the ABA conflicts with the implied preemptive effect of both the FCC's 2018 Order and the Communications Act. The ABA's common carrier obligations directly contravenes the FCC's determination that broadband internet "investment," "innovation," and "availab[ility]" best obtains in a regulatory environment free of threat of common-carrier treatment, including its attendant rate regulation. 2018 Order ¶¶ 86–87, 101; *see Mozilla Corp.*, 940 F.3d at 49–55 (upholding the FCC's determination); the ABA thereby stands as an obstacle to the FCC's accomplishment and execution of its full purposes and objectives and is conflict-preempted.[9]

9. As Defendant would have it, the FCC's 2018 Order reflects so profound a misunderstand-

The D.C. Circuit holding in *Mozilla Corporation* does not convince the Court otherwise. The *Mozilla* Court upheld the FCC's 2018 Order with the exception of the "Preemptive Directive," 940 F.3d at 19, 74–109, through which the FCC attempted to expressly preempt "any state or local requirements that are inconsistent with [its] deregulatory approach," 2018 Order ¶¶ 194–204. The *Mozilla* Court held that the FCC could not *expressly* preempt such state or local requirements pursuant to its Title I authority because Congress did not vest therein the *power to expressly preempt. See Mozilla Corp.*, 940 F.3d at 83 ("[N]othing [ ] empower[s] the [FCC] to engage in express preemption in the 2018 Order."). The FCC may regulate only so far as Congress grants it "express statutory authority" and "ancillary authority," each of which the FCC lacked in trying to expressly preempt under Title I. *Id.* at 74–76. The Preemptive Directive's reach was all-the-more-so *ultra vires* because it entered the *intra*state communications hemisphere "over which Congress expressly denied the [FCC] regulatory authority." *Id.* at 77–78 (internal quotation marks omitted); *id.* at 82 (noting the Preemptive Directive purported to make "a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the 2018 Order").

Mozilla's holding does *not* preclude or revoke the 2018 Order's implicit preemptive effect. The D.C. Circuit concluded its decision by noting "it would be wholly premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the 2018 Order." *Id.* at 86. Those same preemption principles are implicated by the ABA. And parallel to the D.C. Circuit's prediction, when faced with the ABA, Plaintiffs have "explain[ed] how [that] state practice actually undermines the 2018 Order," thus "invok[ing] conflict preemption." *Id.* at 85.[10]

C. Field Preemption

[22, 23] Field preemption reflects a congressional decision " 'to foreclose any state regulation in the area,' irrespective of whether state law is consistent or inconsistent with 'federal standards.' " *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S.Ct. 1591, 191 L.Ed.2d 511 (2015) (quoting *Arizona v. United States*, 567 U.S. 387,

ing of Communications Act that, instead of *protecting* broadband internet providers from common carrier treatment and its attendant threat of rate regulation, it actually *exposes* them to fifty states-worth of such regulations.

Moreover, if Defendant's reading of *Mozilla Corporation* is correct, the FCC's decision to "reclassif[y broadband] *away* from public-utility style regulation" survived the D.C. Circuit's application of the "arbitrary-and-capricious" standard of review despite *causing more* public-utility style regulation. 940 F.3d at 50–55 (emphasis added) (internal quotation marks and citations omitted). The Court has its doubts. How could the FCC's 2018 Order make a "rational connection between the facts found [*i.e.*, public-utility style regulation impedes investment, innovation, and availability] and the choice made [*i.e.*, to classify broadband under Title I]" if, as a matter of law, Title I treatment unfetters fifty state sovereigns to impose their own public-utility style regulations? *See id.*

10. To the extent Defendant relies on the Eastern District of California's Oral Ruling in *ACA Connects v. Becerra*, No. 18-cv-2684 (E.D. Cal. Feb. 23, 2021), for its holding on conflict preemption, such reliance is misplaced. The California Attorney General defeated the preliminary injunction motion by, in part, "pointing out" that the statute there did "not regulate how much providers can charge their customers because providers can charge the user as much or as little as they like for the service and, thus, there is no conflict with the Act." *Becerra* Tr. at 67:18–21. The ABA's express goal is to regulate how much providers can charge.

401, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012)). Where "federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation,' " it may not only impose federal obligations "but also confer a federal right to be free from any other [state law] requirements." *Murphy v. Nat'l Collegiate Athletic Ass'n*, ––– U.S. ––––, 138 S.Ct. 1461, 1480–81, 200 L.Ed.2d 854 (2018) (quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986)).

Laws governing "interstate communication services" comprise the field purportedly preempted here.

1. Parties' Arguments

Plaintiffs argue federal law preempts the field of interstate communications services, citing precedent finding Congress's "intent" in the Communications Act's "broad scheme" of regulation over "interstate service by communications carriers." *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490–91 (2d Cir. 1968) (citing Supreme Court cases); *see Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (discussing *Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968)). Plaintiffs' asserted "field" is demarcated in 47 U.S.C. § 152:

> (a) The provisions of this chapter shall apply to all *interstate and foreign communication* by wire or radio . . ., which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . . .
>
> (b) . . . [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service* by wire or radio of any carrier . . . .

47 U.S.C. §§ 152(a) & (b) (emphasis added). Because the ABA defines "broadband service" in the exact same way as the FCC, Plaintiffs say, New York impermissibly seizes jurisdiction outside its "intrastate services" boundary. *Compare* N.Y. Gen. Bus. Law § 399-zzzzz(1), *with* 2018 Order ¶ 21 (explaining that the FCC "continue[s] to define" broadband services in the same manner as it did in (now-repealed) 47 C.F.R. § 8.11(a) and reciting the definition), *and* 2015 Order ¶ 25 (defining "broadband internet access service").

Defendant opposes by observing "[t]he [Communications] Act establishes . . . a system of dual state and federal regulation," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), with states retaining jurisdiction over intrastate communication services and through which New York may enact the ABA's "purely intrastate affordable-pricing scheme," Def. Opp. 14. Defendant contends that Plaintiffs' reading of 47 U.S.C. § 152(a) impermissibly renders other Communications Act provisions "superfluous." *Id.* at 15. Defendant also cites circuit court precedent outside the Second Circuit that rejects field preemption even where "states seek to regulate interstate telecommunications services." *Id.* at 13 (capitalization and emphasis removed) (citing *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016); *Johnson v. American Towers, LLC*, 781 F.3d 693 (4th Cir. 2015); *In re Universal Serv. Fund Tel. Billing Prac. Litig.*, 619 F.3d 1188 (10th Cir. 2010); *In re NOS Commc'ns*, 495 F.3d 1052 (9th Cir. 2007)).

2. Analysis

[24] Plaintiffs have demonstrated a likelihood of success on the merits based on field preemption. The ABA is not a "purely intrastate affordable-pricing

scheme," nor is it reasonable to read its statutory text in that manner: It covers providers with "the capability to transmit data to and receive data from *all or substantially all internet endpoints.*" N.Y. Gen. Bus. Law § 399-zzzzz(1) (emphasis added). As implied by a cousin term, the "world wide web," broadband internet connects New York State users to internet endpoints well beyond New York's borders. For example, the household from which this New York-based federal Court, working from home, can so-order the parties' briefing schedule on the Internet-based ECF docket, and, in doing so, communicate with Plaintiffs' Washington, D.C.-based counsel, with proof documented on the Notice of Electronic Filing receipt. *E.g.*, Order entered May 5, 2021. The ABA's plain terms apply (absent an exemption) to the telecommunications provider transmitting this interstate communication. In other words, the ABA is not confined to *intra*state communications services.

Indeed, the ABA borrowed its definition the "broadband services" from the FCC. The FCC before 2015, between 2015 and 2018, and since 2018 has

> continue[d] to define "broadband Internet access services" as a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints,

2018 Order ¶ 21 (footnote omitted); *see* 2015 Order ¶ 25 ("Consistent with the [FCC's] 2010 Order . . ."), which is reprinted in N.Y. Gen. Bus. Law § 399-zzzzz(1). While the Court need not, and will not, at this stage hold that all broadband internet services are categorically *inter*state, it suffices to say that the ABA clearly wanders beyond the *intra*state communications line, with no provisions reasonably inferable as limiting (or even trying to limit) its reach.

[25] Defendant calls this view "mistaken" because the ABA is not "an interstate-communication statute" but, rather, "an intrastate pricing regulation." How the ABA is "purely intrastate" is counterintuitive, if not implausible. *See* Def. Opp. at 14–15. It covers broadband internet communications from "all Internet endpoints," including those sent from or to endpoints outside New York State's borders; the ABA is not confined to communications between two New York endpoints. It covers every provider "engaged" in "interstate and foreign [broadband internet] communication," 47 U.S.C. § 152(a), so long as the provider serves New York customers, not just the "many" providers operating "exclusively within the State" who thus serve only New York customers, Def. Opp. at 14. The sole basis on which Defendant relies to call the ABA "intrastate" is its applicability only to "[c]ompanies that have chosen to provide service in New York." *Id.* But *any* state law can be construed as applicable only to those subject to that state's jurisdiction, which, accordingly, does not make it "intrastate." "The key to [the FCC's] jurisdiction," the line between inter- vs. intrastate, "is the nature of the communication itself rather than the physical location of the technology" or the consumers served. *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

[26] Because the ABA regulates within the field of interstate communications, it triggers field preemption. Binding Second Circuit decisions are clear: the Communications Act's "broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress *to occupy the field* to the exclusion of state law." *Ivy Broadcasting Co.*, 391 F.2d at 490–91 (emphasis added)

(analyzing *Postal-Tel. Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 40 S.Ct. 69, 64 L.Ed. 118 (1919) and *Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 40 S.Ct. 167, 64 L.Ed. 281 (1920)); *e.g.*, *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730–31 (2d Cir. 1973) ("The courts, however, have uniformly and consistently interpreted the [Communications] Act to give the [FCC] broad and comprehensive rule-making authority in the new and dynamic field of electronic communication."); *cf.*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 416 (2d Cir. 2002) ("When federal law preempts state law, it prohibits a state or local governmental entity 'from regulating within a protected zone, whether it be a zone protected and reserved for market freedom ... or for [federal agency] jurisdiction.' Federal regulation of interstate and foreign communications plainly preempts much of the field of wireless broadcasting." (ellipses and alteration in original) (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226–27, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993))).

Defendant contends that subsequent courts have called these Second Circuit decisions' "reasoning into question," *id.* (citing *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)), a contention with which the Court disagrees based on the arguments presented.[11] However, it is not this Court's prerogative to disregard *Ivy Broadcasting* when assessing Plaintiffs' likelihood of success.

[27, 28] And while complete preemption[12] and field preemption "must be distinguished," *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272–73 & n.7 (2d Cir. 2005), despite Defendant's reliance on cases involving the former to contest the latter, *see* Def. Opp. at 16–17; *see* Pls. Reply at 7 & n.7, the *Ivy Broadcasting* Court held Congress *both* field-preempted *and* complete-preempted the realm of interstate communications:

> It seems reasonable that the congressional purpose of uniformity and equality of rates should be taken to imply uniformity and equality of service. The published tariff rate will not be uniform if the service for which a given rate is

11. In *Global NAPs, Inc. v. Verizon New England, Inc.*, for example, the Second Circuit noted that Vermont Public Service Board "made no attempt to set rates or charges for" an interstate communication service and therefore "narrowly sidestepped encroachment on the FCC's jurisdiction to set rates on interstate communications." 454 F.3d 91, 102 n.10 (2d Cir. 2006) (citing *Ivy Broadcasting*); *see also Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (FCC has "comprehensive authority" and " 'broad responsibilit[y]' to regulate all aspects of interstate communication by wire or radio by virtue of ... 47 U.S.C. § 152(a)"); *United States v. Southwest Cable Co.*, 392 U.S. 157, 167–68, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968) (FCC "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio" and Communication Act's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system for the (broadcasting) industry" (internal quotation marks omitted)).

12. "Complete preemption is distinct from ordinary or 'defensive' preemption, which includes express, field, and conflict preemption." *Whitehurst v. 1199SEIU United Healthcare Workers E.*, 928 F.3d 201, 206 n.2 (2d Cir. 2019); *see Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272–73 & n.7 (2d Cir. 2005) ("The complete-preemption doctrine must be distinguished from ordinary preemption."). Complete preemption is where "certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims." *Sullivan*, 424 F.3d at 273.

> charged varies from state to state according to differing state requirements. It seems to us that the congressional purpose can be achieved only if a uniform federal law governs as to the standards of service which the carrier must provide and as to the extent of liability for failure to comply with such standards.

391 F.2d at 490–91. In other words, Congress set aside interstate communications as an area in which a uniform federal law governs "standards of service" (field preemption) and "extent of liability" (complete preemption). *See id.*

[29] Defendant's position stems from reading 47 U.S.C. § 152(a) to speak "entirely on federal—not state—authority." Def. Opp. at 15; *see also Becerra* Tr. at 63:3–65:7. The Court finds it hard to square that view with the Supreme Court's decision in *Louisiana Public Service Commission v. FCC*, which described the Communications Act as dividing communications services 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." 476 U.S. 355, 357, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (emphasis removed);[13] *Crockett Tel. Co.*, 963 F.2d at 1566 ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates." (citing 47 U.S.C. § 152)). The FCC's jurisdiction would hardly be "plenary" if it loses, to the states' gain, the right to make rules regarding certain interstate communications services when the FCC alters, through formal rulemaking procedure, the Title of the Communications Act under which it continues to effect its longstanding policy of nonregulation of those communications. *See* 83 Fed. Reg. 7852 (Apr. 23, 2018); *Plenary*, Black's Law Dictionary (11th ed. 2019) ("Full; complete; entire"); *cf. Bethlehem Steel Co.*, 330 U.S. at 776, 67 S.Ct. 1026 (holding there is no state-federal "concurrent jurisdiction" where a federal agency "has jurisdiction of the industry" because, otherwise, "action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict"). The field of interstate communications gets no smaller, and no less exclusive, when the FCC does so. *Mozilla Corp.*, 940 F.3d at 77 (holding that § 152(a) identifies "communications matters falling under the [FCC's] authority" and § 152(b) identifies "those *remaining* within the States' wheelhouse," with "the impossibility exception" helping to "police the line between" the two (emphasis added)). The 2018 Order does *not* say broadband internet no longer reflects an interstate communication service.

For that reason, this Court respectfully believes the Eastern District of California in *ACA Connects v. Becerra* has it back-

13. The Supreme Court observed "the realities of technology and economics belie [ ] a clean parceling of responsibility" between federal interstate matters and state intrastate matters." *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 360, 106 S.Ct. 1890 (where infrastructure "provid[ing] intrastate service is also used to provide interstate service" it is "conceivably within the jurisdiction of both state and federal authorities"). But any unavoidable overlap is not an invitation for concurrent state regulation of *inter*state communications because the "impossibility exception" gives the FCC jurisdiction where it is "not possible to separate the interstate and the intrastate components of the asserted [FCC] regulation." *Mozilla,* 940 F.3d at 77 (quoting *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 375 n.4, 106 S.Ct. 1890). Defendant does not suggest the ABA operates within the overlap and, even if she had, the ABA is plainly *inter*state regulation.

wards. The Communications Act does *not* "specifically le[ave] out certain types of interstate communications [*e.g.*, those transmitted by information services] from the FCC's jurisdiction." *Becerra* Tr. at 63:18–20. Rather, the Communications Act specifically leaves out certain *types of jurisdiction* (*e.g.*, Title II authority to impose common carrier obligations), *but not* jurisdiction writ large, over interstate communications transmitted by information services.

[30, 31] Therefore, Plaintiffs has demonstrated a likelihood of success on the issue of field preemption.[14]

III. Balance of Equities and the Public Interest

[32] Second Circuit precedent suggests that a plaintiff "may be able to show that a preliminary injunction is warranted on the strength of these first two factors alone," *i.e.*, without considering the "balance of the equities" and the "public interest." *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 86 n.38 (2d Cir. 2020). Plaintiffs likely have done so here. But pursuant to Supreme Court instruction, *see id.* (citing *Winter*, 555 U.S. at 20, 129 S.Ct. 365); *Pharaohs GC, Inc.*, 990 F.3d at 225, the Court nevertheless analyzes these last two factors, which "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

[33] The Court also holds these two factors favor preliminary injunctive relief. While the stated purpose of the ABA is to expand access to broadband internet, that is not to say it is the sole legislative effort doing so. Plaintiffs discuss several federal programs allocating billions of dollars to achieve that same end: the Lifeline program, the Emergency Broadband Connectivity Fund, the American Rescue Plan. Pls. Mem. at 21–24; Pls. Reply at 9–10. While Defendant argues that the New York Legislature determined these federal benefits were insufficient, that determination was made prior to the FCC's April 29, 2021 announcement that the Emergency Broadband Benefit would become on effective May 12, 2021.[15]

Additionally, the evidence before the Court suggests the ABA may not achieve its desired effect – and in fact reduce Internet access statewide. Empire Telephone Corporation's declarant avers that Empire will have to cancel expansion projects which, if completed, would result in Empire "serv[ing] more than 20,000 households," thereby disqualifying Empire from an exemption. Empire Tele. Decl. ¶ 10. These projects include "building out the network to reach the City of Binghamton" and "building more than 330 miles of fiber optic network that would be capable of servicing nearly 1,100 homes" in Livingston County. *Id.* ¶¶ 6–7. Likewise Delhi Telephone Company will "be forced to abandon efforts to expand its rural broadband coverage, … set[ting] it back in

14. At oral argument, Defendant contended that Communications Act provisions "expressly preempt[ing] state action would [ ] not be required if there was field preemption," suggesting the former rules out the latter. Tr. of Oral Arg. at 25:20–22. But a federal law's express preemption clause "does not immediately end the [preemption] inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Preemptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Altria Grp., Inc.*, 555 U.S. at 76–77, 129 S.Ct. 538.

15. Public Note, FCC, Wireline Competition Bureau Announces Emergency Broadband Benefit Program Launch Date (Apr. 29, 2021), https://docs.fcc.gov/public/attachments/DA-21-493A1.pdf.

terms of growing its subscriber base." Delhi Tele. Decl. ¶ 2. Heart of the Catskills Communications Inc. would have to "forgo expansion of its network" which would have reached unserved customers. Heart of the Catskills Decl. ¶¶ 3, 19.

Given the foregoing, a balance of the equities and the public interest support a preliminary injunction keeping the status quo.

IV. Rule 65(c) Security

[34, 35] A court "may issue a preliminary injunction ... only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement where there has been no proof of likelihood of harm ...." *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997) (internal quotation marks omitted). The Court exercises its discretion not to require Plaintiffs' to post a bond. Defendants have neither requested one, nor is there any "proof of a likelihood of harm" to New York that could result from granting the injunction. *E.g.*, *Regeneron Pharms., Inc.*, 2020 WL 7778037, at *14; *Town of Brookhaven v. Sills Rd. Realty LLC*, 2014 WL 2854659, at *11 (E.D.N.Y. June 23, 2014).

CONCLUSION

For the reasons discussed above, Plaintiffs' motion for a preliminary injunction is granted. The Court will enter a separate Preliminary Injunction Order enjoining Defendant from enforcing the ABA.

SO ORDERED.

Mohamed Kaid Hezam AL SAIDI, B.M.K.A., a minor child, and S.M.K.A., a minor child, Plaintiffs,

v.

U.S. EMBASSY IN DJIBOUTI, et al., Defendants.

21-cv-3393 (BMC)

United States District Court, E.D. New York.

Signed 06/18/2021

Background: Parent, a United States citizen, and his children, who were born and living in Yemen, filed action seeking a writ of mandamus and temporary restraining order (TRO) directing United States Embassy in Djibouti to adjudicate their petitions required to bring noncitizen family members to the United States by a certain date.

Holdings: The District Court, Brian M. Cogan, J., held that:

(1) plaintiffs did not demonstrate irreparable harm from children potentially losing ability to qualify for derivative citizenship due to delays in processing petitions;

(2) there was no unreasonable delay in processing petitions;

(3) there was no basis for court to require consular officers to accept and adjudicate petitions;

(4) plaintiffs' estoppel claim against the government was not likely to succeed;

(5) plaintiff's challenge to determination made at consulate that petitions were not clearly approvable and would need to be sent to United States Citizenship and Immigration Services (USCIS) was likely to fail;

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members,

Plaintiffs,

- against -

LETITIA A. JAMES, in her official capacity as the Attorney General of New York,

Defendant.
---X

PRELIMINARY INJUCTION ORDER

2:21-cv-2389 (DRH) (AKT)

Upon reading and filing of the Complaint and the papers submitted in support of and in opposition to the issuance of a preliminary injunction, and having heard the arguments of counsel, for the reasons set forth in the Court's Memorandum & Order, dated June 11, 2021, it is hereby

ORDERED, pursuant to Federal Rule of Civil Procedure 65, that Defendant Letitia A. James, in her official capacity as the Attorney General of the State of New York, her employees, agents, and all persons acting on her behalf are preliminarily enjoined from enforcing the Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz; and it is

FURTHER ORDERED that no bond shall be required.

Dated: Central Islip, New York
June 11, 2021

s/ Denis R. Hurley
Denis R. Hurley
United States District Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members,

Plaintiffs,

- against -

LETITIA A. JAMES, in her official capacity as the Attorney General of New York,

Defendant.

---X

AMENDED JUDGMENT
CV 21-2389 (DRH)(AKT)

A Memorandum and Order of Honorable Denis R. Hurley, United States District Judge, having been filed on June 11, 2021, granting Plaintiffs' motion for a preliminary injunction; and a Preliminary Injunction Order of Honorable Denis R. Hurley, United States District Judge, having been filed on June 11, 2021, preliminarily enjoining Defendant Letitia A. James, in her official capacity as the Attorney General of the State of New York, her employees, agents, and all persons acting on her behalf, from enforcing the Affordable Broadband Act, N.Y. Gen. Bus. Law §399-zzzzz; and an Order of Honorable Denis R. Hurley, United States District Judge, having been filed on July 28, 2021, granting the parties' motion for judgment, granting the stipulated final judgment, declaring that N.Y. Gen. Bus. Law §399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021) is preempted by federal law, permanently enjoining Defendant Letitia A. James, in her official capacity as the Attorney General of the State of New York, her employees, agents, and all persons acting on her behalf, from enforcing the Affordable

Broadband Act, N.Y. Gen. Bus. Law §399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021), dismissing Plaintiffs' second claim for relief without prejudice; and directing the Clerk of the Court to enter such final judgment in favor of Plaintiffs, and to close this case; and an Order of Honorable Denis R. Hurley, United States District Judge, having been filed on August 4, 2021, granting motion to amend the judgment and directing the Clerk of Court to enter an amended judgment, it is

ORDERED AND ADJUDGED that judgment is hereby entered in favor of Plaintiffs 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 & Communications Association against Defendant Letitia A. James, in her official capacity as Attorney General of New York; that the parties' motion for judgment is granted; that N.Y. Gen. Bus. Law §399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021) is preempted by federal law; that Defendant Letitia A. James, in her official capacity as the Attorney General of the State of New York, her employees, agents, and all persons acting on her behalf, are permanently enjoined from enforcing the Affordable Broadband Act, N.Y. Gen. Bus. Law §399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021); that Plaintiffs' second claim for relief is dismissed without prejudice; and that this case is closed.

Dated: August 10, 2021
Central Islip, New York

DOUGLAS C. PALMER
CLERK OF THE COURT
By: /s/ James J. Toritto
Deputy Clerk

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members,

Plaintiffs,

- against -

LETITIA A. JAMES, in her official capacity as Attorney General of New York,

Defendant.
---X

Docket No.: 21 CV 2389 (DRH)(AKT)

STIPULATED FINAL JUDGMENT

WHEREAS, on April 30, 2021, 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 & Communications Association (together, "plaintiffs"), filed a complaint against Letitia A. James, in her official capacity as Attorney General of the State of New York, alleging that N.Y. General Business Law ("GBL") § 399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021), is preempted by federal law;

WHEREAS, on May 6, 2021, plaintiffs filed a motion for an order preliminarily enjoining the Attorney General from enforcing N.Y. GBL § 399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021); on May 17, 2021, the Attorney General opposed the motion; and on May 21, 2021, plaintiffs filed a reply brief in support of their motion;

WHEREAS, on June 11, 2021, the Court granted plaintiffs' motion for a preliminary injunction against enforcement of N.Y. GBL § 399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021), holding that plaintiffs were likely to succeed on their claims of conflict preemption and field preemption;

WHEREAS, the parties have conferred and agree that the Court's holdings on preemption in the June 11, 2021, memorandum and order resolve the substantive legal issues in this matter and render the entry of final judgment appropriate;

WHEREAS, in light of that agreement and to enable entry of a final, appealable judgment, plaintiffs consent to the dismissal of their second claim for relief without prejudice; and

WHEREAS, notwithstanding this agreement that entry of final judgment is appropriate at this time, defendant expressly reserves all appellate rights in this matter;

NOW, THEREFORE, it is hereby stipulated and agreed that:

(a) For the reasons given in the Court's June 11, 2021, memorandum and order, the parties agree to the issuance of a final judgment in favor of plaintiffs;

(b) For the reasons given in the Court's June 11, 2021, memorandum and order, the Court declares that N.Y. GBL § 399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021), is preempted by federal law;

(c) For the reasons given in the Court's June 11, 2021, memorandum and order, defendant Letitia A. James, in her official capacity as the Attorney General of the State of New York, her employees, agents, and all persons acting on her behalf are permanently enjoined from enforcing N.Y. GBL § 399-zzzzz, as enacted by ch. 56, pt. NN (244th Sess. 2021);

(d) To enable the entry of a final, appealable judgment, plaintiffs' second claim for relief is dismissed without prejudice;

(e) Defendant reserves the right to appeal this stipulated final judgment, declaration, and permanent injunction; plaintiffs recognize defendant's right to appeal this stipulated final judgment, declaration, and permanent injunction; and

(f) Pursuant to Federal Rule of Civil Procedure 54(d), a motion by any party for costs shall be filed no later than 30 days after the expiration of the period for appeal or, in the event of an appeal, shall be filed within 30 days of the judgment of the court of appeals, the United States Supreme Court, or the final judgment of this Court on remand, whichever is later.

STIPULATED AND AGREED BY:

Dated: July 23, 2021

/s/ Patricia M. Hingerton
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Attorney General of the State of New York
Patricia M. Hingerton
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Respectfully submitted,

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/s/ *Jeffrey A. Lamken* (w/permission)

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**Pro hac vice* motion to be filed

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Attorneys for Plaintiff ACA Connects – America's Communications Association

IT IS ORDERED THAT:

(a) This stipulated final judgment is hereby granted; and

(b) The Clerk of the Court is directed to enter such final judgment in favor of plaintiffs, and to close this case.

Dated: Central Islip, New York
July 28, 2021

s/ Denis R. Hurley
Denis R. Hurley
United States District Judge

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, *Plaintiffs*, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, *Defendant*.	Case No. 2:21-cv-2389-GRB-AKT

STIPULATION REGARDING AGREEMENT NOT TO ENFORCE
N.Y. GEN. BUS. LAW § 399-zzzzz

Plaintiffs — 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 & Communications Association (collectively, "Plaintiffs") — and Defendant Letitia A. James, in her official capacity as Attorney General of New York ("Defendant," and collectively with Plaintiffs, the "Parties"), by and through their respective counsel, hereby stipulate and agree as follows:

WHEREAS, in April 2021, New York enacted General Business Law § 399-zzzzz, as enacted by ch. 56, pt. NN (24th Sess. 2021) ("the Affordable Broadband Act");

WHEREAS, in June 2021, the U.S. District Court for the Eastern District of New York (Hurley, J.) entered an order preliminarily enjoining Defendant from enforcing the Affordable Broadband Act, ECF No. 25;

WHEREAS, in August 2021, the district court entered an Amended Judgment permanently enjoining the Affordable Broadband Act, ECF No. 34;

WHEREAS, in April 2024, the United States Court of Appeals for the Second Circuit issued both an opinion and judgment reversing the district court's Amended Judgment and vacating the permanent injunction, *New York State Telecomms. Ass'n v. James*, No. 21-1975 (2d Cir. Apr. 26, 2024) ("*NYSTA II*"), ECF Nos. 232, 241;

WHEREAS, in April 2024, the Federal Communications Commission ("FCC") voted to adopt an order in which it classified broadband internet access service as a telecommunications service, subject to Title II of the federal Communications Act, *see* Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-320 & 17-108, FCC 24-52 (adopted Apr. 25, 2024, released May 7, 2024) ("April 2024 Order");

WHEREAS, on May 22, 2024, the FCC's April 2024 Order was published in the Federal Register, with an effective date (subject to certain exceptions not relevant to this stipulation) of July 22, 2024, Final Rule, *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45,404 (May, 22, 2024);

WHEREAS, Plaintiffs contend that the FCC's April 2024 Order, if it takes effect, will preempt the Affordable Broadband Act;

WHEREAS, Defendant disputes Plaintiffs' contention and contends that the FCC's April 2024 Order, if it takes effect, will not preempt the Affordable Broadband Act;

WHEREAS, Plaintiffs have informed Defendant that, if the FCC's April 2024 Order takes effect, they intend to file a new complaint and to seek a preliminary and permanent injunction of enforcement of the Affordable Broadband Act based on their arguments about the preemptive effect of the FCC's April 2024 Order;

WHEREAS, the Second Circuit's mandate is scheduled to issue on June 14, 2024, which will have the effect of vacating and dissolving the permanent injunction and permitting Defendant to enforce the Affordable Broadband Act;

WHEREAS, to avoid potential uncertainty or confusion about the effect of the Affordable Broadband Act during the period before and immediately after the FCC's April 2024 Order, if it takes effect, becomes effective;

NOW, THEREFORE, in consideration of the foregoing, the Parties stipulate and agree as follows:

1. Defendant agrees not to enforce the Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz, against any member of the Plaintiff Associations until the expiration of the earlier of the following periods: (a) 95 days after the publication of the FCC's April 2024 Order in the Federal Register (August 25, 2024); or (b) 14 days after any federal court issues a stay pending review of the FCC's April 2024 Order, preventing the FCC's April 2024 Order from taking effect.

2. Plaintiffs agree not to seek further relief from the Second Circuit in Case No. 21-1975, whether through a petition for rehearing or rehearing en banc, a motion for a stay of the mandate, or otherwise; provided, however, that nothing herein prevents Plaintiffs from petitioning for certiorari or relief pending resolution of such a petition for certiorari from the United States Supreme Court or, upon a grant of certiorari, litigating on remand in the Second

Circuit. Plaintiffs further agree to inform the Second Circuit by letter, within two business days of the date this stipulation is fully executed, of their decision not to seek rehearing or rehearing en banc.

3. Plaintiffs agree that any new complaint they may file alleging that the Affordable Broadband Act is preempted by the FCC's April 2024 Order will not be filed under the above-captioned docket number and will instead be filed as part of a new action; provided, however, that nothing in this clause precludes plaintiffs from marking a new action as related to the above-captioned docket. Plaintiffs agree that they will file such new complaint on or after the date when the FCC's April 2024 Order takes effect, and not earlier.

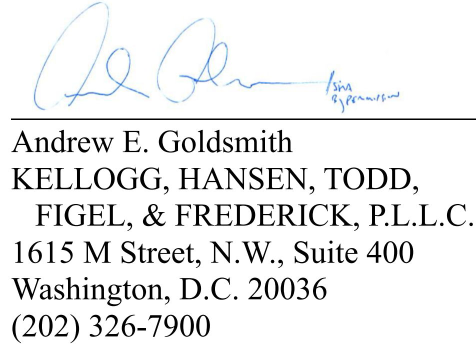
4. The Parties agree that, after the Second Circuit's mandate issues, they will jointly seek to have the above-captioned matter placed into abeyance until the later of the expiration of time for Plaintiffs to petition the U.S. Supreme Court for certiorari review of the Second Circuit's decision in *NYSTA II* or the date the U.S. Supreme Court resolves such a certiorari petition.

5. The Parties agree that by signing this stipulation and agreement, Defendant does not consent to the filing of the new complaint that Plaintiffs have stated they intend to file after the FCC's April 2024 Order takes effect, and Defendant does not waive or prejudice, and instead hereby fully preserves, all objections and arguments that Defendant may make in response to such a new complaint.

6. The Parties agree that this stipulation and agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which, taken together, constitute one and the same agreement.

IT IS SO STIPULATED AND AGREED.

Dated: June 11, 2024



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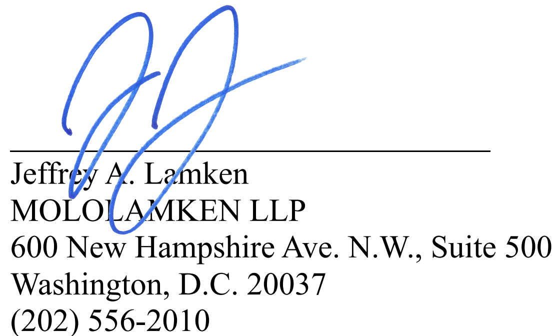

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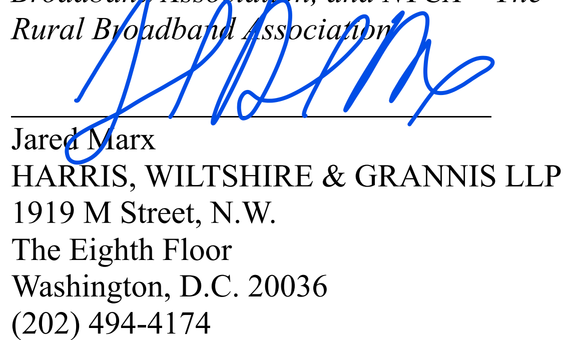

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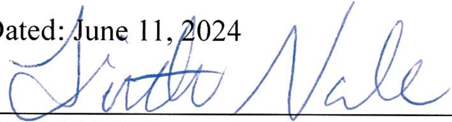
Attorney for Plaintiff Satellite Broadcasting & Communications Association

6. The Parties agree that this stipulation and agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which, taken together, constitute one and the same agreement.

IT IS SO STIPLUATED AND AGREED.

Dated: June 11, 2024



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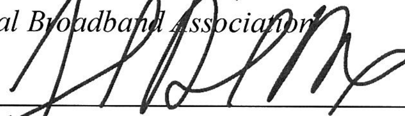

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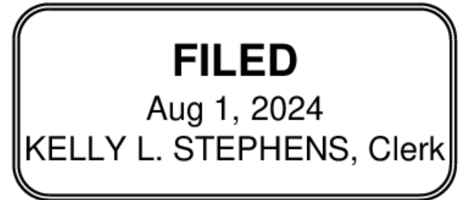
EXHIBIT 6

No. 24-7000



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MCP No. 185; FEDERAL COMMUNICATIONS COMMISSION, IN THE MATTER OF SAFEGUARDING AND SECURING THE OPEN INTERNET, DECLARATORY RULING, ORDER, REPORT AND ORDER, AND ORDER ON RECONSIDERATION, FCC 24-52, 89 Fed. Reg. 45404, Published May 22, 2024.	)	O R D E R

Before: SUTTON, Chief Judge; CLAY and DAVIS, Circuit Judges.

PER CURIAM. On May 22, 2024, the Federal Communications Commission issued a rule classifying broadband internet providers as common carriers subject to heightened regulatory requirements under Title II of the Communications Act of 1934. *See Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404 (May 22, 2024) (to be codified at 47 CFR pts. 8, 20). The rule was set to go into effect on July 22, 2024. We administratively stayed this effective date until August 5, 2024. Several broadband providers asked this court to stay the final rule pending review of their petitions. Because the broadband providers have shown that they are likely to succeed on the merits and that the equities support them, we grant the stay.

I.

Broadband internet refers to the set of platforms that permit users to access the internet at speeds faster than dial-up services. *See* F.C.C., Getting Broadband Q&A (Jan. 25, 2024), https://www.fcc.gov/consumers/guides/getting-broadband-qa. Over three-quarters of Americans have access to high-speed broadband service. *Safeguarding*, 89 Fed. Reg. at 45412. In addition

to renting or constructing the physical network connecting computers, broadband internet providers offer other services that enable subscribers to access content from "edge providers"—namely websites, such as Google, Netflix, and Amazon, that host content on their own networks. *Id.* at 45430. These services include DNS, short for Domain Name Services, a "phonebook" that matches web addresses (e.g., http://www.ca6.uscourts.gov) with their IP (internet protocol) addresses. And they include "caching" services that speed up data access by storing copies of edge provider content closer to the user's home system. *Id.* at 45428–30.

The Communications Act of 1934 covers broadband providers, and it gives the Federal Communications Commission authority to promulgate rules and regulations under the Act. The extent of that regulatory authority turns on whether the providers count as common carriers under the Act. If a business counts as a common carrier, it must comply with Title II of the Act, which includes rate-review regulations and non-discrimination obligations. *See* 47 U.S.C. §§ 201–03. For other businesses, the Commission may impose only the ancillary regulations authorized under Title I, which generally preserve the ability of companies to respond to market conditions. *See, e.g.*, *id.* §§ 154(i), 161.

The development of the internet presented the Commission with a classification challenge. When Congress first enacted this law in 1934, it defined common carriers to include anyone involved in "wire communications." Pub. L. 73-416, § 3(a), (h), 48 Stat. 1064, 1065–66 (codified at 47 U.S.C. §§ 153(11), (59)). Think telephone companies and the monopolies that went with them. But by the 1970s, telephone companies and others had begun competing to offer data processing services through telephone wires. *See In the Matter of Regul. & Pol'y Probs. Presented by the Interdependence of Comput. & Commc'n Servs. & Facilities*, 28 F.C.C.2d 291, 293–300, ¶¶ 8–28 (1970). Common carrier rules designed for telephone-wire monopolies, the Commission

realized, could inhibit the development of "data information services." *Re Second Comput. Inquiry*, 77 F.C.C.2d 384, 433, ¶ 128 (1980). The Commission responded by distinguishing the "basic transmission service" that transferred data between two points from the "enhanced service" that allowed subscribers to interact with data stored elsewhere. *Id.* at 419–22, ¶¶ 95–99.

Responding to these developments, Congress enacted the Telecommunications Act of 1996. It established a new category of "telecommunications service," which offers "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50), (53). The Commission must treat telecommunications service providers as common carriers. *See id.* § 153(51). The 1996 Act also created a new category of "information service," which applies to a company that offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24). The Commission may not treat information service providers as common carriers. *Id.* § 153(11), (51).

After passage of the 1996 Act, the Commission for many years took the view that broadband internet access services were information services, not telecommunication services. That left them free of Title II's common carrier requirements. *See In re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4823, ¶¶ 38–40 (2002) (cable modem broadband); *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C. Rcd. 14853, 14858, ¶ 5 (2005) (DSL); *In the Matter of United Power Line Council's Petition for Declaratory Ruling*, 21 F.C.C. Rcd. 13281, 13285–90, ¶¶ 7–15 (2006) (broadband over power lines); *In the Matter of Appropriate Regul. Treatment for Broadband Access to the Internet over Wireless Networks*, 22 F.C.C. Rcd.

5901, 5908–14, ¶¶ 18–34 (2007). (wireless broadband); *see also In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C. Rcd. 11501, 11540, ¶ 81 (1998) (internet access providers).

Reviewing a decision from the Ninth Circuit, the Supreme Court upheld this classification under *Chevron*. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005). Specifically, the Supreme Court found that the classification of broadband internet access offered through cable modems as an information service was a permissible interpretation of the Communications Act. *Id.* at 986.

In 2010, the Commission continued to treat broadband internet services as something covered by Title I but opted to alter its rules based on a debate over the risk that broadband providers could favor some edge providers' content over others. *See Safeguarding*, 89 Fed. Reg. at 45498. The Commission tried to use its Title I authority to impose "open internet" rules on broadband providers that banned them from blocking or unreasonably discriminating between lawful content. *In the Matter of Preserving the Open Internet Broadband Indus. Pracs.*, 25 F.C.C. Rcd. 17905, 17940–46, 17968, ¶¶ 59–75, 117 (2010). A federal court invalidated this rule on the ground that the Commission could impose such requirements only under Title II. *Verizon v. F.C.C.*, 740 F.3d 623, 650, 655–56 (D.C. Cir. 2014).

The next chapter unfolded in 2015. That year, the Commission promulgated a rule that categorized broadband providers as common carriers and required net neutrality under Title II. *See In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5757–58, ¶¶ 355–56 (2015). Relying on *Chevron*, the D.C. Circuit upheld the rule. *U.S. Telecom Assoc. v. F.C.C.*, 825 F.3d 674, 697–711 (D.C. Cir. 2016).

In 2018, the Commission returned to its prior view. It issued a new rule that broadband providers fall under Title I and do not qualify as common carriers. *In the Matter of Restoring*

Internet Freedom, 33 F.C.C. Rcd. 311, 322–24, ¶¶ 30–31 (2018). The D.C. Circuit again upheld the classification and again did so under *Chevron*. *Mozilla Corp. v. F.C.C.*, 940 F.3d 1, 19–35 (D.C. Cir. 2019) (per curiam).

On May 22, 2024, the Commission switched positions again. Under its current rule, the Commission has classified broadband providers as common carriers under Title II. *Safeguarding*, 89 Fed. Reg. at 45421. The rule requires broadband providers to disclose "accurate information regarding the network management practices" and forbids them from engaging in blocking, throttling, paid prioritization, and "unreasonable interference" with users and edge providers. *Id.* at 45554 (to be codified at 47 C.F.R. §§ 8.2, 8.3(a)–(d)). The rule at this point forbears other Title II regulations, including rate regulation and tariffing. *See id.* at 45482–86.

Several broadband providers and supporting organizations petitioned for review of the rule in eight different federal circuit courts. Consistent with the relevant statute, a lottery was held to determine which circuit would handle the case. 28 U.S.C. § 2112(a)(3). The Sixth Circuit was drawn, and we consolidated the petitions for review.

II.

A stay decision rests on four factors: likelihood of success on the merits; injury to the petitioners in the absence of a stay; injury to others from a stay; and the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Likelihood of success. The petitioners are likely to succeed on the merits because the final rule implicates a major question, and the Commission has failed to satisfy the high bar for imposing such regulations. Although the petitioners have raised other arguments in support of their position that the FCC exceeded its authority in promulgating the rule at issue, such as whether broadband can be classified as a telecommunications service under the Communications Act and the stare

decisis effect of the *Brand X* decision, we decline to reach those arguments at this preliminary stage.

An agency may issue regulations only to the extent that Congress permits it. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). When Congress delegates its legislative authority to an agency, it presumably resolves "major questions" of policy itself while authorizing the agency to decide only those "interstitial matters" that arise in day-to-day practice. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)). When Congress upsets that presumption and delegates its power to "alter the fundamental details of a regulatory scheme" to an agency, it must speak clearly, without "hid[ing] elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001); *see Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). The more an agency asks of a statute, in short, the more it must show in the statute to support its rule.

Net neutrality is likely a major question requiring clear congressional authorization. As the Commission's rule itself explains, broadband services "are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression," to say nothing of broadband's importance to national security and public safety. *Safeguarding*, 89 Fed. Reg. at 45405–12; *see also id.* at 45496–97. Congress and state legislatures have engaged in decades of debates over whether and how to require net neutrality. Because the rule decides a question of "vast 'economic and political significance,'" it is a major question. *Util. Air Regul. Grp.*, 573 U.S. at 324 (citation omitted).

The Communications Act likely does not plainly authorize the Commission to resolve this signal question. Nowhere does Congress clearly grant the Commission the discretion to classify

broadband providers as common carriers. To the contrary, Congress specifically empowered the Commission to define certain categories of communications services—and never did so with respect to broadband providers specifically or the internet more generally. *See* 47 U.S.C. § 153(51) (requiring the Commission to "determine whether the provision of fixed and mobile satellite service shall be treated as common carriage" under the definition of a "telecommunications carrier"); *id.* § 332(d)(1), (3) (defining mobile services in part "as specified by regulation by the Commission"). Absent a clear mandate to treat broadband as a common carrier, we cannot assume that Congress granted the Commission this sweeping power, and Petitioners have accordingly shown that they are likely to succeed on the merits.

Other stay factors. The petitioners also have shown a "possibility of irreparable injury." *Nken*, 556 U.S. at 434 (quotation omitted). The petitioners face delays in product rollouts and disadvantages in negotiating interconnection agreements, and such competitive injuries qualify as irreparable consequences. *See Ohio v. Becerra*, 87 F.4th 759, 781–82 (6th Cir. 2023). Plus, they will incur "unrecoverable compliance costs" in accommodating the rule. *Kentucky v. Biden*, 57 F.4th 545, 550, 555–56 (6th Cir. 2023).

The remaining stay factors, assessing the harm to the opposing party and weighing the public interest, merge in a challenge to government action. *Nken*, 556 U.S. at 435. The public interest generally "lies in a correct application" of law, and the Commission's action likely exceeds its legal authority. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation omitted).

III.

The Commission tries to head off this conclusion in several ways.

As for prospects of success, the Commission invokes its own stare decisis argument, claiming that *Brand X* supports today's rule. In its view, *Brand X*'s silence about the major-questions doctrine implies that it does not matter to today's dispute. But silence is just that. It is particularly irrelevant when it comes to comparing the 2002 *Brand X* rule (which sought only light-touch authority under Title I) and the 2024 rule (which seeks broad authority to regulate broadband providers like common carriers under Title II).

The Commission separately claims clear congressional delegation of authority to classify broadband as a common carrier. It observes that it may "prescribe such rules and regulations as may be necessary in the public interest" to effectuate Title II and other sections. 47 U.S.C. § 201(b); *see id.* §§ 154(i), 303(r). That is true. But such general or "ancillary" authority to fill gaps in Congress's regulatory scheme does not suffice to show that Congress clearly delegated authority to resolve a major question like this one. *Whitman*, 531 U.S. at 468; *see also Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

The Commission next notes that the Act's sole mention of broadband allows the Commission to use "price cap regulation" and "regulatory forbearance" to promote "broadband telecommunications capability." 47 U.S.C. § 1302(a), (d)(1). But this authorization to impose some regulations on broadband providers does not provide the Commission with clear authority to regulate all broadband providers as common carriers. *See Verizon*, 740 F.3d at 650. The section's reference to broadband telecommunications, as opposed to broadband generally, suggests that Congress recognized the potential existence of broadband information services as well. This section also applies when the Commission determines that broadband telecommunications are not "being deployed to all Americans in a reasonable and timely fashion." 47 U.S.C. § 1302(b). That finding does not resolve whether broadband counts as a telecommunication service, and it's hard

to believe Congress hid this claimed broad delegation of power in the "Miscellaneous Provisions" of Title VII, as opposed to Title II. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 153.

As for the other stay factors, the Commission counters that the petitioners have not submitted quantitative estimates of their compliance costs or identified specific plans that the rule threatens. Yet the rule itself "acknowledge[s] that reclassifying [broadband providers] as a Title II telecommunications service may lead to some increase in compliance costs." *Safeguarding*, 89 Fed. Reg. at 45532. Although the Commission has found these costs to be small relative to the rule's overall benefits, *see id.* at 45532, 45551–52, we do not evaluate that tradeoff once we conclude that the Commission likely exceeded its legal authority, *see Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 120 (2022) (per curiam).

The joint motion to stay pending review of the final rule is **GRANTED**. The clerk is **DIRECTED** to schedule this case for oral argument at the court's fall sitting, October 28–November 1, 2024, so that a randomly drawn merits panel may consider the case. The petitioners are **DIRECTED** to submit their opening brief by August 12, 2024. The respondents are **DIRECTED** to submit their brief by the sooner of September 11, 2024, or thirty days after the petitioners file their opening brief. The petitioners may submit a reply brief by the sooner of October 2, 2024, or twenty-one days after the respondents have filed their brief.

SUTTON, Chief Judge, concurring. I concur in full in the per curiam opinion and write to offer one additional reason for granting the stay.

The best reading of the statute, and the one in place for all but three of the last twenty-eight years, shows that Congress likely did not view broadband providers as common carriers under Title II of the Telecommunications Act. At one level, the United States Supreme Court has already resolved this question of classification. All nine justices in *Brand X* agreed that broadband internet access—the same issue in front of us—provides an information service as the Act defines that term under Title I. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005) ("[C]able companies that sell broadband Internet service do not provide 'telecommunications servic[e]' . . . under Title II."); *id.* at 987 ("Cable modem service is an information service . . . because it provides consumers with a comprehensive capability for manipulating information using the internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files . . . and to access e-mail."); *id.* at 1010 (Scalia, J., dissenting) ("[T]he delivery service provided by cable . . . merely serves as a conduit for the information services that have already been 'assembled' by the cable company in its capacity as ISP."); *id.* (Scalia, J., dissenting) ("When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete. The information has been (as the statute requires) generated, acquired, stored, transformed, processed, retrieved, utilized, or made available."). The only disagreement in that case centered on a separate issue, whether the Commission could treat the "offering" of last-mile broadband transmission as an integral part of that information service. *Id.* at 986–87. The majority held that the Commission reasonably concluded it did not. *Id.* at 989–90. Given the accepted premise of *Brand X*—that broadband providers are not common carriers under the Act—it would be odd for a lower court to look the other way. *See Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989).

The history of the relevant statutory terms—"information service" and "telecommunications service"—shows that the Act likely classifies broadband as an information service. When Congress enacted the Telecommunications Act, it enshrined the Commission's prior dichotomy between basic and enhanced services within its new definitions of telecommunications and information services. *See Brand X*, 545 U.S. at 977. Telecommunications services, like basic services, offer pure data transmission without any processing. *See* 47 U.S.C. § 153(50), (53). An information service, like enhanced services, uses those telecommunication services to process information. *See id.* § 153(24). In addition to data transmission, broadband providers offer data processing and storage to users through DNS and caching services. *See Brand X*, 545 U.S. at 992–94, 999–1000. These services provide users "with a comprehensive capability for manipulating information." *Id.* at 987. Just as it did for dial-up predecessors, Congress covered broadband under information services.

Other sections of the Telecommunications Act confirm that Congress meant to exclude broadband from Title II. Section 230, for instance, begins with Congress's findings that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). It goes on to declare a federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). And it defines "interactive computer service" to include "any information service . . . that provides access to the Internet." *Id.* § 230(f)(2). Section 231 adopts this same deregulatory approach, interpreting the term "internet access service" to exclude "telecommunication services." *Id.* § 231(e)(4). Only a two-faced Congress would bolster deregulation as the best means to promote the internet economy and then treat broadband providers as heavily regulated common carriers.

The Commission rejects this conclusion. It notes that the Act's sole mention of broadband allows the Commission to use "price cap regulation" and "regulatory forbearance" to promote "broadband telecommunications capability." *Id.* § 1302(a), (d)(1). But data transmission is only one component of the broader package of services offered to consumers. And, as the per curiam opinion notes, this authorization under Title VII to impose some regulations on broadband providers does not provide the Commission with the power to regulate all broadband providers as common carriers under Title II. *See Verizon v. F.C.C.*, 740 F.3d 623, 650 (D.C. Cir. 2014).

The Commission next invokes *Skidmore*, asking us to give credence to the agency's expert judgment over the technical questions implicated by this case. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). An agency's power to persuade turns on the thoroughness of its reasoning, its technical expertise, and its "consistency with earlier and later pronouncements," especially those contemporaneous with the statute's enactment. *Id.* The problem is, we do not know which group of experts to respect. Most of them since the passage of the 1996 Act have reasoned that broadband and similar services come under Title I, not Title II's coverage of common carriers. The contemporaneous interpretation of the Act, the one in place for nearly two decades, refused to treat broadband internet access services as the offering of telecommunication services. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976). In just three of the Act's twenty-eight years has the agency taken its current position that broadband internet access service qualifies as a telecommunications service as opposed to an information service. The consistency query makes matters worse. The Commission's "intention to reverse course for yet a fourth time" suggests that its reasoning has more to do with changing presidential administrations than with arriving at the true and durable "meaning of the law." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring). In truth, the *Skidmore* factors, the doctrine's "power to persuade,

if lacking the power to control," *id.* at 2267 (quotation omitted), all favor the Commission's first interpretation, not its recent one.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

EXHIBIT 7

"violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." Riggs, 287 F.3d at 226 (quoting United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997)) (concluding that the government's breach of the plea agreement met the fourth prong of plain error review).

WHERE THE CASE GOES FROM HERE

[25] For the reasons explained above, the government breached the plea agreement during the sentencing hearing. The district court's judgment is therefore **vacated**, and we **remand** this case for further proceedings before a different district court judge. See Brown, 5 F.4th at 917 (applying the same disposition after holding the government breached the plea agreement); Riggs, 287 F.3d at 226 (same); Clark, 55 F.3d at 15 (same).[9]

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, Satellite Broadcasting and Communications Association, on behalf of their respective members, Plaintiffs-Appellees,

v.

Letitia A. JAMES, in her official capacity as Attorney General of New York, Defendant-Appellant.

No. 21-1975
August Term 2022

United States Court of Appeals, Second Circuit.

Argued: January 12, 2023

Decided: April 26, 2024

Background: Trade organizations representing internet service providers brought action against New York Attorney General seeking injunctive relief and a declaratory judgment that New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband internet access, was preempted by the federal Communications Act of 1934. The United States District Court for the Eastern District of New York, Denis R. Hurley, J., 544 F. Supp. 3d 269, granted organizations' motion for a preliminary injunction and, at the parties' request, entered a stipulated final judgment and a permanent injunction against the ABA's enforcement. New York Attorney General appealed.

Holdings: The Court of Appeals, Nathan, Circuit Judge, held that:

9. The Bureau of Prisons' electronic database for the location of inmates shows that Cortés was released from incarceration in early April, about one month after oral argument in this case. In the intervening period, neither party has suggested that his appeal is moot. And, in fact, his release does not automatically moot this appeal, given that Cortés is still serving a three-year term of supervised release and is subject to a restitution order based on the higher total loss amount in the PSR. See United States v. Reyes-Barreto, 24 F.4th 82, 84-86 (1st Cir. 2022).

(1) appellate jurisdiction existed over Attorney General's appeal;

(2) section of Communications Act of 1934 outlining the jurisdictional boundaries of the Federal Communications Commission (FCC) did not provide compelling evidence of Congress's intent to occupy the field of rate regulation of interstate communications services;

(3) structure of Communications Act of 1934, and various of its provisions, showed that it was not Congress's intent for the federal government to exclusively occupy the field of rate regulation of interstate communications services, and field preemption based on the statute thus did not invalidate ABA; and

(4) in light of FCC's decision to regulate broadband internet access as an information service under Title I of the Communications Act of 1934, rather than as a telecommunications service under Title II of that statute, conflict preemption did not invalidate ABA.

Judgment reversed; permanent injunction vacated.

Sullivan, Circuit Judge, filed dissenting opinion.

1. Administrative Law and Procedure ⚷2275

Telecommunications ⚷1852, 1924

The Federal Communications Commission (FCC) has the authority to determine the appropriate category under the Communications Act of 1934 for a particular communications service, and its determinations are entitled to *Chevron* deference. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

2. Federal Courts ⚷3321, 3334(1)

Appellate court had jurisdiction over state Attorney General's appeal of stipulated final judgment and permanent injunction barring, as preempted by the federal Communications Act of 1934, enforcement of New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband internet access, in action against Attorney General by trade groups representing internet service providers, despite general rule barring appellate review of consent judgments, where the judgment resolved the preemption issue as a matter of law, all claims had been disposed of with finality, the parties stipulated to obtain immediate appellate review without circumventing restrictions on appellate jurisdiction, and the Attorney General had expressly preserved the right to appeal. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.; N.Y. General Business Law § 399-zzzzz.

3. Federal Courts ⚷3321

In general, an appellate court lacks appellate jurisdiction to review appeals from consent judgments.

4. Federal Courts ⚷3278

Even a district-court ruling that does not formally or technically resolve a claim can suffice to support an appeal, as long as the ruling makes clear that the court has effectively resolved the claim as a matter of law.

5. Federal Courts ⚷3321

Appeals from stipulated judgments are not permitted as a means to circumvent carefully calibrated restrictions on appellate jurisdiction, such as (for example) the discretionary framework that allows courts to decline to hear appeals from class-certification decisions.

6. Federal Courts ⚷3271

The federal policy against piecemeal appeals is not implicated where an entire case can be decided in a single appeal.

7. Federal Courts ⚷3321

The inquiry into appellate jurisdiction over a stipulated judgment will not necessarily end in every case with four factors, namely (1) whether the district court plainly rejected the legal basis for an appellant's claim or defense, (2) whether all claims were disposed of with prejudice, (3) whether the appellant's consent to final judgment was designed solely to obtain immediate appeal of the prior adverse decision, without pursuing piecemeal appellate review, and (4) whether the appellant expressly preserved the right to appeal; satisfying those factors may not be sufficient to confer jurisdiction if, for example, there is an independent reason for finding that adversity no longer remains between the parties or that the appeal has become moot.

8. Federal Preemption ⚷3

Federal preemption of a state statute can be express or implied.

9. Federal Preemption ⚷6, 9

Implied preemption renders a state law inoperative in two circumstances: (1) when the state law regulates conduct in a field that Congress intended the federal government to occupy exclusively (so-called field preemption), and (2) when the state law actually conflicts with federal law (so-called conflict preemption).

10. Federal Preemption ⚷13

Express preemption arises when a federal statute expressly directs that state law be ousted.

11. Federal Preemption ⚷9

Field preemption occurs when Congress manifests an intent to occupy an entire regulatory field to the exclusion of the states; this intent can be inferred from a framework of regulation so pervasive that Congress left no room for the states to supplement it.

12. Federal Preemption ⚷24

Because the states are independent sovereigns in the federal system, when a court determines whether a federal act preempts state law through field preemption, the court starts with the assumption that the historic police powers of the states were not meant to be superseded by the federal act unless that was the clear and manifest purpose of Congress.

13. Federal Preemption ⚷94

Telecommunications ⚷1512(1)

New York's Affordable Broadband Act (ABA) is a regulation of interstate communications services for purposes of determining whether it is preempted by the federal Communications Act of 1934. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.; N.Y. General Business Law § 399-zzzzz.

14. Federal Preemption ⚷94

Telecommunications ⚷1513

There is a tradition of states using their police power to regulate rates charged for interstate communications services, and court would thus assume, for purposes of determining whether the Communications Act of 1934 preempted New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband internet access, that New York's exercise of its rate-regulation power was not preempted unless doing so was the clear and manifest purpose of Congress. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

15. Federal Preemption ⚷94

Telecommunications ⚷1513

Section of the Communications Act of 1934 outlining the jurisdictional boundaries of the Federal Communications Commission (FCC) and providing that the statute applies "to all interstate and foreign com-

munication by wire or radio" and barring FCC jurisdiction over "intrastate communication service by wire or radio" did not provide compelling evidence of Congress's intent to occupy the field of rate regulation of interstate communications services, and that section thus did not support invalidating, through field preemption, New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband internet access. Communications Act of 1934 § 2, 47 U.S.C.A. § 152; N.Y. General Business Law § 399-zzzzz.

16. Federal Preemption ⚷24

The mere existence of a federal regulatory or enforcement scheme does not by itself imply preemption of state remedies.

17. Federal Preemption ⚷9, 10

A statute granting regulatory authority over a subject matter to a federal agency is not in and of itself sufficient to find field preemption; Congress must do much more to oust all of state law from a field.

18. Federal Preemption ⚷48
Gas ⚷2

The basic purpose of Congress in passing the Natural Gas Act was to occupy a field in which the Supreme Court had held that the states may not act. Natural Gas Act § 1, 15 U.S.C.A. § 717 et seq. (NGA).

19. Federal Preemption ⚷94
Telecommunications ⚷1513

Structure of the Communications Act of 1934, and various of its provisions, showed that it was not Congress's intent for the federal government to exclusively occupy the field of rate regulation of interstate communications services, and field preemption based on the statute thus did not invalidate New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband internet access, where the act had no framework for rate regulation over Title I information services like broadband internet access, the act had provisions barring states from regulating specific types of communication services, not including broadband, and other provisions preserved state remedies and allowed states to impose "price cap regulation" over telecommunications services. Communications Act of 1934 §§ 1, 414, 47 U.S.C.A. §§ 151 et seq., 414; 47 U.S.C.A. § 1302(a); N.Y. General Business Law § 399-zzzzz.

20. Telecommunications ⚷1852

When a service is regulated as an information service under Title I of the Communications Act, the Federal Communications Commission (FCC) lacks the express or ancillary authority to impose rate regulations. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

21. Federal Preemption ⚷94
Telecommunications ⚷1513

In light of the decision by the Federal Communications Commission (FCC) to regulate broadband internet access as an information service under Title I of the Communications Act of 1934, rather than as a telecommunications service under Title II of that statute, conflict preemption did not invalidate New York's Affordable Broadband Act (ABA), which regulated rates charged to low-income customers for broadband, even though the FCC had decided that broadband should not be subject to utility-style regulation, since Title I granted the FCC no authority either to impose or to forbear rate regulations, and the FCC could not exclude New York from regulating in an area where the FCC itself lacked the power to act. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.; N.Y. General Business Law § 399-zzzzz.

22. Federal Preemption ⚷3

The burden of establishing obstacle preemption, like that of impossibility preemption, is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.

23. Federal Preemption ⚷19

Under the doctrine of obstacle preemption, states are not permitted to use their police power to enact a regulation if the failure of federal officials affirmatively to exercise their full authority under a federal statute takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.

24. Federal Preemption ⚷10

A federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority.

25. Federal Preemption ⚷10

If Congress has not conferred power to act upon an agency, that agency cannot preempt the validly enacted legislation of a sovereign state.

26. Administrative Law and Procedure ⚷1103

Federal Preemption ⚷10

If an agency has no authority to regulate in a particular field, its policy preferences cannot be a valid basis for regulatory action or preemption.

27. Federal Preemption ⚷94

Telecommunications ⚷1512(1)

When the Federal Communications Commission (FCC) determines that a particular communications service should be subject to the heightened regulatory regime of Title II of the Communications Act of 1934, governing telecommunications services, the FCC has the concomitant power to preempt state law that conflicts with its regulatory decisions. Communications Act of 1934 § 1, 47 U.S.C.A. § 151 et seq.

Appeal from the United States District Court for the Eastern District of New York, No. 21-cv-2389, Denis R. Hurley, *Judge*.

Judith N. Vale (Barbara D. Underwood, Steven C. Wu, Eric Del Pozo, on the brief) for Letitia James, Attorney General, State of New York, New York, NY, for Appellant.

Scott H. Angstreich, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. (Andrew E. Goldsmith, Joseph S. Hall, Alex A. Parkinson, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Jeffrey A. Lamken, MoloLamken LLP, Jared P. Marx, Harris, Wiltshire & Grannis, LLP, on the brief), Washington DC, for Appellees.

Before: Sullivan, Nathan, and Merriam, Circuit Judges.

Nathan, Circuit Judge:

In April 2021, New York enacted the Affordable Broadband Act (ABA), which aims to expand internet access by requiring internet service providers to offer broadband internet to low-income New Yorkers at reduced prices. The Plaintiffs, a group of trade organizations representing internet service providers, maintain that the ABA is impliedly preempted by federal law. We conclude that it is not.

As a threshold matter, we conclude that we have jurisdiction to hear this appeal. Although the parties stipulated to the judgment from which New York appeals, they did so under specific conditions that our case law recognizes as preserving appellate jurisdiction. The district court ef-

fectively resolved the Plaintiffs' preemption claim as a matter of law, by rejecting the legal basis of New York's preemption defenses; all claims have been disposed of with finality and with prejudice; the parties stipulated to judgment solely to obtain immediate appellate review, without circumventing any restrictions on our appellate jurisdiction; and New York expressly preserved its right to appeal from the stipulated judgment. The parties have not circumvented the final judgment rule but have merely accelerated the process of obtaining the final judgment that became inevitable once the district court reached its legal conclusion.

Turning to the merits, we conclude as follows. First, the Communications Act of 1934 (as amended by the Telecommunications Act of 1996) does not wholly preempt states from regulating the rates charged for interstate communications services, because the Act does not establish a framework of rate regulation that is sufficiently comprehensive to imply that Congress intended to exclude the states from entering this field. Second, the ABA is not conflict-preempted by the Federal Communications Commission's 2018 order classifying broadband as an information service. That order stripped the agency of its statutory authority to regulate the rates charged for broadband internet, and a federal agency cannot exclude states from regulating in an area where the agency itself lacks regulatory authority. Accordingly, we **REVERSE** the judgment of the district court and **VACATE** the order permanently enjoining enforcement of the ABA.

BACKGROUND

I. Legal Background

[1] The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, created the Federal Communications Commission (FCC) and authorized it to regulate all "interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication." *Id.* § 152(a). Under the Communications Act, communications services are subject to different regulatory regimes depending on how they are classified. For example, radio and mobile phone services are regulated under Title III of the Act, and cable television services are regulated under Title VI. The FCC has the authority to determine the appropriate statutory category for a particular communications service, and its determinations are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

Broadband internet has, at different times, alternately been categorized by the FCC as a "telecommunications service" under Title II of the Communications Act, and as an "information service" under Title I. These designations are mutually exclusive, and they come with important regulatory consequences. If broadband is a Title II telecommunications service, then internet service providers (ISPs) are common carriers subject to a variety of statutory obligations and restrictions. For example, common carriers are barred from levying unreasonable charges, 47 U.S.C. § 201(b), or unjustly discriminating in the provision of services, *id.* § 202(a). Title II also contains a provision that permits the FCC to "forbear from applying any regulation or any provision of" the Act if it determines that the regulation is unnecessary. *Id.* § 160(a). Once the FCC chooses to exercise this forbearance authority, state and local regulators are preempted and "may not continue to apply or enforce" the relevant regulation. *Id.* § 160(e). On the other hand,

if the FCC designates broadband as a Title I information service, then it is "exempted from common carriage status" under the Act. *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019). Courts have accordingly held that the FCC lacks the power to impose common carrier obligations on ISPs under Title I. *See Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) (rejecting notion that the FCC's Title I authority allows it to impose rate regulations on ISPs); *Verizon v. FCC*, 740 F.3d 623, 655–59 (D.C. Cir. 2014) (concluding that the FCC lacked the statutory authority under Title I to impose net neutrality regulations).

The FCC has reclassified broadband internet on several occasions and did so most recently in 2018. *See In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018). This 2018 Order reclassified broadband internet as a Title I information service and eliminated the FCC's net neutrality regulations [1] as part of a broader agenda to "end utility-style regulation of the Internet in favor of . . . market-based policies" and adopt a "light-touch" regulatory framework. *Id.* ¶¶ 2, 207. The 2018 Order also contained a Preemption Directive, which purported to expressly preempt all state or local regulations of ISPs that would "interfere with the federal deregulatory policy restored in this order." *Id.* ¶¶ 194–204. The stated goal was to prevent states and municipalities from implementing the "utility-type" common-carrier regulations that the federal government was eliminating. *Id.* ¶ 195.

As will be discussed extensively below, the D.C. Circuit considered the legality of the FCC's reclassification of broadband as a Title I service and the FCC's authority to issue the Preemption Directive. *See Mozilla*, 940 F.3d at 18 (D.C. Cir. 2019). In *Mozilla*, the D.C. Circuit upheld the FCC's reclassification of broadband as a Title I service. However, the court vacated the Preemption Directive because it was not grounded "in a lawful source of statutory authority." *Id.* at 74. Because the FCC chose to reclassify broadband as a Title I service, the court concluded that the FCC could not rely on its Title II forbearance authority to preempt state regulation over broadband internet.

II. Factual Background

In 2021, the New York State Legislature enacted the Affordable Broadband Act, which aims to provide internet access to the families least able to afford it. In legislative memoranda, the ABA's sponsors explained that the circumstances of the COVID-19 pandemic had "made it abundantly clear" that broadband internet was "an essential service in its own right." Joint App'x 100. Legislators noted that internet access had become a de facto requirement for accessing health care, education, and work opportunities. *Id.* at 101. But despite its indispensable role in contemporary society, reliable internet access remained out of reach for many. The New York State Comptroller cited data from the most recent Census estimate, which found that "more than 1 million, or 13.8 percent of, New York households do not have subscriptions to broadband internet," and "[o]ne in three low-income households

1. Net neutrality refers to the principle that ISPs should "treat all Internet traffic the same regardless of source." *Verizon*, 740 F.3d at 628. Net neutrality regulations "limit the ability of Internet service providers to interfere with the applications, content, and services on their networks [and] allow users to decide how they want to use the Internet without interference from Internet service providers." Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 Stan. L. Rev. 1, 4 (2015).

lacks access." Office of the N.Y.S. Comptroller, *Availability, Access, and Affordability: Understanding Broadband Challenges in New York State* 1 (2021). The Comptroller report concluded that "these access disparities disproportionately impacted low-income households during the pandemic and may generally present a disadvantage for these New Yorkers and their communities." *Id.*

In an effort to address this digital divide, the ABA requires anyone "providing or seeking to provide ... broadband service in New York state" to "offer high speed broadband service to low-income consumers" at statutorily fixed prices. *See* 2021 N.Y. Sess. Laws 202–04 (McKinney) (codified at N.Y. Gen. Bus. Law § 399-zzzzz). ISPs must offer one of two broadband plans to all low-income consumers who qualify for certain means-tested governmental benefits. N.Y. Gen. Bus. Law § 399-zzzzz(2). Qualifying consumers must be offered broadband at no more than $15 per month for service of 25 Mbps, or $20 per month for high-speed service of 200 Mbps. *Id.* §§ 399-zzzzz(2)–(4). This requirement, however, is not absolute. Certain price increases may be allowed every few years, and ISPs that serve 20,000 households or fewer may be exempted if the New York Public Service Commission "determines that compliance with such requirements would result in unreasonable or unsustainable financial impact on the broadband service provider." *Id.* §§ 399-zzzzz(3)–(5).

Soon after the ABA's passage, the Plaintiffs filed suit against the New York State Attorney General, seeking injunctive relief and a declaratory judgment that federal law preempts the ABA and that enforcement of the ABA would violate the Supremacy Clause and the Plaintiffs' rights under 42 U.S.C. § 1983. The Plaintiffs then moved for a preliminary injunction.

In June 2021, the district court granted the Plaintiffs' motion and preliminarily enjoined enforcement of the ABA. Joint App'x 155. The court concluded that the ABA "triggers field preemption" because it "regulates within the field of interstate communications," and separately held that "the ABA conflicts with the implied preemptive effect of ... the FCC's 2018 Order." *N.Y. State Telecomms. Ass'n v. James*, 544 F. Supp. 3d 269, 282, 285 (E.D.N.Y. 2021).

Because a grant of a preliminary injunction is immediately appealable as of right, *see* 28 U.S.C. § 1292(a)(1), New York initially filed an interlocutory appeal from this order. However, because the district court had reached a legal conclusion that appeared to resolve all of the parties' claims, the parties later jointly requested that the district court enter a stipulated final judgment and permanent injunction based on the court's reasoning in its preliminary injunction decision. The district court agreed. It therefore permanently enjoined enforcement of the ABA and entered the parties' stipulated final judgment, which dismissed the Plaintiffs' § 1983 claim without prejudice and provided that "[d]efendant reserves the right to appeal this stipulated final judgment, declaration, and permanent injunction." Joint App'x 156–59. After the stipulated final judgment was entered, the parties jointly moved to withdraw the appeal of the preliminary injunction, and this appeal followed.

DISCUSSION

I. Appellate Jurisdiction

[2] Before turning to the merits, we first address whether we have jurisdiction to decide this appeal. Following oral argument, we issued an order directing the parties to submit supplemental briefing

addressing whether New York's stipulation to the entry of judgment deprived us of appellate jurisdiction. All parties maintain that we have appellate jurisdiction. We agree.

[3] The fact that the parties stipulated to judgment does not deprive us of jurisdiction. In general, we lack appellate jurisdiction to review appeals from consent judgments. *See LaForest v. Honeywell Int'l Inc.*, 569 F.3d 69, 73 (2d Cir. 2009) ("Appeal from a consent judgment is generally unavailable on the ground that the parties are deemed to have waived any objections to matters within the scope of the judgment." (citation omitted)). However, in accordance with nearly all other circuits to have considered the question,[2] we have held that we may nevertheless exercise appellate jurisdiction over claims resolved by a consent judgment when certain factors are met. Our cases have identified four such factors. First, the district court must have "plainly rejected the legal basis" for the appellant's claim or defense. *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 94 (2d Cir. 2013).[3] Second, all claims must be disposed of with prejudice. *Id.* Third, the appellant's consent to final judgment must be "designed solely to obtain immediate appeal of the prior adverse decision, without pursuing piecemeal appellate review." *Id.* Fourth, the appellant must have "expressly preserved" the right to appeal. *LaForest*, 569 F.3d at 74 (2d Cir. 2009); *see also Linde v. Arab Bank, PLC*, 882 F.3d 314, 324 (2d Cir. 2018) (same). Consideration of these four factors is faithful to the Supreme Court's mandate that "finality is to be given a practical rather than a technical construction." *Microsoft Corp. v. Baker*, 582 U.S. 23, 37, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017) (citation omitted). Our precedents have not directed that all four factors must be met before we exercise appellate jurisdiction over a voluntarily dismissed claim. Our decision in *Ali* did not discuss the fourth factor, and our decisions in *LaForest* and *Linde* did not address the first three. We need not decide whether each factor is necessary because here all four factors are present.

First, the district court plainly rejected the legal basis for New York's defense. In its June 11 order granting a preliminary injunction, the district court conclusively held that "the ABA . . . stands as an obstacle to the FCC's accomplishment and execution of its full purposes and objectives and is conflict-preempted." *N.Y. State Telecomms. Ass'n*, 544 F. Supp. 3d at 282. It further held: "Because the ABA regulates

2. *See BIW Deceived v. Loc. S6*, 132 F.3d 824, 828 (1st Cir. 1997); *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 222–23 (3d Cir. 2000); *Cohen v. Va. Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986); *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 682–83 (7th Cir. 2001); *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1070 (9th Cir. 1998); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992); *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989) (en banc), *cert. denied*, 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 838 (1990). To our knowledge, only the Fifth Circuit has arguably disagreed, *see Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 607 F.2d 1100 (5th Cir. 1979), but a subsequent Fifth Circuit decision called *Amstar* into question, *see Ybarra v. Dish Network, L.L.C.*, 807 F.3d 635, 639 (5th Cir. 2015); *see also Dorse v. Armstrong World Indus., Inc.*, 798 F.2d 1372, 1375–77 (11th Cir. 1986).

3. In *Ali*, the district court issued a ruling denying summary judgment and rejecting the third-party plaintiffs' claims "as a matter of law." 719 F.3d at 89. The parties then jointly requested that the district court dismiss all pending claims with prejudice, which it did, "in order to obtain immediate appellate review." *Id.* at 90. Although in *Ali* the judgment was a "voluntary dismissal," from which a *plaintiff* sought to appeal, the reasoning of that decision applies with equal force to the situation here, where a *defendant* seeks to appeal after entry of a consent judgment.

within the field of interstate communications, it triggers field preemption. Binding Second Circuit decisions are clear: the Communications Act's 'broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress *to occupy the field* to the exclusion of state law.' " *Id.* at 285 (quoting *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–91 (2d Cir. 1968)). The district court was only required to find a likelihood of success on the merits in order to grant a preliminary injunction. But the court did not restrict its holding to such tentative terms. Instead, it articulated unequivocal and purely legal conclusions concerning the preemptive effect of federal law, which were in no way tentative nor contingent on further discovery or factual development.

[4] Under our precedents, that practical resolution of the legal question in this case is sufficient to support an appeal from the subsequent final judgment. It is of no consequence that the district court's conclusion was not technically final, because our inquiry is a pragmatic one. We look to whether the court resolved a claim "in effect" by "plainly reject[ing] [its] legal basis." *Ali*, 719 F.3d at 88, 90. In other words, even a ruling that does not formally or technically resolve a claim can suffice, as long as it makes clear that the court has *effectively* resolved the claim as a matter of law. When we have concluded we lacked jurisdiction to review stipulated judgments it was because we determined that the relevant interlocutory decision did not so plainly resolve a claim as a matter of law. *See Empire Volkswagen Inc. v. World–Wide Volkswagen Corp.*, 814 F.2d 90, 95 (2d Cir. 1987); *Palmieri v. Defaria*, 88 F.3d 136, 140 (2d Cir. 1996). This case readily meets the standard articulated in *Ali*, given the district court's unequivocal conclusions regarding preemption.[4]

Even if we were to construe the district court's legal conclusions in its June 11 order as merely tentative ones because they were resolved in the context of a preliminary injunction, the district court's July 28 order[5] granting a permanent injunction confirmed that it definitively rejected the legal basis for New York's defense. That final judgment determined that federal law is not only likely to, but indeed does, preempt the ABA. The judgment stated that "the Court's holdings on preemption in the June 11, 2021, memorandum and order resolve the substantive legal issues in this matter" and "[f]or the reasons given in the Court's June 11, 2021, memorandum and order, the Court declares that [the ABA] is preempted by federal law." Joint App'x 157. Had the district court determined otherwise, it would have rejected the parties' stipulation to judgment or accepted it without adopting language declaring that its prior holding "resolve[d] the substantive legal issues in this matter" and unequivocally concluding that the ABA "is preempted by federal law" "[f]or the reasons given" in its earlier preliminary injunction order. *Id.* Although the district court judgment adopted stipulated language, that adoption reflects the

4. The definitive legal conclusion reached by the district court in this case was nothing like the tentative predictions or contingent *in limine* rulings the dissent hypothesizes. *See* Diss. Op. at 163–64. Our reasoning here would not allow immediate appeal of those decisions, nor of every preliminary injunction decision. For example, a decision granting a preliminary injunction based on provisional legal analysis, on facts not yet fully developed, or primarily on irreparable harm would be entirely different. In short, the dissent sees a slippery slope only because it misses the guardrails already built into our case law.

5. The July 28 judgment was amended on August 10 to correct a clerical error. *See* Joint App'x 160–61.

district court's understanding of the finality of its legal holding in this case. District courts are not rubber stamps.[6]

Second, all claims have now been disposed of with prejudice. Although in the district court the Plaintiffs voluntarily dismissed their § 1983 claim *without* prejudice, they have subsequently agreed to dismiss the claim *with* prejudice. *See* Supp. Br. for Appellees at 3. Doing so eliminated the risk of piecemeal appeals in this matter and cured any defect in finality posed by the § 1983 claim, as "we have allowed a [party] to appeal an adverse ruling disposing of fewer than all of its claims following [its] voluntary relinquishment of its remaining claims with prejudice." *Chappelle v. Beacon Commc'ns Corp.*, 84 F.3d 652, 653 (2d Cir. 1996); *see also Empire Volkswagen*, 814 F.2d at 94 (same).

[5] *Third*, New York's stipulation to final judgment was designed solely to obtain immediate appellate review of the district court's underlying legal conclusion and does not invite piecemeal litigation or circumvent limitations on our appellate jurisdiction. Appeals from stipulated judgments are not permitted as a means to circumvent carefully calibrated restrictions on appellate jurisdiction, such as (for example) the discretionary framework that allows courts to decline to hear appeals from class certification decisions. *See Microsoft*, 582 U.S. at 35, 38-40, 137 S.Ct. 1702.[7] But this is simply not a case in which the parties tried to hoodwink the courts or skip the last leg of any real race. New York clearly was not seeking to circumvent the restrictions on interlocutory appeals, given that it had an appeal as of right from the grant of the preliminary injunction, *see* 28 U.S.C. § 1292(a)(1), or could have stipulated to the same result pursuant to Federal Rule of Civil Procedure 65(a)(2) (or through uncontested summary judgment practice or trial on stipulated facts).[8] Nor can it be said that the

6. The dissent suggests that we misconstrue the nature of stipulated judgments, which are not rulings on the merits entitled to preclusive or precedential effect. *See* Diss. Op. at 162–63. But the dissent may misconstrue the nature of our inquiry here. Whatever the force of this stipulated judgment in a future case, there is no reason why we cannot look to its language to discern what this district court effectively determined in *this* case, under our case law concerning appeals from stipulated judgments.

7. The dissent misunderstands *Microsoft* to mean that a stipulated-judgment appeal can never be used to "seize additional appellate rights." Diss. Op. at 165. But that cannot be the rule if, as the dissent concedes, some stipulated-judgment appeals are permissible. Any time parties use this procedure, they are attempting to obtain some form of appellate review otherwise not immediately available. *Microsoft* concerns a narrower proposition: that parties may not manipulate stipulated judgments in order to circumvent restrictions on what parties may ordinarily appeal. In *Microsoft*, for example, the Court prohibited parties from using this strategy to force appellate review of a class certification decision that the court of appeals had exercised its discretion to deny. *See* 582 U.S. at 39-40, 137 S.Ct. 1702. Similarly, in the non-precedential summary order cited by the dissent, we held that we lacked jurisdiction over a stipulated-judgment appeal following the grant of a motion to compel arbitration because the appeal would have circumvented the Federal Arbitration Act's prohibition of appeals from the grant of such motions. *See Bynum v. Maplebear, Inc.*, 698 F. App'x 23, 24 (2d Cir. 2017) (summary order).

8. In fact, as the dissent acknowledges, if New York had appealed from the grant of the preliminary injunction, even in that interlocutory posture we could have determined that the Plaintiffs' claim was "entirely void of merit" and decided to "award judgment to the appropriate party." *New York v. Nuclear Regul. Comm'n*, 550 F.2d 745, 759 (2d Cir. 1977), *superseded by rule on other grounds as recognized by Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 170 (2d Cir. 2001). And even if we had not formally done so, a decision from this Court on the purely legal question of preemp-

parties stipulated to a final judgment in order to bypass district court resolution of any open merits questions, given that the district court had already concluded in its June 11 order that federal law preempted the ABA. The parties have not circumvented the final judgment rule but have merely accelerated the process of obtaining the final judgment that became inevitable once the district court reached its legal conclusion. There was simply nothing left to litigate in the district court. New York had argued its case and lost.

[6] Moreover, the stipulated-to dismissal does not "invite[ ] protracted litigation and piecemeal appeals." *Microsoft Corp.*, 582 U.S. at 37, 137 S.Ct. 1702. If anything, the parties entered the consent judgment to *avoid* piecemeal adjudication and a needless drain on resources. The procedure here allows one appeal to resolve the issue of preemption in this case with finality, rather than litigating the same legal question once at the preliminary injunction stage and again after final judgment. And with the Plaintiffs having agreed to dismiss their § 1983 claim with prejudice, there will be nothing left for the parties to litigate following this appeal—barring, of course, review of this decision by the Supreme Court. As we said in *Ali*: "The federal policy against piecemeal appeals is not implicated where an entire case can be decided in a single appeal." 719 F.3d at 89 (cleaned up). Plainly so here. If we affirm, the case ends. If we reverse, the case also ends.

Fourth, New York expressly preserved its right to appeal in the stipulated-to final judgment. *See* Joint App'x 158 (stating that New York "reserves the right to appeal"). Having secured the ability to challenge the district court's preemption conclusions in this Court, New York did not concede to the district court's substantive holding, but rather agreed "that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) (citation omitted). The matter being appealed—the district court's purely legal preemption holding—clearly falls within the scope of this express reservation. If, by contrast, New York expressly preserved only its right to challenge the district court's choice of *remedy* on appeal and not its broader right to challenge the underlying legal holding, then we could not review the district court's conclusions regarding preemption. However, New York's express reservation of its right to appeal does not contain any such proviso and the preemption holding of the district court is unquestionably within the scope of the express reservation.

[7] We recognize that the inquiry into our appellate jurisdiction will not necessarily end with these four factors in every case. Satisfying these factors may not be sufficient to confer jurisdiction if, for example, there is an independent reason for finding that adversity no longer remains between the parties or that the appeal has become moot. But here, we do not identify any additional basis for questioning our jurisdiction. To the contrary, this appeal bears all the hallmarks of a case or controversy: a live and genuine dispute remains between the parties, with material consequences at stake.

We are easily satisfied that we have jurisdiction to decide this appeal and we reject the dissent's contention that the

tion in this case would not have left the district court with any room to disagree in subsequent proceedings on remand. In light of this, it is especially puzzling that the dissent suggests that New York circumvented any rules of appellate jurisdiction.

parties' unremarkable use of a stipulated judgment in the circumstances of this case forever forecloses review of the district court's decision enjoining New York's duly enacted law. We turn to that review now.

II. Preemption

[8–10] In this case, the Plaintiffs have advanced two theories of implied preemption.[9] *First*, they contend that the ABA is preempted because federal law occupies the entire field of rate regulations for interstate communications services to the exclusion of the states. *Second*, the Plaintiffs maintain that the ABA is conflict-preempted by the 2018 Order because the ABA stands as an obstacle to the FCC's stated policy objective of deregulating ISPs. The district court agreed with both arguments. We review each of those conclusions in turn, *de novo*. *Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31, 34 (2d Cir. 2020).

A. Field Preemption

[11, 12] Field preemption occurs when Congress manifests an intent to occupy an entire regulatory field to the exclusion of the states. This intent "can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.' " *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The Supreme Court has noted that these are "rare cases." *Kansas v. Garcia*, 589 U.S. 191, 140 S. Ct. 791, 804, 206 L.Ed.2d 146 (2020). "[B]ecause the States are independent sovereigns in our federal system," courts "start with the assumption that the historic police powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (citation omitted).

At the district court, the Plaintiffs argued that the ABA was field-preempted because the Communications Act preempted *all* state regulation of interstate communications services. That was quite a stunning claim. As *amici* Internet Law Professors note, "no court ha[d] ever found field preemption of the whole of interstate communications. Instead, courts have evaluated field preemption claims with respect to much narrower subfields . . . ." Internet Law Profs. Br. 13. *See, e.g.*, *Freeman v. Burlington Broads., Inc.*, 204 F.3d 311, 319–20 (2d Cir. 2000) (considering "whether federal law preempts state and local regulation of [radio frequency] interference"); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105–06 (2d Cir. 2010) (identifying the field as "the regulation of the technical and operational aspects of wireless telecommunications service").

Moreover, courts in New York and across the country have upheld numerous state regulations of interstate communications services against preemption challenges. *See, e.g.*, *ACA Connects v. Frey*,

9. "Federal preemption of a state statute can be express or implied . . . ." *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007). "Implied preemption renders a state law inoperative in two circumstances: (1) when the state law 'regulates conduct in a field that that Congress intended the Federal Government to occupy exclusively,' (so called '*field* preemption') and (2) when the state law 'actually conflicts with federal law,' (so called '*conflict* preemption')." *In re Jackson*, 972 F.3d 25, 33 n.4 (2d Cir. 2020) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). In contrast, "[e]xpress preemption arises when a federal statute expressly directs that state law be ousted." *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) (cleaned up). The Plaintiffs have not asserted any claim of express preemption in this appeal.

471 F. Supp. 3d 318, 323–26 (D. Me. 2020) (affirming Maine's authority to restrict broadband providers from disseminating customers' personal information); *People v. Charter Commc'ns, Inc.*, 162 A.D.3d 553, 81 N.Y.S.3d 2, 3 (2018) (affirming New York's authority to regulate deceptive advertising by broadband providers about their broadband services); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046–54 (7th Cir. 2013) (affirming Indiana's authority to regulate robocalls); *Tex. Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999) (affirming Texas's authority to "impos[e] additional eligibility requirements on carriers otherwise eligible to receive federal universal service support").

[13] The Plaintiffs' broad claim was stunning, but not long for this world. Perhaps recognizing this position was not tenable, they defend only a narrower version on appeal. Instead of defining the field as all "interstate communications services," they now argue that the relevant field is "*rate regulation* of interstate communications services." Appellees' Br. 34–35 (emphasis added). Because it appears that the Plaintiffs have abandoned their original position, we consider whether Congress has occupied the field of rate regulation of interstate communications services to the exclusion of the states.[10] We proceed by examining the scope of states' historic police powers over communications services, the text and structure of the Communications Act, and the relevant case law.

1. The States' Police Powers

When reviewing preemption challenges, courts "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (citation omitted). This Court has held that "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990).

[14] In this case, however, the Plaintiffs contend that there should be *no* presumption against preemption because "[t]here is no historic presence of state law regulating the rates of interstate communications services." Appellees' Br. 43. The Plaintiffs' decision to narrow their argument on appeal does important work here. While New York and its *amici* cite many historical examples of state regulations of interstate communications services, the Plaintiffs argue that none of them are relevant because they are not *rate* regulations.

The Plaintiffs have moved the goalposts on the preemption field, but their claim fails anyway. Cable television is an interstate communications service, and when it was lightly regulated under Title I—as broadband internet is today—many states enacted laws that regulated the rates cable companies could charge for their services. *See* Philip R. Hochberg, *The States Regu-*

10. As a threshold matter, New York argues that the ABA is a purely intrastate regulation because the ABA's "price regulation applies only to products offered by companies operating in New York to specified consumers who reside in New York, and it concerns only broadband service to be accessed from computers in New York." Appellant's Br. 32–33. However, the law of this Circuit instructs us that the FCC has jurisdiction to regulate communications services if the *communications* "go from one state to another." *N.Y. Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980). This "end-to-end" analysis is the controlling test for whether a regulation is jurisdictionally intra- or interstate, and applying it, we conclude that the ABA is a regulation of interstate communications services.

late Cable: A Legislative Analysis of Substantive Provisions 29–30, 91–96 (1978) (describing cable rate legislation and regulation in Delaware, Hawaii, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, South Dakota, and Virginia), https://perma.cc/Z89E-JTHQ. Among these regulatory regimes, New York's system was "the most comprehensive," with robust antidiscrimination provisions and requirements that price increases be approved by state authorities. *Id.* at 91–93. Nevada also imposed public utility–style regulations on cable providers, including a requirement that rates be "just and reasonable." *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 460 (D. Nev. 1968) (three-judge court), *aff'd*, 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746 (1970). And when a group of cable companies challenged the Nevada statute, arguing—as the Plaintiffs do now—that it was preempted by the Communications Act, a three-judge panel unanimously rejected their claim. *See id.* at 464–65 ("Congress, in enacting the Federal Communications Act of 1934, did not intend absolute preemption of the field to the exclusion of all state regulation."). That decision was summarily affirmed by the Supreme Court. 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746 (1970).

The Plaintiffs attempt to distinguish *TV Pix* by arguing that it "did not concern *interstate* rate regulation." Appellees' Br. 45. That is incorrect. Although the *TV Pix* opinion describes the community antenna systems as being "essentially a local business," 304 F. Supp. at 463, that language was not relevant to the field preemption holding. Instead, it was related to the court's separate holding that the laws did not violate the Dormant Commerce Clause. *Id.* The *TV Pix* court stated that there was "no doubt" that the community antenna TV businesses were "engaged in *interstate communication*, even where, as here, the intercepted signals emanate from stations located within the same State." *Id.* at 461 (emphasis added) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 168–69, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968)).

Based on this history and precedent, we conclude that there *is* a tradition of states using their police power to regulate rates charged for interstate communications services. Therefore, we proceed "with the assumption" that such powers "were not to be superseded by the [Communications Act] unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565, 129 S.Ct. 1187. We turn next to the text of the Communications Act to determine that purpose.

2. The Text of the Communications Act

[15] The Plaintiffs' main textual argument is that § 152 of the Communications Act evinces Congress's intent to preempt all rate regulations of interstate communications services. Section 152 outlines the jurisdictional boundaries of the FCC and provides that:

> (a) The provisions of this chapter shall apply to *all interstate and foreign communication* by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . . .
>
> (b) Except as provided in sections 223 through 227 of this title, inclusive, section 276, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with

> *intrastate communication service* by wire or radio of any carrier ....

47 U.S.C. § 152 (emphases added).

The Plaintiffs contend that this statute "is how Congress confirmed the FCC's exclusive jurisdiction over rate-setting for interstate communications services," though they do not explain how their reading of this text could be limited to rate regulation. Appellees' Br. 36. They quote *Louisiana Public Service Commission v. FCC* for the proposition that subsections (a) and (b) "divide 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." 476 U.S. 355, 360, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). The district court also relied on this language from *Louisiana*, stating that "[t]he FCC's jurisdiction would hardly be 'plenary' if it loses, to the states' gain, the right to make rules regarding certain interstate communications services when the FCC alters" the Title under which those services are regulated. *N.Y. State Telecomms. Ass'n*, 544 F. Supp. 3d at 287. These arguments are flawed for two reasons.

First, the Plaintiffs' reliance on *Louisiana* is misplaced. The Plaintiffs argue that the Supreme Court interpreted § 152 as dividing the world of communications into two mutually exclusive hemispheres. But that is in fact the *opposite* of what the Supreme Court did. The *Louisiana* Court said the following in reference to § 152:

> [W]hile the Act would *seem* to divide the world of domestic telephone service neatly 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—*in practice, the realities of technology and economics belie such a clean parceling of responsibility*.... [B]ecause the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other "hemisphere."

476 U.S. at 360, 106 S.Ct. 1890 (emphases added). *Louisiana* made clear that the states continue to have a role in regulating communications services, even if such regulations touch on interstate services. *See id.* at 375, 106 S.Ct. 1890 ("The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system."). The Supreme Court's decision in *Louisiana* strongly undermines, rather than supports, the Plaintiffs' argument based on the text of § 152.

[16, 17] *Second,* although we agree that § 152(a) broadly grants the FCC jurisdiction over "all interstate and foreign communication," nothing in the text suggests that the FCC has *exclusive* jurisdiction over interstate communication, which is the relevant question for implied field preemption. And the dissent, for its part, never explains how it makes the leap from broad jurisdiction to exclusive jurisdiction. *See* Diss. Op. at 166–67. The Supreme Court's decisions on preemption make clear that "the mere existence of a federal regulatory or enforcement scheme ... does not by itself imply pre-emption of state remedies." *English v. Gen. Elec. Co.*, 496 U.S. 72, 87, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Thus, "a statute granting regulatory authority over [a] subject matter to a federal agency" is not in and of

itself sufficient to find field preemption. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 638, 132 S.Ct. 1261, 182 L.Ed.2d 116 (2012) (Kagan, J., concurring). "Congress must do much more to oust all of state law from a field." *Id.; see also Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) ("Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law.").

The Plaintiffs nonetheless argue that this statutory language granting federal authority evinces an intent to preempt because Congress used substantially similar language in the Federal Power Act and the Natural Gas Act. *See* 16 U.S.C. § 824(b)(1); 15 U.S.C. § 717(b)–(c). Those Acts give the Federal Energy Regulatory Commission "exclusive authority" over interstate wholesale electricity sales, *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016), and "exclusive jurisdiction" over interstate wholesale natural gas sales, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01, 305, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

[18] Without context, this seems like a compelling argument, and it is one the dissent adopts at face value. *See* Diss. Op. at 167–68. But the argument loses its force when one notices that the jurisdictional provisions in the Federal Power Act and the Natural Gas Act were passed *after* the Supreme Court issued a series of Dormant Commerce Clause decisions holding that "regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States." *Interstate Nat. Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 689 & n.13, 67 S.Ct. 1482, 91 L.Ed. 1742 (1947). "[T]he basic purpose of Congress in passing the Natural Gas Act was to occupy this field in which the Supreme Court has held that the States may not act." *Id.* at 690, 67 S.Ct. 1482 (internal quotation marks omitted); *see also Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 67–68, 63 S.Ct. 953, 87 L.Ed. 1258 (1943) ("The primary purpose of Title II, Part II [of the Federal Power Act] . . . was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the States . . . ."). In other words, the similar jurisdictional language from the Federal Power Act and the Natural Gas Act does not evince Congress's intent to preempt the field, because Congress was acting in an area in which it was already established that states were prohibited from regulating.

Therefore, nothing in the text of § 152 provides "compelling evidence" of Congress's intent to occupy the field of rate regulation of interstate communications services. *Gen. Motors*, 897 F.2d at 41.

3. The Structure of the Communications Act

[19] Other provisions of the Communications Act also rebut the Plaintiffs' claim that the federal government exclusively occupies the field of rate regulation of interstate communications services.

[20] To start, the Communications Act has *no* framework for rate regulation over Title I services like broadband, let alone one that is "so pervasive . . . that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 399, 132 S.Ct. 2492 (cleaned up). When a service is regulated under Title I, the FCC lacks the express or ancillary authority to impose rate regulations. *See Comcast*, 600 F.3d at 655 (D.C. Cir. 2010).

The sole grant of regulatory authority within Title I is located at 47 U.S.C. § 154(i), which permits the FCC to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." The Supreme Court has held that this authority is "restricted to [acts] reasonably ancillary to the effective performance of the Commission's various responsibilities." *Sw. Cable*, 392 U.S. at 178, 88 S.Ct. 1994. Thus, the Court has vacated FCC regulations of information services unless such regulations are in furtherance of a "statutorily mandated responsibilit[y]" that is rooted in "an express delegation of authority to the Commission." *Comcast*, 600 F.3d at 652 (citing *Sw. Cable*, 392 U.S. at 177–78, 88 S.Ct. 1994; *United States v. Midwest Video Corp.*, 406 U.S. 649, 670, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972) (plurality opinion)). However, neither the Plaintiffs—nor the FCC itself—have ever identified a "statutorily mandated responsibility" in the Communications Act that would permit the use of § 154(i) to impose common carrier requirements such as rate regulation. *Cf. Verizon*, 740 F.3d at 635–50 (D.C. Cir. 2014) (upholding broadband disclosure rules as ancillary to 47 U.S.C. § 1302).

This *absence* of regulation is the exact opposite of a federal "framework … so pervasive" that it results in field preemption. *Arizona*, 567 U.S. at 399, 132 S.Ct. 2492 (cleaned up). The Plaintiffs' position would create a regulatory vacuum in which the federal government has both declined to regulate an industry and simultaneously prohibited states from regulating. Though the Supreme Court has noted that such a vacuum may be constitutionally permissible, "to say that it can be created is not to say that it can be created subtly." *P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 500, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988); *cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 68–70, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (finding no field preemption based on congressional delegation to agency where statute "does not *require* the [agency] to promulgate comprehensive regulations covering every aspect" of the asserted field). Congress has not legislated an absence of regulatory authority here.

Furthermore, the Communications Act contains provisions expressly prohibiting states from regulating specific types of communications services, and none covers all rate regulations of interstate communications services. Instead, the Act identifies specific *types* of communications services, regulates them differently under different Titles, and preempts state regulation of some of them on a case-by-case basis. For example, when Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, it added Title VI to the Communications Act and expressly forbade state regulation of "the rates for the provision of *cable service* except to the extent provided under this section and section 532 of this title." 47 U.S.C. § 543(a) (emphasis added). This provision would be wholly unnecessary if the broader field had already been preempted. Congress similarly included a forbearance provision for Title II services, which prohibits the states from enforcing some Title II regulations *if* certain prerequisites are met and the FCC concludes that the regulations at issue are unnecessary. *Id.* § 160. No such regime exists for services regulated under Title I.

There is simply no indication that Congress intended to preempt a field as broad as "rate regulation of interstate communications services." To the contrary, Congress made explicit its intent to preempt other subfields of interstate communications. Supreme Court precedent is clear that "Congress' enactment of a provision defining the pre-emptive reach of a statute

implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

Other provisions of the Communications Act also support our conclusion that rate regulation is not field-preempted. For example, Section 414 contains a "savings clause," which states that "the provisions of this chapter are *in addition to* such remedies" that "now exist[ ] at common law or by statute." 47 U.S.C. § 414 (emphasis added). And strikingly, § 1302(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, *price cap regulation* . . . or other regulating methods that remove barriers to infrastructure investment.

(emphasis added). The most natural conclusion to draw from all these provisions (and the one that comports with our presumption against preemption) is that Congress intended for the 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.

4. Case Law on the Communications Act

The final refuge of the Plaintiffs' case for field preemption is this Court's decision in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). In *Ivy*, we drew on the Supreme Court's decisions in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 40 S.Ct. 69, 64 L.Ed. 118 (1919), and *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315, 40 S.Ct. 167, 64 L.Ed. 281 (1920), to conclude that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area." *Ivy*, 391 F.2d at 491.

The Plaintiffs argue that *Ivy*'s field preemption holding extends to all interstate communications services—not just telephone and telegraph companies. We disagree. *Ivy* does not field-preempt rate regulation of broadband internet (or other Title I information services) because the Communications Act subjects those services to an entirely different regulatory regime than telephone and telegraph companies.

Telegraph and telephone services were and continue to be regulated as common carriers under the Communications Act. These services are subject to numerous regulations that do not apply to Title I services like broadband internet. The *Ivy* court's field preemption holding was premised on its observation that "Congress has enacted *comprehensive* legislation regulating *common carriers* engaged in interstate telegraph and telephone transmission." *Id.* at 490 (emphases added). The Court highlighted provisions of the Communications Act that are specific to common carriers: § 201, which "requires communications carriers to furnish communications service upon reasonable request"; §§ 201–02, which prohibit carriers from levying "unreasonable or discriminatory charges, practices, classifications and regulations"; and § 203, which requires carriers to "file tariff schedules with the FCC." *Id.* Based on "this *broad scheme* for the regulation of interstate service by *communications carriers*," it concluded that Congress had preempted the field. *Id.* (emphases added).

Moreover, the Supreme Court cases *Ivy* relied upon—*Postal Telegraph-Cable Co.* and *Western Union Telegraph Co.*—also concerned telegraph companies that were regulated as common carriers under the predecessor to the Communications Act. Both of those cases relied on the fact that Congress had subjected carriers to the "rule of equality and uniformity of rates" when concluding they could only be regulated by the federal government. *Postal Tel.-Cable*, 251 U.S. at 30, 40 S.Ct. 69; *see also W. Union Tel. Co.*, 251 U.S. at 316, 40 S.Ct. 167 ("[T]he provisions of the statute bringing *telegraph companies* under the Act to Regulate Commerce as well as placing them under the administrative control of the Interstate Commerce Commission so clearly establish the purpose of Congress to subject *such companies* to a uniform national rule ...." (emphasis added)). *Ivy*'s logic may apply to other communications services with common carrier obligations, but it does not apply to services that are wholly exempt from them. The extensive federal regulation of common carriers that justifies field preemption in *Ivy* is nowhere to be found for broadband internet.

Reading *Ivy* to cover all communications services would also conflict with Supreme Court precedent on the Communications Act. In *Head v. New Mexico Board of Examiners in Optometry*, the Supreme Court warned that "the validity of [a preemption] claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act." 374 U.S. 424, 429–30, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963). The Plaintiffs ask us to hold that the Communications Act exempts *all* services from state rate regulation—regardless of how those services are regulated under the Communications Act. If we were to do that, we would be making the exact sort of sweeping assumption about the Act that Supreme Court precedent forecloses and that is contrary to the actual statutory analysis by this Court in *Ivy*.

In sum, neither the text and structure of the Communications Act, the history of this type of regulation, nor relevant precedent support the Plaintiffs' argument that Congress intended to preempt the field of rate regulation of interstate communications services when it passed the Communications Act.

B. Conflict Preemption

[21] In the alternative to their field preemption contention, the Plaintiffs argue that the ABA is conflict-preempted because it stands as an obstacle to the accomplishment and execution of the FCC's 2018 Order. As discussed earlier, the 2018 Order reclassified broadband internet as a Title I service in order to "end utility-style regulation of the Internet in favor of ... market-based policies" and adopt a "light-touch regulatory framework." 2018 Order ¶¶ 2, 106. By moving broadband outside of the more comprehensive regulatory regime in Title II, the FCC surrendered the statutory authority to enact any rate regulations on broadband internet providers. *See Comcast*, 600 F.3d at 655 (D.C. Cir. 2010); *Verizon*, 740 F.3d at 650 (D.C. Cir. 2014).

Because the ABA subjects broadband providers to rate regulation—a "centerpiece of common-carrier regulation"—the Plaintiffs argue that it stands as an obstacle to the "federal policy of promoting broadband deployment while preserving an open internet." Appellees' Br. 17. We consider whether this agency-driven federal policy preference carries preemptive effect against the states and conclude that it does not.

[22] "The burden of establishing obstacle preemption, like that of impossibility preemption, is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 101–02 (2d Cir. 2013) (cleaned up).

[23–26] Under well-established principles of administrative law and federalism, "States are not permitted to use their police power" to enact a regulation if "failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (cleaned up). However, "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S.Ct. 1890. If Congress has not conferred "power to act" upon an agency, that agency cannot "pre-empt the validly enacted legislation of a sovereign State." *Id.* It follows that if an agency has no authority to regulate in a particular field, its policy preferences cannot be a valid basis for regulatory action or preemption. *See id.* at 374–75, 106 S.Ct. 1890 ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.").

Therefore, the question at the heart of the conflict preemption inquiry is whether the FCC has the statutory authority to enact (or preempt) common carrier–style regulations of broadband under Title I. Our two sister circuits that have considered this question have determined the answer is "no." *Mozilla*, 940 F.3d at 76–86 (D.C. Cir. 2019); *ACA Connects v. Bonta*, 24 F.4th 1233, 1241–45 (9th Cir. 2022). We agree.

[27] As discussed earlier, Title II imposes common carrier obligations on telecommunications services, including a requirement that rates be "just and reasonable." 47 U.S.C. § 201(b). Title II also includes a "forbearance provision" that allows the FCC to decline to enforce some regulations of telecommunications services if it believes regulation is unnecessary and forbearance is in the public interest. *Id.* § 160(a). If the FCC decides to forbear from imposing a common carrier obligation, the states are prohibited from imposing that same obligation on the telecommunications service. *Id.* § 160(e). There is little doubt that when the FCC determines that a particular communications service should be subject to the heightened regulatory regime of Title II, it has the concomitant power to preempt state law that conflicts with its regulatory decisions.

In contrast, Title I grants the FCC no authority to impose rate regulations, nor does it contain a forbearance provision similar to Title II. Thus, because broadband is now regulated as a *Title I* service, the FCC has no congressionally delegated authority to impose *or* forebear rate regulations. Absent the "power to act," the FCC has no power to preempt broadband rate regulation. *La. Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S.Ct. 1890; *see also Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976) (noting a "vital difference between a refusal to use granted power, and an attempt to prevent regulation by others in an area where no ordinary Commission jurisdiction appears to exist").

Neither the Plaintiffs nor our dissenting colleague attempt to identify a source of statutory authority that gives the FCC the

power to preempt anywhere in Title I. Instead, the Plaintiffs argue (and the dissent accepts) that the agency's threshold decision to recategorize broadband from Title II to Title I is an independent source of preemptive authority because it is an "affirmative exercise of the FCC's statutory authority" and was done to "prohibit the very *ex ante* rate regulation that the ABA imposes." Appellees' Br. 18 (internal quotation marks omitted); *see also* Diss. Op. at 168–69.

To be sure, the FCC's decision on how broadband should be classified is entitled to *Chevron* deference. *Brand X*, 545 U.S. at 980–81, 125 S.Ct. 2688; *Mozilla*, 940 F.3d at 18–20 (concluding that the FCC's decision to reclassify broadband from Title II to Title I in the 2018 Order was lawful). But the fact that the FCC can choose between Title I and Title II does not mean that the FCC can opt to retain its Title II preemption authority after reclassifying broadband as a Title I service. There is a crucial distinction between being able to choose *which* of two exclusive regulatory regimes applies and being able to pick and choose powers from *both* regulatory regimes simultaneously. Whereas the former comports with the agency's statutory authority, the latter contravenes it. *See Mozilla*, 940 F.3d at 80 (observing that the FCC "cannot completely disavow Title II with one hand while still clinging to Title II forbearance authority with the other").

The Plaintiffs defend this pick-and-choose approach by arguing that "[t]he FCC's policy preferences are not separable from the 2018 Order's classification decision." Appellees' Br. 20. Because "the FCC *started* by reaching the affirmative determination that interstate broadband should not be subject to *ex ante* rate regulation," and "[t]he D.C. Circuit [in *Mozilla*] upheld the FCC's policy grounds as a reasoned basis for its selection of the regulatory regime to govern interstate broadband," the Plaintiffs argue that according this policy decision preemptive force would be consistent with the principles of *Chevron* deference. Appellees' Br. 20–22.

This approach essentially asks us to apply another layer of deference to a determination that already receives *Chevron* deference. The Plaintiffs hope that the definitional ambiguity "that permits the Commission to classify broadband under Title I" can somehow "spawn[ ] a power to preempt with all the might of an express statutory grant of authority." *Mozilla*, 940 F.3d at 82. But this *Chevron*-squared strategy fails for three reasons.

First, contrary to the Plaintiffs' claims, the FCC's policy preferences and its classification decision *are* separable. The FCC did not justify its classification decision solely on policy grounds. It also engaged in statutory interpretation and concluded that "the best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service." 2018 Order ¶ 20. The FCC called its statutory analysis "sufficient grounds alone on which to base [its] classification decision." *Id.* ¶ 86.

Second, the Plaintiffs' expansive reading of *Chevron* has no basis in *Chevron* itself. *Chevron* is a case about filling gaps in statutes, "not a magic wand that invests agencies with regulatory power beyond what their authorizing statutes provide." *Mozilla*, 940 F.3d at 84. If the Plaintiffs had pointed to some statutory ambiguity in Title I and the FCC had construed that provision as providing it with the power to impose rate regulations, then *Chevron* might be invoked in favor of preempting the ABA. But the only ambiguity that the Plaintiffs have identified pertains to whether broadband internet is an "information service" or a "telecommunications service." 47 U.S.C. § 153(24), (53). The

FCC has the power to fill that gap, and it can use its policy judgment to choose one category or the other, but it cannot rewrite the Communications Act to change the consequences that flow from that choice. To hold otherwise "would virtually free the Commission from its congressional tether." *Comcast*, 600 F.3d at 655.

Third, the Plaintiffs provide no coherent basis for distinguishing our implied preemption analysis from the express preemption analysis in *Mozilla*, which is persuasive authority. The district court concluded that the D.C. Circuit's decision in *Mozilla* did not foreclose a finding of conflict preemption because it struck down the 2018 Order's *express* preemption provision and left the question of its implied preemptive effect for another day. The court thus reasoned that the decision "does *not* preclude or revoke the 2018 Order's implicit preemptive effect." *N.Y. State Telecomms. Ass'n*, 544 F. Supp. 3d at 283.

To be sure, the *Mozilla* court stated that "it would be wholly premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the 2018 Order" because "no particular state law is at issue in this case." 940 F.3d at 86. However, *Mozilla* was also clear that the statutory ambiguity that allows the FCC to choose between Title I and Title II is not a freestanding source of preemptive authority. *See id.* at 82. The Plaintiffs—who do not argue that *Mozilla* was wrongly decided—fail to explain why the same statutory ambiguity should confer implied preemptive authority when it does not confer express preemptive authority.

Instead, the Plaintiffs contend that *Mozilla* vacated the Preemption Directive on different grounds—namely, because it tried "to categorically abolish all fifty States' statutorily conferred authority to regulate *intrastate* communications." Appellees' Br. 26 (quoting *Mozilla*, 940 F.3d at 86). This argument is also unavailing. Though the scope of the Preemption Directive was *one* reason why it was unlawful, it was not the *sole* reason. The Preemption Directive was also vacated because it was not rooted in a relevant source of statutory authority. *See Mozilla*, 940 F.3d at 78 ("[T]he power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy. *Doubly so here* where preemption treads into an area—State regulation of intrastate communications—over which Congress has expressly 'deni[ed]' the Commission regulatory authority." (emphasis added)). Because implied preemption, like express preemption, "cannot be a mere byproduct of self-made agency policy," the Plaintiffs' attempt to distinguish *Mozilla* must fail. *Id.*

* * *

Several of the Plaintiffs in this action vociferously lobbied the FCC to classify broadband internet as a Title I service in order to prevent the FCC from having the authority to regulate them. *See* Donald Shaw, *Amidst Fight to Kill Net Neutrality, Comcast and Other Telecoms Spent $190 Million on Lobbying*, Sludge (June 11, 2018), https://perma.cc/5BVU-Y97E. At that time, Supreme Court precedent was already clear that when a federal agency lacks the power to regulate, it also lacks the power to preempt. The Plaintiffs now ask us to save them from the foreseeable legal consequences of their own strategic decisions. We cannot. If they believe a requirement to provide internet to low-income families at a reduced price is unfair or misguided, they have several pathways available to them. They could take it up with the New York State Legislature. They could ask Congress to change the

scope of the FCC's Title I authority under the Communications Act. They could ask the FCC to revisit its classification decision, as it has done several times before. But they cannot ask this Court to distort well-established principles of administrative law and federalism to strike down a state law they do not like.

CONCLUSION

The judgment of the United States District Court for the Eastern District of New York is **REVERSED**, and the permanent injunction barring enforcement of the Affordable Broadband Act is **VACATED**.

Richard J. Sullivan, Circuit Judge, dissenting:

I respectfully dissent from the majority's opinion for two reasons. First, I believe that we lack jurisdiction to even hear this appeal. Second, even if we had jurisdiction to reach the merits of the parties' preemption arguments, I am persuaded that New York's Affordable Broadband Act (the "ABA") is preempted by federal law.

I. We Lack Appellate Jurisdiction To Review The Stipulated Judgment.

This appeal comes to us in an "unusual posture." *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 88 (2d Cir. 2013). After New York was preliminarily enjoined from enforcing the ABA, it *stipulated* to judgment against it, and then appealed that stipulated judgment. This was a strategic move. In the district court's preliminary injunction order, it stated that the ABA "is conflict-preempted" by federal law, and thus concluded that the challengers were likely to succeed in showing preemption on the merits, as required to obtain a preliminary injunction. *N.Y. State Telecomms. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 282 (E.D.N.Y. 2021) ("*NYSTA*"). At that point, New York could have appealed the injunction directly under 28 U.S.C. § 1292(a)(1) (in fact, New York initially filed such an appeal, only to later withdraw it). That interlocutory appeal, however, would have been a narrow challenge *only* to whether the district court "abused its discretion" in granting the injunction, as opposed to a challenge that would produce "a final resolution of the merits" of preemption. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). In other words, in appealing the preliminary injunction, New York could not have asked us for judgment on the merits of preemption in its favor – it could have asked us only to dissolve the injunction while it continued to litigate the merits before the district court.

Rather than pursue that limited appeal, New York instead consented to a stipulated judgment in order to take a full appeal on the merits of preemption. That is, it stipulated to a judgment against it and asked the district court to enter a permanent injunction forbidding it from enforcing the ABA as preempted. *See* J. App'x at 157. The district court obliged, and New York has now appealed the resulting judgment, asking us to award it judgment on the merits with a finding that the ABA is not preempted by federal law.

But this tactic – which I will refer to as a "stipulated judgment appeal" – is generally not permitted as a shortcut to appellate review. Because these appeals are attempts to "evade the final judgment rule," we allow them in only limited circumstances. *Palmieri v. Defaria*, 88 F.3d 136, 139 (2d Cir. 1996).[1] In the majority's view,

1. Over the years, we have confronted stipulated judgment appeals by both plaintiffs and defendants. For plaintiffs, such appeals usually follow an adverse interlocutory decision in

an appellant can appeal from a stipulated judgment when (1) the district court "plainly rejected the legal basis" for the appellant's case (either a claim or defense), (2) all claims are disposed of with prejudice, (3) the stipulated judgment is "designed solely to obtain immediate appeal of the prior adverse decision, without pursuing piecemeal appellate review," and (4) the appellant has "expressly preserved" the right to appeal. Maj. Op. at 143–44 (internal quotation marks omitted).

Though I agree that all of these elements are prerequisites, our precedent requires two more conditions before a party may appeal a stipulated judgment. First, in order to "plainly reject[ ]" the legal basis for the appellant's case, *id.* at 13, the district court's decision must be a "*final* ruling" on an issue, as opposed to a tentative finding or dicta, *Palmieri*, 88 F.3d at 139 (emphasis added). In other words, a decision cannot "effectively dismiss[ ]" a claim when it is only a provisional finding that is "subject to change when the case unfolds." *Id.* (quoting *Luce v. United States*, 469 U.S. 38, 41–42, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984)). Second, the stipulated judgment appeal cannot be an attempt to circumvent the interlocutory appellate rules already in place. As the Supreme Court has held, if the interlocutory appellate rules preauthorize a narrow right to appeal certain issues, then a litigant cannot use a stipulated judgment to claim the right to appeal *additional* issues beyond those preauthorized. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 31–32, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017) (holding that a litigant cannot use a stipulated judgment to appeal a class certification denial "as a matter of right" (internal quotation marks omitted)).

To invoke our appellate jurisdiction, both conditions must be met. Because neither is present here, I would dismiss the appeal for lack of appellate jurisdiction.

A. The Adverse "Decision" Was Provisional Dicta.

Our precedents make clear that an appellant cannot appeal a stipulated judgment when it suffered only a *tentative* setback in the district court. In other words, if a district court issues a provisional finding subject to change – such as one that casts doubt on a litigant's claims only in dicta – then that cannot be an "effective dismissal" of the claims, and no appeal can be taken from a stipulated judgment thereafter. We said as much in *Palmieri v. Defaria*, where we held that a litigant could not appeal a stipulated judgment when he suffered a tentative evidentiary loss before the district court that was "subject to change at trial." 88 F.3d at 140.

In *Palmeiri*, the plaintiff brought copyright claims accusing the defendant of copying his song and sought to prove up that allegation with evidence that the defendant had had access to the disputed song prior to the alleged infringement. *See id.* at 137. After the defendant moved *in*

the district court and a voluntary dismissal of all claims under Federal Rule of Civil Procedure 41(a)(2). *See, e.g.*, *Palmieri*, 88 F.3d at 140. For defendants, stipulated judgment appeals typically involve situations like the one here, in which the appellant received an adverse interlocutory decision below, followed by entry of a judgment by consent – effectively a court-approved settlement. *See, e.g.*, *LaForest v. Honeywell Int'l Inc.*, 569 F.3d 69, 73 (2d Cir. 2009). Though there are subtle distinctions between these two scenarios, they are not relevant to this discussion, and I collectively refer to both types as "stipulated judgment appeals." *See generally* Bryan Lammon, *Manufactured Finality*, 69 Vill. L. Rev. (forthcoming 2024) (manuscript at 23–37) (discussing various attempts to "manufacture[ ] finality" through voluntary dismissals and stipulated judgments), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4572017 [https://perma.cc/86QK-WMVE].

limine to exclude that evidence, the district court granted the motion in part, finding that some of the evidence concerning the defendant's access to the song was inadmissible and reserving for trial whether the rest could be introduced. *See id.* Disappointed with that ruling, the plaintiff invited the district court to enter final judgment against him so that he could appeal the *in limine* ruling right away. *See id.* at 138. The district court did so, and the plaintiff appealed the resulting judgment, challenging the district court's *in limine* findings.

Emphasizing that the *in limine* ruling was merely tentative, we held that the stipulated judgment was not appealable. Though we acknowledged the rule that stipulated judgment appeals are occasionally permitted when the district court had "effectively dismissed [the] case," *id.* at 139, we nonetheless held that the *in limine* ruling was not an "effective dismissal" because it lacked two features: (1) the district court had not "take[n] the position" that the plaintiff's proof was insufficient as a matter of law, and (2) the *in limine* ruling was merely tentative and "subject to change at trial in the district court's discretion." *Id.* at 140. In other words, we recognized an additional limit on the "effective dismissal" rule – namely, that the adverse decision below must be a "final ruling" as opposed to one that is merely tentative or conditional. *Id.* at 139 ("An *in limine* evidentiary ruling does not constitute a final ruling on admissibility." (italics added)).[2]

Indeed, we emphasized the provisional nature of the *in limine* ruling throughout our opinion, and even distinguished earlier "effective dismissal" cases because those involved district court orders that "could not be examined again at trial." *Id.* at 141 (distinguishing *Allied Air Freight v. Pan Am. World Airways*, 393 F.2d 441 (2d Cir. 1968)). As we went on to explain, this rule – that a stipulated judgment cannot be appealed when the adverse finding is only tentative – makes good sense. Though we can take appeals from stipulated judgments following *conclusive* holdings, "[t]here is no reason to spend scarce judicial resources reviewing a decision that may be changed due to [later] developments." *Id.* at 139. We therefore allow a party to proceed to appeal through a stipulated judgment only when the case is effectively dismissed by a "final ruling" on the appealed issue. *Id.* To hold otherwise would only encourage "piecemeal appeals," *id.* at 141, with litigants leapfrogging the district court at the first sign of trouble. The fact that litigants might prefer such shortcuts is of no moment. One can surely imagine situations in which litigants might be discouraged by negative comments from a district judge during an early hearing on a purely legal question, or even where a litigant might dislike the initial district court draw based on unfavorable decisions issued by the assigned judge in other related cases. But those sorts of tentative setbacks are not enough to bypass the district court and the adjudicative process. By first requiring a "final" ruling on an issue, the *Palmieri* rule prevents attempts to "evade the final judgment rule." *Id.* at 139.

2. Though we have characterized our rule against stipulated judgment appeals as "jurisdiction[al]," *Ali*, 719 F.3d at 88, we have not explained whether the rule is constitutional or statutory in nature. *But see* Bryan Lammon, *Voluntary Dismissals, Jurisdiction & Waiving Appellate Review*, 92 U. Cin. L. Rev. 394, 406 (2023) (arguing that this rule is best understood as a waiver doctrine and warning that treating it as an Article III issue could mean conditional guilty pleas are unconstitutional). Whatever the rule's origins, it bars New York's appeal here.

For that same reason, New York cannot appeal the provisional findings in the district court's order granting a preliminary injunction against it. As a threshold matter, there is little dispute that the district court's preliminary injunction was not a "final ruling" on the merits of preemption. Quite the opposite, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Tex.*, 451 U.S. at 395, 101 S.Ct. 1830. Indeed, we have long recognized that, with respect to preliminary injunction rulings, "[t]he judge's legal conclusions, like his fact-findings, *are subject to change* after a full hearing and the opportunity for more deliberation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953) (emphasis added); *see id.* ("For a preliminary injunction . . . is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness."). If anything, "[a] decision on a preliminary injunction is, in effect, only a prediction about the merits." *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 107 (2d Cir. 2012) (internal quotation marks omitted). Thus, just like the *in limine* ruling in *Palmieri*, the district court's preemption analysis was strictly provisional and could not have "effectively dismissed" New York's case. *Palmieri*, 88 F.3d at 140.

The majority nevertheless maintains that the district court's ruling was an effective dismissal because the district court used "unequivocal" language when it said that the ABA "is conflict-preempted." Maj. Op. at 143–44 (quoting *NYSTA*, 544 F. Supp. 3d at 282). But the tenor of the district court's language in a preliminary injunction ruling is not enough to render the decision "final." A strong "prediction" is still only a prediction. *Biediger*, 691 F.3d at 107. Whatever the tone of the district court's order, those statements came in a preliminary injunction ruling and were necessarily provisional and "subject to change." *Hamilton Watch*, 206 F.2d at 742.

In fact, the district court's comments about the merits of preemption were, if anything, even *less* final than the evidentiary ruling in *Palmieri*, given that the preemption comments here were dicta. Because the district court needed only to find that the ABA was *likely* preempted in order to grant the preliminary injunction, any more definitive "assessment of the actual merits" of preemption was "dicta." *Fish v. Schwab*, 957 F.3d 1105, 1140 (10th Cir. 2020) (internal quotation marks omitted); *see also United States v. Hussein*, 178 F.3d 125, 129 (2d Cir. 1999) (any finding "not necessary" to granting a preliminary injunction is "dictum"). Palmieri could at least argue that the evidentiary rulings were provisional *holdings* on admissibility. New York cannot even claim that here. Because the district court's statements about the ultimate merits of preemption were dicta, they were not even a "decision" to begin with, let alone a final ruling. *Carroll v. Lessee of Carroll*, 57 U.S. (16 How.) 275, 286–87, 14 L.Ed. 936 (1853) ("If [a point of law] might have been decided either way without affecting any right brought into question, then, according to the principles of common law, an opinion on such a question is not a decision.").

This conclusion – that litigants cannot take stipulated judgment appeals from dicta in a provisional order – aligns with our other precedents on this issue. As far as I can tell, none of our past cases (including those relied on by the majority) authorized a stipulated judgment appeal after a district court cast doubt on a litigant's case through provisional dicta. To the contrary, each of the appellants in those cases sustained an adverse *holding* that "effectively

dismissed" his case. *See, e.g.*, *Ali*, 719 F.3d at 89 (approving stipulated judgment appeal when the district court held in a partial summary judgment order that appellant's proffered reading of a contract was foreclosed by the "express language" of the contract (internal quotation marks omitted)); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 322 (2d Cir. 2018) (approving stipulated judgment appeal after appellant was found liable by a jury); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987) (approving stipulated judgment appeal of certain claims after district court granted summary judgment on those claims).[3]

Attempting to reconcile its decision with *Palmieri*, the majority posits that the only jurisdictional defect in *Palmieri* was that the *in limine* rulings did not "plainly resolve a claim as a matter of law." Maj. Op. at 144. But that is not what *Palmieri* actually said. We instead made clear that the *in limine* rulings could not support a stipulated judgment appeal for two separate reasons: (1) the *in limine* rulings did not resolve the claim "as a matter of law," *and* (2) the *in limine* rulings were only tentative. *Palmieri*, 88 F.3d at 140. Indeed, we repeatedly stressed that the *in limine* rulings were insufficient because they were "subject to change" and not a "final ruling on admissibility." *Id.* The majority's best counter is that the preliminary injunction ruling here was more definitive than usual, but again that goes nowhere, because "a preliminary injunction ... is, *by its very nature*, interlocutory, tentative, provisional, ... not fixed or final or conclusive, characterized by its for-the-time-beingness." *Hamilton Watch Co.*, 206 F.2d at 742 (emphasis added).

As a fallback, the majority pivots to the language of the stipulated judgment, in which the district court so-ordered the parties' stipulation that, "[f]or the reasons given in the Court's [preliminary injunction] order, the Court declares that [the ABA] is preempted by federal law." J. App'x at 157. In the majority's view, the district court "determined" that the ABA was preempted as a matter of law when it signed off on the parties' stipulated language, which in turn was an effective dismissal of New York's case. Maj. Op. at 144–45.

But the majority misconstrues the nature of stipulated judgments. A stipulated judgment cannot "effectively dismiss" a case for the simple reason that a district court does not "determine" anything when it so-orders a stipulated judgment. That is because a stipulated judgment "is not a ruling *on the merits* of the legal issue."

3. In fact, *Empire Volkswagen* – one of our most-cited cases on stipulated judgment appeals – lends further support to the *Palmieri* rule against stipulated judgment appeals of provisional findings. There, the defendant moved for summary judgment on several of the plaintiffs' claims, and the district court granted that motion in part. *See* 814 F.2d at 93. Even though several claims survived, the plaintiffs believed that the ruling "unduly limited" those claims by "excluding" an important theory of recovery. *Id.* at 93–94. Consequently, they voluntarily dismissed the surviving claims and attempted to appeal all of the claims from the resulting stipulated judgment. *See id.* at 94. Significantly, we held that the plaintiffs could appeal the claims that were dismissed at summary judgment but could *not* appeal the voluntarily dismissed claims. We concluded that, even if the partial summary judgment order limited those surviving claims – and cast doubt on their ultimate success – the district court's order did not in fact "*decide*[ ]" those claims "adversely" to the plaintiffs. *Id.* It mattered not that the plaintiffs "interpret[ed] ... [the] partial summary judgment order as an effective dismissal of [those claims]." *Id.* at 95. The only relevant inquiry was whether the district court had issued a holding that rejected those claims. *See id.* at 94 ("[W]e will consider[ ] only those portions of [the] order *decided* adversely to [the plaintiffs].").

Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995); *see also SEC v. Petro-Suisse Ltd.*, No. 12-cv-6221 (AJN), 2013 WL 5348595, at *3 (S.D.N.Y. Sept. 25, 2013) ("A consent decree is 'not a ruling on the merits.' " (quoting *Langton*, 71 F.3d at 935) (alterations omitted)). Instead, a consent judgment is the "result of private bargaining," *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 894 (2d Cir. 1976), that "normally embodies a compromise" in which "the parties each give up something they might have won had they proceeded with the litigation," *Barcia v. Sitkin*, 367 F.3d 87, 90 (2d Cir. 2004) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971)). In other words, the entry of a stipulated judgment merely invites the district court to sign off on a compromise that the parties reached on their own accord.

Because the language in the stipulated judgment was the product of "consent" rather than a "decision on the merits," the district court could not have effectively dismissed New York's case merely by granting the stipulated judgment. *HS Equities, Inc. v. Hartford Accident & Indem. Co.*, 609 F.2d 669, 674 n.8 (2d Cir. 1979) (internal quotation marks omitted). Even though the stipulated judgment contained language declaring that the ABA was preempted, that language was not a finding or a determination by the district court. Indeed, the preemption "declar[ation]" appeared in a portion of the stipulated judgment that was "stipulated and agreed" to by the parties (as opposed to a finding that the district court had to make on its own). J. App'x at 157. The majority's only response is to suggest that the district court's "adoption" of the stipulated language reflected the "finality" of the "legal holding" from its preliminary injunction order. Maj. Op. at 144–45. But as already discussed, the district court did not "adopt" or "determine" anything in the stipulated judgment, nor was its earlier finding on preemption "final" or even a "holding." The district court merely signed off on a compromise that the parties (not the court) reached about the meaning of provisional dicta that appeared in an earlier order. That is not enough to establish finality.

To be clear, none of this means that New York was required to toil in the district court until the conclusion of a trial on the merits. New York could have pursued its interlocutory appeal of the preliminary injunction under 28 U.S.C. § 1292(a)(1) and asked this Court to dissolve it. Alternatively, it could have moved to consolidate the preliminary injunction hearing with an expedited trial on the merits under Rule 65(a)(2), which would have triggered an earlier merits ruling (and with it, an earlier appeal). Better yet, New York could have invited the district court to enter summary judgment against it *sua sponte* – which, unlike the stipulated judgment, would have required the district court to make "an actual adjudication" on preemption. *Lipsky*, 551 F.2d at 893.

The majority says it was fine to skip those steps – and to "accelerate[ ]" the appeal – because it would be "pragmatic." Maj. Op. at 140, 144. But our "jurisdiction . . . does not entail an assessment of convenience." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006). Quite the opposite, we enforce our jurisdictional rules "strictly," *Muskrat v. United States*, 219 U.S. 346, 356, 31 S.Ct. 250, 55 L.Ed. 246 (1911), and this case illustrates why. By abandoning *Palmieri*'s teachings, we give the greenlight to "piecemeal appeals." *Palmieri*, 88 F.3d at 141. Like the parties here, litigants will forego the relief available under Section 1292(a)(1) – dissolution of a preliminary injunction – to proceed straight to a merits

appeal through a stipulated judgment. *In limine* rulings will invite more of the same. By the majority's logic, litigants may turn to stipulated judgments merely because a judge makes critical remarks during oral argument or at a premotion conference. There may be worthy occasions for a stipulated judgment appeal, but a district court's provisional dicta is not one of them.

B. The Stipulated Judgment Appeal Circumvents Preauthorized Rules On Interlocutory Appeals.

In addition to lacking the finality required under *Palmieri*, the stipulated judgment also runs afoul of the Supreme Court's decision in *Microsoft v. Baker* because it was procured by subverting the established regime for interlocutory appeals.

In *Microsoft*, the Supreme Court held that parties cannot use stipulated judgments to circumvent interlocutory appeal rules that otherwise would foreclose their appeal. *See* 582 U.S. at 37, 137 S.Ct. 1702. There, the plaintiffs brought a putative class action and moved to certify it. *Id.* at 33, 137 S.Ct. 1702. After the district court denied that motion, the plaintiffs sought discretionary interlocutory review under Federal Rule of Civil Procedure 23(f), a special provision under which a plaintiff (or a defendant) can ask the court of appeals to immediately review a denial (or a grant) of class certification. *Id.* at 34, 137 S.Ct. 1702. When the Ninth Circuit declined to hear the appeal, the plaintiffs endeavored to force a mandatory appeal through a stipulated judgment. Specifically, they moved to dismiss their case with prejudice, explaining that once the district court entered final judgment they would then "appeal the order striking their class allegations." *Id.* at 35, 137 S.Ct. 1702 (alterations and internal quotation marks omitted). As requested, the district court granted the plaintiffs' stipulated motion to dismiss and directed entry of final judgment. The plaintiffs then appealed the class certification order, arguing that they were appealing from a final judgment under section 1291 – and that the appeals court now had to hear their appeal of the class certification denial. *See id.* The Ninth Circuit agreed that it had jurisdiction to consider the appeal under section 1291, found that the district court had abused its discretion in striking the class allegations, and remanded the case to the district court for further proceedings on the merits. *See id.* at 35–36, 137 S.Ct. 1702.

The Supreme Court granted certiorari on the jurisdictional question and held that the stipulated judgment was not final – and thus not appealable – under section 1291. *See id.* at 37, 137 S.Ct. 1702. Significantly, the Court reasoned that the judgment could not be final because the plaintiffs had procured it in a bid to "subvert[ ] the final judgment rule" and the interlocutory review process Congress (in tandem with the Rules Committee) had established. *Id.* Indeed, Rule 23(f) prescribed a "discretionary regime" under which litigants could ask courts of appeals to review adverse class certification decisions. *Id.* at 39, 137 S.Ct. 1702. But after the Ninth Circuit exercised that discretion and declined to review the district court's initial certification denial, the plaintiffs sought to *force* the Ninth Circuit to hear their appeal anyway, even though the established interlocutory rules allowed only for discretionary appeals. *See id.* at 40, 137 S.Ct. 1702. In other words, the plaintiffs had sought to use a stipulated judgment to manufacture appellate rights (there, mandatory appeals) that neither Congress nor the Rules Committee had preauthorized. Therefore, even though the stipulated judgment was "technical[ly]" compliant – in that it resolved all of the plaintiffs' claims and left nothing else for the district court to do – it

still could not be truly final. *Id.* at 41, 137 S.Ct. 1702 ("[Section] 1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation.").

Significantly, *Microsoft* did not purport to limit this rule – that litigants cannot use stipulated judgments to subvert established interlocutory rules – to class certification appeals. *See Trendsettah USA v. Swisher Int'l, Inc.*, 31 F.4th 1124, 1132 (9th Cir. 2022) (explaining that *Microsoft* applies when there are "similar statutory restrictions [to Rule 23(f)] that would be adversely affected by permitting voluntary dismissal of claims with prejudice"). Indeed, we ourselves have extended *Microsoft* to another context in holding that litigants cannot use stipulated judgments to subvert the interlocutory rules on orders deciding motions to compel arbitration. *See Bynum v. Maplebear Inc.*, 698 F. App'x 23, 24 (2d Cir. 2017). As we explained, Congress provided a special mechanism in 9 U.S.C. § 16 under which a defendant can immediately appeal an order denying its motion to compel arbitration. Yet Congress provided no such avenue for orders *granting* those motions. We therefore barred plaintiffs from using stipulated judgments to engineer an appeal of an otherwise unappealable interlocutory order sending plaintiffs' claims to arbitration. *See id.* (citing *Microsoft*, 582 U.S. at 27–28, 137 S.Ct. 1702). Other circuits are in accord. *See Keena v. Groupon, Inc.*, 886 F.3d 360, 365 (4th Cir. 2018) (reaching the same result as *Bynum* under *Microsoft*); *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1122 (9th Cir. 2020) (same).

Microsoft thus sets forth a broad rule: whenever Congress or the Rules Committee has preauthorized the right to appeal specific interlocutory orders, a litigant may not employ a stipulated judgment to seize additional appellate rights beyond those preauthorized avenues. If the interlocutory rules provide for only discretionary review of certain orders, then litigants cannot exploit stipulated judgments to secure mandatory review. And if the rules authorize interlocutory review only of orders *denying* a given motion, then litigants cannot resort to such tactics to obtain appellate review of orders granting those motions. A district court's entry of an "actual final judgment" is of no moment if that final judgment was procured in a bid to subvert the preapproved interlocutory rules. *Microsoft*, 582 U.S. at 40, 137 S.Ct. 1702 (emphasis and internal quotation marks omitted).

Because New York used a stipulated judgment to expand its preauthorized appellate rights, *Microsoft* bars our appellate jurisdiction here. Once New York was preliminarily enjoined, it had one preauthorized appellate right: to seek dissolution of the preliminary injunction under section 1292(a)(1). *See* 28 U.S.C. § 1292(a)(1) (permitting interlocutory appeal of orders "granting ... injunctions"). Had it taken this route, New York could have argued that the district court abused its discretion in granting the preliminary injunction under the familiar four-factor test; if we agreed, we would then dissolve the injunction and send the case back to the district court for continued litigation on the merits of preemption. *See Univ. of Tex.*, 451 U.S. at 392, 101 S.Ct. 1830 (listing the discretionary four-factor test for granting a preliminary injunction). But rather than take that narrow appeal, New York used a stipulated judgment to appeal the *ultimate merits* of preemption right away – that is, by asking us to issue a "final resolution" on whether the ABA is preempted as a matter of law. *Id.* That is a "significantly different" inquiry than an appeal seeking dissolution of an injunction under section 1292(a)(1). *Id.* There is thus no escaping it: section 1292(a)(1) did not preauthorize

New York to appeal the ultimate merits of preemption, yet New York has done so anyway through a stipulated judgment.

That is precisely what *Microsoft* disallowed. And just as in *Microsoft*, New York's gambit upsets the "careful calibration" of section 1292(a)(1). 582 U.S. at 31, 137 S.Ct. 1702. When Congress passed this provision, it authorized interlocutory appeals of preliminary injunctions "in order to prevent the injustice of burdening a party with a manifestly erroneous decree *while the ultimate merits of a dispute are being litigated*." *Indep. Party of Richmond Cnty. v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (emphasis added). In other words, Congress provided a limited appellate right to challenge *only* the injunction, so that a defendant would not be burdened by an erroneous restraint while it litigated the merits before the district court. If Congress had also desired for enjoined defendants to appeal the "ultimate merits" right away, then it would have authorized as much in section 1292(a). *Id.* Congress did no such thing, and that alone should foreclose New York's attempt to secure that appellate right by stipulated judgment here.

For its part, the majority suggests that *Microsoft* does not apply because we have discretion (under our "pendent appellate jurisdiction") to reach the merits when we hear an interlocutory appeal of an injunctive order under section 1292(a)(1). *See San Filippo v. U.S. Tr. Co. of N.Y.*, 737 F.2d 246, 255 (2d Cir. 1984).[4] But that makes this case more like *Microsoft*, not less. As already discussed, *Microsoft* bars parties from using a stipulated judgment appeal to convert a discretionary right to appeal into a mandatory one. *See* 582 U.S. at 31–32, 137 S.Ct. 1702 (explaining that Rule 23(f) gives appellate courts discretion to accept an appeal of a class certification denial and rejecting plaintiffs' attempt to force an appeals court to hear such an appeal). That is essentially what New York has done here. If it had appealed the preliminary injunction under section 1292(a)(1), then we would have had limited discretion to address the ultimate merits of preemption. But because New York appeals on the basis of its stipulated judgment, it now contends that we *must* address the ultimate merits of preemption, thereby diminishing the discretion of the Court while enhancing its own. There is no meaningful distinction between what the parties have done here and what the parties did in *Microsoft*. In both cases the parties used a stipulated judgment appeal to secure greater appellate rights than those preauthorized by Congress. As the Supreme Court made clear in *Microsoft*, that is not permitted.

II. The ABA Is Preempted By Federal Law.

Although the lack of appellate jurisdiction should, by itself, be dispositive and compel dismissal of this appeal, I write briefly to respond to the majority's resolution of the merits question concerning federal preemption of the ABA. To my mind, our precedents make clear that the ABA is both field- and conflict-preempted by federal law.

First, the ABA is field-preempted because the Communications Act preempts all rate regulation of interstate communi-

4. To be clear, we can exercise this discretionary power in contexts beyond interlocutory appeals of injunctions; as a general matter, "once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where there is sufficient overlap [between] the appealable and nonappealable issues." *San Filippo*, 737 F.2d at 255 (alterations and internal quotation marks omitted).

cation services. By its text, the Communications Act grants the FCC 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. 47 U.S.C. § 152(a)–(b) (defining the interstate and intrastate division); *id.* § 414 (preserving a limited set of state common-law rules). Thus, the Act prescribes that the FCC has exclusive authority over interstate communications, except for certain areas like consumer protection where states have traditionally exercised power. *See, e.g.*, *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 443–44, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (explaining that the "savings clause" in section 414 preserved state power to regulate interstate radio advertisements). Because rate regulation was not one of those traditional spheres of state authority, only the FCC retains the authority to regulate rates of interstate communications.[5]

Indeed, we held as much in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490–91 (2d Cir. 1968). There, we explained 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. *Id.* (internal quotation marks omitted). Though the majority asserts that *Ivy Broadcasting* meant to say that this preemption covered only the rates of Title II common carriers, we have not so limited *Ivy Broadcasting* when we have cited it in the intervening decades. *See, e.g.*, *Glob. NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102 n.10 (2d Cir. 2006) (citing *Ivy Broad.*, 391 F.2d at 491) (finding that a state regulatory board had "narrowly sidestepped encroachment on the FCC's jurisdiction to set rates on interstate communications" without limiting these statements to Title II).

The structure of the Communications Act confirms its preemptive scope. When Congress defined the FCC's authority in section 152, it used language – contrasting "interstate" versus "intrastate" "authority," 47 U.S.C. § 152(a)–(b) – that mirrored other statutes where Congress conferred exclusive federal authority. For instance, Congress granted the Federal Energy Regulatory Commission ("FERC") exclusive authority over interstate electricity sales when it provided that a federal statute "shall apply to the transmission of electric energy in interstate commerce," but not to "the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1); *see Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016). Congress also used such language in granting FERC "exclusive jurisdiction" over interstate natural gas sales. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01, 308, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988); *see* 15 U.S.C. § 717(b)–(c) (providing that the 1938 Natural Gas Act "shall apply to the transportation of natural gas in interstate commerce" but not to gas sales occurring "within" a state). By employing the same

5. The majority offers scant support for its claim that states have historically regulated the rates of interstate communications. *See* Maj. Op. at 148–49. It offers only an article noting that eleven states oversaw rate regulation of cable during the 1970s. But limited activity in twenty percent of the states is far from a meaningful tradition. Moreover, at the time of that rate regulation, cable was "essentially a local business," where local operators broadcast to small surrounding regions. *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 463 (D. Nev. 1968). That is quite unlike the modern internet, which virtually always involves interstate communications even for the most routine tasks. I therefore do not see a meaningful tradition of such rate regulation at the state level.

structure here, Congress likewise granted the FCC exclusive domain over rate regulation of interstate communications.

Put succinctly, in passing the Communications Act, Congress enacted a "federal law [that] occupies [the] field of [rate] regulation so comprehensively that it has left no room for supplementary state regulation." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 479, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018) (internal quotation marks omitted). Because the ABA intrudes into that field, it is preempted, and its enforcement should be enjoined.

Second, the ABA is conflict-preempted because it would "frustrate the purposes" of the FCC's 2018 decision to reclassify broadband as a Title I service. *SPGGC LLC v. Blumenthal*, 505 F.3d 183, 189 (2d Cir. 2007). For the purposes of conflict preemption, "[f]ederal regulations have no less preemptive effect than federal statutes." *Id.* at 188 (internal quotation marks omitted). Thus, we need not focus on whether Congress intended to "supersede state law" so much as whether the *agency* meant to do so in issuing the regulations. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

Here, there is little doubt that the FCC intended to preempt state laws that, like the ABA, imposed *ex ante* rate regulation on broadband. Even when the FCC briefly reclassified broadband as a Title II telecommunications service in 2015, it explained that "we do not and cannot envision adopting new *ex ante* rate regulation of broadband [i]nternet access in the future." 30 FCC Rcd. 5601, ¶ 451 (2015); *see also id.* ¶ 382 ("There will be no rate regulation."). And in 2018, when the FCC returned broadband to its traditional classification as a Title I information service, the agency explained that its decision was driven by "concerns" that even the *possibility* of "rate regulation" attendant to Title II common carriage status "ha[d] resulted" in "untenable social cost[s] in terms of foregone investment and innovation." 33 FCC Rcd. ¶¶ 87, 101. To that end, the FCC's order stated its intent to "end utility-style regulation of the Internet in favor of . . . market-based policies" and a "light-touch" regulatory framework. *Id.* ¶¶ 2, 207.

In sum, the FCC's actions and words evince an obvious "purpose[ ]," *SPGGC*, 505 F.3d at 188, to foster openness and investment by sheltering broadband internet service from rate regulation. Because the ABA seeks to impose that very regulation, it is preempted.

For its part, New York insists that the FCC's 2018 Order cannot preempt state law because the FCC has no power to regulate services when they are classified under Title I, as broadband is now. New York Br. at 50–51. In other words, New York suggests that because the FCC currently lacks power to regulate broadband rates, it cannot prevent states from regulating those rates either.

That argument fails to account for the obvious fact the FCC does have the power to regulate broadband. Just as it did in 2015, the FCC could reclassify broadband as a Title II service and impose *ex ante* rate regulations on it. Yet the FCC chose not to – a choice that "takes on the character of a ruling that no such regulation is appropriate or approved." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). Because "federal officials affirmatively [declined] to exercise their full authority" under the Communications Act in making a discretionary choice, "[s]tates are not permitted to use their police powers to enact such a regulation" in the resulting void. *Id.*

* * *

At bottom, we cannot hear a stipulated judgment appeal until the district court has issued a final ruling on the appealed issue. Nor can we entertain such an appeal when it is the product of an open attempt to subvert the interlocutory appellate rules. Because this appeal violates both of these precepts, I would dismiss it without reaching the merits of preemption. And even if I had to reach the merits, I would find that the ABA is preempted by federal law, as the majority's cribbed reading of the Communications Act undermines the authority of the FCC to regulate interstate communications and emboldens states like New York to impose costs on broadband internet service that extend well beyond their borders. For all these reasons, I respectfully dissent from the majority's opinion.

Jason DOHERTY, Plaintiff-Appellant,

v.

Patricia BICE, Individually and as Dean of Student Affairs for Purchase College, State University of New York, Jared Stammer, Individually and as Conduct Officer for Purchase College, State University of New York, Qui Qui Balascio, Individually and as Associate Dean of Student Affairs for Purchase College, State University of New York, Defendants-Appellees.

No. 23-1217
August Term 2023

United States Court of Appeals,
Second Circuit.

Argued: March 19, 2024

Decided: May 10, 2024

Background: Former student brought action alleging that state university administrators violated Title II of Americans with Disabilities Act (ADA) when they issued no-contact orders against him during his freshman orientation. The United States District Court for the Southern District of New York, Nelson S. Román, J., 2023 WL 5103900, granted defendants' motion for judgment on pleadings, and student appealed.

Holdings: The Court of Appeals, Sullivan, Circuit Judge, held that:

(1) student's claims for declaratory and injunctive relief were moot, and

(2) emotional distress damages were unavailable under Title II of ADA.

Affirmed.

1. Federal Courts ⚷3587(2)

Court of Appeals reviews de novo district court's decision to grant motion for judgment on pleadings. Fed. R. Civ. P. 12(c).

2. Federal Courts ⚷3581(1), 3585(2)

Court of Appeals generally reviews de novo questions of standing and mootness.

3. Federal Courts ⚷2080

To resolve jurisdictional issues, Court of Appeals may consider affidavits and other materials beyond pleadings, but cannot rely on conclusory or hearsay statements contained in affidavits.

EXHIBIT 8

No. 24-7000

FILED
Jul 12, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MCP No. 185; FEDERAL COMMUNICATIONS COMMISSION, IN THE MATTER OF SAFEGUARDING AND SECURING THE OPEN INTERNET, DECLARATORY RULING, ORDER, REPORT AND ORDER, AND ORDER ON RECONSIDERATION, FCC 24-52, 89 Fed. Reg. 45404, Published May 22, 2024.	O R D E R

Before: SUTTON, Chief Judge; CLAY and DAVIS, Circuit Judges.

Multiple broadband providers have filed a motion to stay the Federal Communications Commisssion's ("FCC") declaratory order *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404 (May 22, 2024). To provide sufficient opportunity to consider the merits of the motion to stay the FCC's order, we conclude that an administrative stay is warranted. *See Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011) (collecting cases). The FCC's order is hereby temporarily stayed until August 5, 2024. In the interim, the panel would be grateful for supplemental briefs by the parties with respect to the application of stare decisis and *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), to this dispute, filed no later than July 19, 2024.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

EXHIBIT 9

Declaration of Jim Baase
(Exhibit A)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF JIM BAASE IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Jim Baase, declare as follows.

1. I, Jim Baase, am Chief Operating Officer for Empire Telephone Corporation ("Empire Telephone"). In that role, I am responsible for operating both Empire Telephone (an incumbent local exchange company) and its affiliate Empire Long Distance Corporation (a competitive local exchange company) (together, "Empire"), both of which provide broadband Internet access service to customers in parts of New York.

2. I submit this declaration to describe the harms that Empire would incur if Part NN of New York State Budget Bill S2506-C (the "Rate Regulation") took effect on June 15, 2021, as scheduled.

3. Empire provides service in eight counties in New York: Chemung, Genesee, Livingston, Ontario, Schulyer, Seneca, Steuben, and Yates Counties. Empire has invested more than $60 million in its network and added over 80 employees in the last seven years to serve customers in these counties.

4. The median household income in each of these counties is well below the national median. A large percentage — from 47 percent to 62 percent — of the households in several of the largest school districts within Empire's service area are eligible for the National School Lunch Program.

5. Because of the predominantly low-income population that Empire serves, a large number of its current and potential broadband customers would qualify for discounted service under the Rate Regulation. Providing broadband service at the discounts the Rate Regulation mandates would have several significant negative effects on Empire's business.

6. First, Empire has qualified to receive an $11.3 million grant from the USDA to provide service to unserved and underserved households in Livingston County. The project would involve Empire — at a total cost of more than $15 million — building more than 330 miles of fiber optic network that would be capable of serving nearly 1,100 homes. However, if the Rate Regulation goes into effect, Empire will most likely turn down the grant and cancel the project. Even with the grant money, Empire could not afford to invest in this buildout because a large percentage of its potential customers would be eligible for the discounted monthly rates under the Rate Regulation.

7. Second, Empire recently purchased from another provider $530,000 of fiber optic facilities, which require an annual maintenance cost of $46,000, as part of a planned entry into the Binghamton and Broome County markets. Empire has also hired two technicians and rented

space in five buildings with an annual rental cost of $36,000. Empire will invest another $600,000 in the near term and had planned to invest $7 to 8 million over the next three to four years to build out the network to reach the City of Binghamton. If the Rate Regulation takes effect, Empire will scale back this project to the near term investment and abandon the plans to build out to the smaller villages and town along this new fiber route as well as limit our build out in the City of Binghamton.

8. Third, I estimate that, if the Rate Regulation takes effect, Empire would suffer a net income loss of approximately $2 million per year. With such losses, Empire would be forced to substantially reduce its costs in order to maintain profitability. Empire could not afford to continue growing its business in New York, would cease other investments, and would need to reduce the size of its workforce accordingly.

9. Fourth, compliance with the Rate Regulation would render it infeasible to build and maintain our extensive rural service network. Empire Telephone serves just over five customers per mile, on average. Empire Telephone provides service over wires and fiber optic cable that are attached to utility poles and for which it must pay pole rental charges at state set rates. The annual cost to Empire Telephone — just for pole rentals — is nearly $1800 per mile. If half of its customers qualify for discounted service under the Rate Regulation — a reasonable assumption given the economic characteristics of the counties in which Empire Telephone operates — annual revenues from Empire Telephone's customers would be approximately $2,000 on a per mile basis ($50/month from half the customers; $15/month from the other half). In other words, approximately 90 percent of Empire Telephone's revenues would go to pay a single cost — pole rentals — leaving it with insufficient revenue to cover the various other costs — such as customer service, engineering, network maintenance, and operating taxes — that

Empire Telephone incurs in providing service. These shortfalls would force Empire Telephone to restructure its business further, harming its service and its customers, costing it substantial goodwill that it has built up over generations.

10. Finally, although Empire currently provides broadband to fewer than 20,000 households — and, therefore, is eligible for an exception from the Rate Regulation from the New York Department of Public Service ("DPS") — the DPS has not yet announced the standards it will use to decide whether to grant such exceptions. In addition, under Empire's current expansion plans, I anticipate that Empire would serve more than 20,000 households within two years, at which point Empire would be subject to the Rate Regulation. Because the investments described above are made and anticipated to be recouped over a period longer than two years, even if Empire obtained an exception from the Commission, Empire would still likely abandon those investments and need to restructure its business to avoid the harms the Rate Regulation would impose.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April, 2021 in Victor, NY.

Jim Baase

Declaration of Matthew Kramer Coakley (Exhibit B)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., CTIA – THE WIRELESS ASSOCIATION, ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, USTELECOM – THE BROADBAND ASSOCIATION, NCTA — THE RURAL BROADBAND ASSOCIATION, and SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF MATTHEW KRAMER COAKLEY
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Matthew Kramer Coakley, declare as follows:

1. I am Matthew Kramer Coakley, Executive Director of Home Segment Marketing for the operating companies of Verizon Communications Inc. ("Verizon") that provide wireless and wireline telecommunications services throughout the United States. I make this declaration in support of the Associations' motion for a preliminary injunction and to describe the irreparable harms certain operating companies of Verizon could suffer if the requirements of Section 399-zzzzz of the New York General Business Law, as enacted by chapter 56 of the Laws of 2021 (the "New York Statute") go into effect on June 15, 2021, as scheduled. This bill would require all providers of wireline and fixed wireless service in New York State, including

Verizon, to make available to qualifying consumers a broadband plan for no more than $15 or $20 month, depending on download speed.

2. Verizon is committed to helping customers who qualify for financial assistance obtain high speed broadband access. To that end, as described below, Verizon already has a program in place that provides fast and reliable internet service to eligible customers, in conjunction with existing federal programs. The New York Statute mostly duplicates those efforts. But to the extent it goes beyond those existing programs, the New York Statute imposes unfair and irreparable harms on Verizon.

3. Verizon offers several types of fixed broadband service in New York State. In some parts of the State, including in parts of New York City and the surrounding suburbs, Verizon offers high speed broadband service through a fiber optic network and markets this service under the brand name “Fios.” Currently, Verizon provides high speed broadband access to approximately 1.6 million Fios consumers in New York State. In other parts of the State, where Verizon does not have a fiber optic network, Verizon offers broadband service over copper phone lines using older Digital Subscriber Line (“DSL”) technology. Currently, Verizon provides such service to approximately 60,000 consumers in New York State. And, in a limited number of locations outside of the area where Verizon offers Fios service, Verizon offers broadband access through its LTE Home fixed wireless product; this service connects a fixed router in a customer’s home to the internet through Verizon’s mobile network. Although Verizon currently has very few LTE Home customers, approximately 70,000 households are located in areas of New York State live where this service is available.

Fios Service

4. In areas where Fios service is available, Verizon currently makes available to customers who qualify for financial assistance a high speed broadband plan at a cost of $19.99 per month.[1] This plan is known as "Fios Forward." It offers download and upload speeds of at least 200 megabits per second and would therefore satisfy the requirement in the Statute. Nevertheless, if the Statute were allowed to go into effect, it would impose costs on Verizon that Verizon would not be able to recover from customers or the State if the court ultimately finds the Statute to be preempted under federal law or otherwise unlawful.

5. Fios Forward is available to customers who qualify for the federal Lifeline program. This program provides subsidies toward communications services to certain qualifying individuals. To qualify for Fios Forward, a customer must first apply for the Lifeline program and, once approved by the administrator of the Lifeline program, the customer is eligible to enroll in the Fios Forward plan on their Fios home internet service.

6. In addition, beginning on May 12, the FCC is instituting a new Emergency Broadband Benefit ("EBB") that will — temporarily — make available to Lifeline-eligible as well as certain other qualifying individuals a subsidy of up to $50 per month for broadband. Verizon is participating in the EBB program. Once this benefit goes into effect, qualifying customers can apply it to Fios service. The result will be that eligible customers could receive Fios home internet service at no cost to them (or, if they are renting equipment from Verizon, for

[1] The regular retail price of this plan is $39.99, reduced to $19.99 for qualifying customers after application of a Verizon credit and any Lifeline subsidy. This price does not include equipment costs or fees as described below. To qualify for this Fios Forward rate, a customer must also enroll their account in an automatic payment plan. The cost for customers who do not enroll in automatic payment is $10 higher per month.

approximately $5 per month).[2] However, the EBB is a temporary program and it is unclear how long these benefits will be available.

7. The New York Statute would require Verizon to make available qualifying broadband service to categories of customers who may not also qualify for Lifeline service or the FCC's EBB, and would require Verizon to continue this program even after the EBB ends. This imposes several sets of likely costs on Verizon.

8. First, Verizon must spend time and resources to establish a system to verify whether customers in fact qualify for reduced cost service under the New York Statute. Unlike with the federal Lifeline program, there is no centralized database against which Verizon can check whether a customer meets these qualifications. Accordingly, Verizon will have to design and implement such a verification system. This will include designating and training customer service representatives to review and approve the documentation necessary to demonstrate a customer is eligible to participate in the program. It may include systems integrations or verification processes with multiple federal and state agencies, which in turn could make it more time-consuming and complicated for consumers to verify eligibility, activate broadband service, and regularly re-verify their eligibility throughout their tenure. It will also require Verizon to securely retain this information. Verizon estimates the total personnel costs of this work to be $125,000, and potentially more, depending on the level of complexity encountered during the development process.

[2] As noted earlier, this rate is for customers who enroll in an automatic payment plan. Customers who do not enroll in automatic payment would pay $10 per month for service or $15 including equipment rental. As explained below, customers are not required to rent Verizon's equipment, and may use their own router if they choose.

9. Second, if customers meet the eligibility requirements for the New York Statute but are not eligible for the federal Lifeline or EBB subsidies and sign up for the Fios Forward plan, Verizon will suffer the loss of revenue of at least $20 per month per participating customer — the difference between what Verizon charges eligible customers for the Fios Forward plan and what it charges non-eligible customers for the same service ($39.99 per month).

10. Finally, the Statute requires Verizon to "make commercially reasonable efforts to promote and advertise" the availability of its low income broadband plan. The full scope of this requirement is vague. However, if Verizon were to promote this program in ways similar to how it intends to promote the EBB program, Verizon estimates that it could result in up-front costs of at least $250,000 and potentially over $1,000,000, depending on the type of advertising involved, the channels required to reach customers throughout the State of New York, and how long the campaign runs.

11. The New York Statute may also impose another non-recoverable cost on Verizon even for customers who are currently eligible for the Fios Forward plan, in the absence of the EBB (which, as noted earlier, is only in effect temporarily). To use the high speed Fios broadband service Verizon provides, a customer must have a router. Verizon does not require customers to obtain the router from Verizon, and in most cases customers on the Fios Forward plan use their own routers in connection with Fios service. Verizon does, however, offer customers, including those on the Fios Forward plan, the opportunity to rent a router from Verizon for $15 per month or to purchase the router for $299, plus applicable taxes. For customers who elect that option, that charge is in addition to the $19.99 per month cost of the Fios Forward plan. Verizon does not believe that the New York Statute prohibits such rentals or purchases because neither is a fee for "service provider equipment required" to obtain broadband

service from Verizon. But if the Statute were interpreted to require Verizon to provide routers to eligible customers as part of the no more than $20 cost of the Fios Forward plan, Verizon would suffer the loss of revenue associated with the rental or purchase of these routers it would have to provide effectively for free. This would not only be a loss of revenue but also an out of pocket cost since Verizon does not manufacture these routers but rather purchases them from other companies and would therefore suffer a loss for each router it was required to provide for free.

DSL Service

12. Verizon would also be subject to irreparable harm if the Statute were interpreted to require Verizon to offer DSL to qualifying customers at a cost of $15 per month. Because of technological limitations associated with this older type of service, asymmetric DSL cannot physically meet the minimum speed requirements set out in the Statute. Moreover, somewhat counterintuitively, because this older type of service relies on older infrastructure of copper phone lines, it costs more to provide DSL service than the more modern Fios service. Verizon does not currently offer a low income DSL plan, and Verizon's DSL customers will not be eligible for the EBB.

13. If the Statute were interpreted to require Verizon to offer a $15 per month DSL plan, Verizon would suffer the loss of the difference between what eligible current customers currently pay for their service and the $15 they would pay when they sign up for a broadband plan under the New York Statute. Verizon estimates that at least 20% of New York consumers, including Verizon's DSL base, could be eligible for this new discounted service. Today, Verizon's lowest priced DSL plan offered to the public costs $74.99 per month, which includes $40 for the DSL service and $34.99 for a voice plan. Customers cannot purchase DSL without an associated voice plan. If the Statute were applied to DSL, eligible customers who sign up

would be able to purchase DSL only for only $15 with no requirement that they sign up for a voice plan, a loss of $60 per customer to Verizon. If the Court later holds that the New York Statute is unlawful, for these customers, Verizon would not be able to retroactively bill customers for the difference. Furthermore, going forward, Verizon would have to either continue providing those discounts voluntarily — incurring the harms set forth above — or cease providing the discounts, creating harm to Verizon's reputation and customer goodwill.

14. Moreover, providing DSL service for $15 would actually be below Verizon's cost to offer that service. Verizon calculates its variable cost alone to offer DSL service to an additional DSL customer to be in excess of $15 per month. Therefore, every customer — including every new customer — who obtains DSL service for which Verizon only receives $15 will cause a monetary loss to Verizon.

15. Additionally, because Verizon does not currently have a qualifying plan for DSL, Verizon would have to incur the internal costs associated with establishing and implementing such a new plan at least for existing customers. Verizon estimates that just the personnel cost for doing this to be approximately $50,000, and potentially more, depending on the level of complexity encountered during the development process. In addition, Verizon would incur the cost of the eligibility verification process described above. These costs could not be recovered in the event the Statute is ultimately found to be unenforceable.

Fixed Wireless Service

16. Verizon also offers, in certain areas outside of where it offers Fios service, the ability for customers to purchase fixed wireless broadband service known as LTE Home. This service provides broadband access through a home-based router connected on the Verizon Wireless 4G cellular network. The availability of the LTE Home service is limited to areas

where the Verizon Wireless cellular network currently has the capacity to handle the increased network usage associated with this service. In those areas, the LTE Home service currently meets the speed requirements in the Statute for the $15 low income broadband plan.

17. In those areas where Verizon currently offers LTE Home service, requiring Verizon to provide broadband to eligible customers at a cost of $15 would subject Verizon to irreparable harm. Verizon currently offers LTE Home service for a retail price of $60 (for customers on auto pay, $70 for those not on autopay),[3] plus taxes and fees. Verizon does not currently offer a qualifying LTE Home plan and only has an extremely limited number of customers using this service in New York. For any customer who is eligible under the New York Statute and who would sign up for 4G Home at a cost of $15 per month, Verizon will suffer a non-recoverable loss of revenue of over $45 per month (or $25 if they are a Verizon Wireless customer). In fact, $15 is below Verizon's current cost associated with this service. Although the availability of the EBB could mitigate this loss, as noted earlier, the length of the EBB is uncertain and, moreover, it is possible that customers could qualify under the New York Statute but not be eligible for the EBB.

18. If the Court later holds that the New York Statute is unlawful, Verizon would not be able to retroactively bill LTE customers who were only paying $15 per month for the difference between that amount and what they would have paid in the absence of the Statute. Furthermore, going forward, Verizon would either have to continue providing those discounts voluntarily — incurring the harms set forth above — or cease providing the discounts, creating harm to Verizon's reputation and customer goodwill.

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[3] Customers who also purchase Verizon Wireless mobile service are eligible for an additional $20 per month discount, making their add-on rate for 4G LTE Home $40.

19. Furthermore, as described earlier with regard to DSL, because Verizon does not currently have a qualifying plan for LTE Home, Verizon would be required to incur costs associated with setting up such a plan as well as the associated eligibility verification process. Since Verizon uses different systems across its wireline (Fios and DSL) and its wireless (LTE Home) product lines, personnel costs for development and systems integration work described earlier would be duplicated for both business lines

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of April, 2021 in Montclair, New Jersey.

Matthew Kramer Coakley

Declaration of Glen Faulkner
(Exhibit C)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., CTIA – THE WIRELESS ASSOCIATION, ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, USTELECOM – THE BROADBAND ASSOCIATION, NCTA — THE RURAL BROADBAND ASSOCIATION, and SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF GLEN FAULKNER,
PRESIDENT AND GENERAL MANAGER, MTC CABLE

I, Glen Faulkner, hereby state as follows:

1. I am President and General Manager of Heart of the Catskills Communications, Inc. d/b/a MTC Cable. MTC Cable is a wholly-owned subsidiary of Margaretville Telephone Company, Inc. ("MTC"), which is itself majority employee-owned.

2. Founded in 1916, Margaretville Telephone Company has long provided telephone service in and around Margaretville, New York. Its subsidiary, MTC Cable, provides broadband Internet access, video, and VoIP phone service to over 7,050 customers in the predominantly rural Central Catskill region of New York.

3. For the reasons explained in detail below, the Rate Regulation recently enacted by the State of New York threatens to inflict irreparable harm on MTC Cable. The regulation will require MTC Cable to offer broadband Internet access service to certain low-income customers at a price of no more than $15 per month—a 75% discount on its current lowest pricing, and just one-third of its average cost of providing service. Compliance with the Rate Regulation would slash MTC Cable's revenues, jeopardizing its ability to make obligatory payments on debt it took on to construct its broadband network. Compliance would also require the company to forgo expansion of its network and impose unrecoverable administrative costs. Those losses would be unrecoverable from the State, and any attempt to recover them from customers by raising prices after-the-fact would severely damage customer goodwill and subscribership.

4. As also explained below, the Rate Regulation's exemption for smaller broadband providers, which may or may not be granted at the sole discretion of the New York Department of Public Services, does not obviate those irreparable harms.

MTC Cable's Deployment of Broadband Service to Underserved New York Communities

5. Since 1916, MTC has provided telephone services in and around Margaretville, New York. From 2014 to 2020, through its subsidiary MTC Cable, it undertook a major, capital-intensive campaign to deploy broadband service via cable and fiber to underserved communities across the Central Catskills region. It entered into public-private partnership contracts with the State of New York as part of the Broadband Program Office's ("BPO") Broadband Expansion Project and Connect NY Broadband Grant Project. Pursuant to these public-private partnerships, MTC Cable built more than 950 miles of fiber over a six-year period, passing 13,514 households. That broadband build-out has provided major benefits to the region, bringing Internet access as

fast as one gigabit per second to homes and businesses in rural communities—many of which were not previously served by any wired broadband options whatsoever.

6. Building broadband in rural areas such as the Central Catskills is extremely costly. MTC Cable's service area—which includes portions of Delaware, Greene, Schoharie, and Ulster counties, in New York—is predominantly rural. A single mile of fiber plant serves on average just 5.4 customers but can cost over $35,000 to construct. In total, MTC Cable spent more than $35 million from 2014-2020 to construct its broadband network. While the State of New York made significant financial contributions to those projects—the broadband expansion would have been totally infeasible without government support—under the contracts MTC Cable was required to invest large amounts of its own capital. The company invested over $15 million, of which over $11 million was financed by taking on bank debt. MTC Cable also had to significantly expand its workforce to execute the projects—increasing its headcount from 18 employees to 42.

7. Rural broadband networks are not only expensive to build, but also costly to operate. Expenses such as maintenance of fiber and cable plant are high for systems that extend over large geographic areas. Expenses such as pole attachment fees—rental fees broadband providers must pay to utility pole owners—are also high for such systems. Such fees are typically assessed on a per-pole basis, and a rural broadband provider must make use of many utility poles to cover its whole service area. Meanwhile, low population densities means that rural providers have few customers per mile of infrastructure from which to recover those costs. Additionally, while MTC Cable received funding from State sources in connection with deployment of its network in the Central Catskills region, MTC Cable alone is responsible for the ongoing operational costs.

8. While deploying broadband in the Central Catskills is expensive, households in the region have less financial ability to pay for broadband service than households in the rest of New York State. As shown in the table below, the four counties encompassing MTC Cable's service area have a median household income 7-28% lower than for the State as a whole. Indeed, most of MTC Cable's customers are in Delaware County, which has the lowest median income. Additionally, due to the large number of low-income households in these counties, *all students* in the public-school districts in MTC Cable's service area receive free lunch at school.

Location	Median Household Income (2019)
Delaware County	$49,544
Greene County	$53,601
Schoharie County	$57,714
Ulster County	$64,304
New York State	$68,486

9. In view of affordability concerns, the public-private partnership contracts between MTC Cable and the State of New York all impose restrictions on the pricing of broadband service deployed pursuant to the contracts. The contracts require MTC Cable to provide, in connection with service constructed leveraging State funds, a "Required Pricing Tier" that "provide[s] for broadband Internet service at minimum speeds of 25/4 Mbps (download/upload), at a monthly rate not to exceed $60" (inclusive of taxes and fees). The contracts also preclude bandwidth usage fees and data caps for such service. Because nearly all of MTC Cable's broadband network was built pursuant to these contracts, nearly all of its customers (99.5%) are eligible to receive 25/4 Mbps service for at most $60 per month. MTC Cable expressly relied on the $60 contractual price point (for the minimum tier of service) when it decided to enter into these contracts and take on the debt for its share of construction costs.

10. Given the financial need in the rural communities it serves, MTC Cable has long sought to make broadband service affordable—while preserving its ability to build and offer that

service in the first place. MTC Cable has signed up to participate in existing state and federal programs to provide broadband service to low-income customers. It will participate in the State of New York's Connect ED program, which will offer free broadband service to low-income households with school-aged children. It also will participate in the Federal Communications Commission's Emergency Broadband Benefit ("EBB") Program, which will provide broadband service to low-income households during the COVID-19 pandemic. These programs offer government support in connection with obligations for broadband providers to offer free or discounted service to low-income customers. Unlike the Rate Regulation, they do not impose the significant (and unbearable) costs of providing such service entirely on the broadband providers.

Irreparable Harm to MTC Cable from the Rate Regulation

11. MTC Cable understands that, on April 16, 2021, New York Governor Andrew Cuomo signed NYS Budget Bill S2506-C. Section 1 of Part NN of the bill amends New York's General Business Law with a new Rate Regulation, § 399-zzzzz. The Rate Regulation requires "broadband service" providers (including MTC Cable) to offer certain "low-income consumers" broadband Internet access service at a download speed of (1) at least 25 Mbps at a cost of no more than $15 per month, or (2) at least 200 Mbps at a cost of no more than $20 per month, inclusive of recurring taxes and fees. § 399-zzzzz, ¶¶ 2-4. It defines "low-income consumers" to include anyone in a household with (a) children eligible for free or reduced-price school lunch; (b) children eligible for supplemental nutrition program benefits; (c) anyone eligible for Medicaid benefits; (d) senior citizens eligible for rent protections; (e) anyone eligible for rent protections due to disability; and (f) anyone receiving affordability benefits from a utility. *Id.*, ¶ 2. The statute also restricts when, and by how much, broadband providers can increase their prices. *Id.*, ¶¶ 3-4. And it requires providers to "make all commercially reasonable efforts to promote and advertise the

availability of broadband service for low-income consumers." *Id.*, ¶ 7. Broadband providers must come into compliance with these requirements no later than June 15, 2021.

12. MTC Cable understands that the Rate Regulation provides for enforcement by the New York Attorney General, with remedies for non-compliance including restitution and civil penalties of up to $1,000 per violation. § 399-zzzzz, ¶ 10. MTC Cable is also aware that Governor Cuomo has vowed to aggressively enforce the Rate Regulation—for example, by rescinding franchises under state law from broadband providers who do not comply.

13. If permitted to go into effect, the Rate Regulation will inflict irreparable harm on MTC Cable. On one hand, non-compliance is not an option. If the company chooses not to comply with the Rate Regulation, it will be subject to massive civil penalties. The penalties could amount to millions of dollars if the failure to offer the $15 rate to each of thousands of customers is treated as a distinct "violation" subject to a $1,000 fine. And recission of state franchises, as Governor Cuomo has threatened, would be a "death penalty" for a broadband provider like MTC Cable—completely barring it from offering service. MTC Cable simply cannot risk those outcomes.

14. Harms from attempting to comply with the regulation would be no less ruinous. MTC Cable currently charges approximately $57 per month for 25 Mbps service, consistent with the $60 ceiling set forth in its public-private partnership contracts with the State of New York. Complying with § 399-zzzzz would force the company to discount that price *by about 75%*, without providing any avenue for MTC Cable to recover that lost revenue from other sources.

15. The $15 rate would not only be a major discount from MTC Cable's current rates, but it would also drive the price far below the cost of providing service. As explained above, broadband networks in sparse rural areas are expensive both to build and to operate. MTC Cable must not only recoup its large investment into network construction but must also pay higher costs

for ongoing maintenance, upstream bandwidth, etc. MTC Cable's average cost to provide service is approximately $44 per month per household—*triple* the Rate Regulation's $15 celling. The $15 price point is thus utterly divorced from any rational calculation of the costs of providing service for rural providers like MTC Cable. Comparing the $15 rate in § 399-zzzzz with the $60 rate in the public-private partnership contracts makes that plainly apparent. Just a couple of years ago, the State contracted with MTC Cable to deploy broadband throughout rural New York based on a $60 price ceiling for the cheapest service tier. Now it demands that MTC Cable cut that price by about 75%, to $15 per month, with no explanation for the apparent change in the State's view of the economically reasonable price point for such service.

16. Not only would compliance with the Rate Regulation require MTC Cable to make massive rate cuts, those cuts would likely affect a large number of subscribers. The Rate Regulation defines as "low income" anyone in a household with a child "eligible for free or reduced-priced lunch through the National School Lunch Program." § 399-zzzzz, ¶ 2. In the four counties MTC Cable serves, *all students* are eligible for free or reduced-priced lunch. That eligibility criterion alone would cover approximately 20% of MTC Cable's broadband customers. As another data point, about one-quarter of MTC Cable's subscribers purchase 25 Mbps service at or near the minimum $57 price point. Insofar as households purchase the most cost-conscious service tier due to limited incomes, a quarter of the company's customers could be eligible for, and switch to, the $15 per month tier mandated under § 399-zzzzz. Additionally, a $15 per month minimum tier would also cause new low-income customers to sign up for service. Given the $44-per-customer average cost for MTC Cable to provide service, MTC Cable would be signing up new customers at a price less than the cost of serving those customers. That would further reduce the company's cash flow, driving it even deeper toward and into the red.

17. The combined effect of massive discounts and a large number of customers eligible for discounted pricing will be a large loss of total revenue. MTC Cable estimates that top-line revenue will decrease by $1,364,000, and net cash flow will decrease by $1,031,000. The statute offers no way to offset lost revenues, and it would be infeasible to offset lost revenues by charging higher income customers higher prices. If MTC Cable seeks to offset losses by charging higher prices to customers who do not qualify for the $15 rate, those higher-income customers may switch to competing providers, such as satellite broadband providers with which MTC Cable competes throughout its service area. Alternatively, those customers may drop down to a lower service tier with lower pricing—for example, dropping from gigabit service to 100 Mbps service, or dropping premium cable channels. Those possibilities are especially significant given that MTC Cable's service area has lower median incomes than the State as a whole. That makes it much more likely that customers who do not qualify for the $15 rate (but who are still price sensitive) will switch to another provider or a lower tier of service in response to any price increase.

18. Revenue and cash-flow reductions of that magnitude would have major impacts on MTC Cable's business. First, it would jeopardize MTC Cable's ability to make regular payments on its debt. As explained above, MTC Cable borrowed more than $11 million to build out its broadband network. After an initial period during which the company was required only to pay only interest, the company is now obligated to make regular payments of interest and principal on that debt. Those payments are *in excess of* what MTC Cable could bear in the face of the projected decline in revenues. When MTC Cable entered into public-private partnership contracts with the State to build broadband—and borrowed millions of dollars to pay for its share of construction costs—it did so in reliance on the $60-per-month ceiling in those contracts. Cutting the price by

three-quarters would obliterate the financial assumptions on which MTC Cable's broadband network was built and financed, and risks making it unviable entirely.

19. Compliance also will create other harms. MTC Cable plans to conduct service expansions (funded by MTC Cable itself) to reach pockets of customers who remain unserved. MTC Cable will have to halt such efforts to manage cash flow. MTC Cable will also have to incur administrative costs to offer and bill for the $15-per-month service tier. Computer billing systems, marketing materials, and the like will have to be updated. The Rate Regulation also requires providers to advertise the $15-per-month service, which will require MTC Cable to incur additional marketing expenses. § 399-zzzzz, ¶ 7.

20. These harms to MTC Cable will be irreparable. If MTC Cable incurs any civil penalties, or worse suffers catastrophic losses from losing its franchise, it could not recover such losses as damages from the State, given the State's Eleventh Amendment immunities. And if MTC Cable complies, there is no way for it to recover losses from being forced to offer below-cost service to low-income customers. It is plainly implausible (and would be cruel to suggest) that MTC Cable could recover losses from the low-income customers themselves after this litigation. Customers with limited incomes would likely be unable to pay any surcharge beyond MTC Cable's normal rates to recover losses. Any attempt to do so would likely result in significant loses of subscribership as customers who could afford service at $57 per month are forced to give up service at a higher price point. It would also be grossly unfair to surprise lower-income customers with an unexpected bill for past services. Nor would it be possible to recover the amounts from higher-income customers. As explained above, in a competitive market, customers could switch to alternatives such as satellite, or drop down to cheaper service tiers. Any attempt to recover lost

revenues from customers, moreover, either lower-income or higher-income customers, would likely result in lost subscribership that could not be easily reversed, and loss of customer goodwill.

21. Compliance would also impose other irreparable harms. Even if Plaintiffs prevail in this litigation, MTC Cable will suffer a large loss of customer goodwill, and probably a loss of subscribers as well, if it is forced to lower prices to $15 for many customers only to raise them to the prior levels after this litigation. Goodwill will be injured even if MTC Cable does not attempt to recover revenues lost during the pendency of this litigation. Customer goodwill also be impaired in other ways. Revenue losses will impair MTC Cable's ability to invest in the quality and security of its network, such as in network resiliency efforts. Harms to goodwill resulting from possible quality and security issues would be hard to reverse. MTC Cable, moreover, has no remedy for the adverse financial consequences to the company if it is unable to make payments on its debt due to losses in revenue. Damage to the company's credit, relationships with lenders, and commercial reputation from any default on debt would be irreversible. Finally, if MTC Cable forgoes opportunities to expand its network during the pendency of this litigation, those missed opportunities will produce lasting harms. Not only will the company have forgone revenue it could have earned during that period; it also will have suffered competitive harms from customers signing up with competitors, such as satellite competitors, in the meantime. Those competitive harms will not only be lasting; they will be impossible to quantify.

22. MTC Cable understands that the Rate Regulation provides for a discretionary exemption to its requirements. The regulation empowers the New York Department of Public Services ("DPS") to waive, at its discretion, the statutory requirement if a broadband provider has less than 20,000 customers *and* it finds that enforcement "would result in unreasonable and unsustainable financial impact on the broadband service provider." § 399-zzzzz, ¶ 5. The DPS has

issued a notice stating that, to receive consideration for the exemption before the June 15 effective date, broadband providers must apply by May 15. It has not, however, made any commitment to granting waiver requests by June 15. Nor has it articulated the standards it will use to evaluate waiver requests—such as how it will determine whether providers would suffer "unreasonable or unsustainable financial impact" justifying waiving the regulation. The speculative availability of the waiver, therefore, does not obviate MTC Cable's irreparable harms. MTC Cable cannot risk failing to comply in hopes that it will be granted a waiver—it must proceed with compliance and incur the above-described irreparable harms regardless.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

April 27, 2021

Glen Faulkner
MTC Cable
P.O. Box 260
50 Swart Street
Margaretville, NY 12455

Declaration of Jennifer Manner
(Exhibit D)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF JENNIFER A. MANNER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Jennifer A. Manner, declare as follows.

1. I, Jennifer A. Manner, am the Senior Vice President for Regulatory Affairs for Hughes Networks Systems, LLC ("Hughes").

2. I submit this declaration to address the irreparable harms that Hughes Network Systems, LLC would incur if Part NN of New York State Budget Bill S2506-C (the "Rate Regulation") took effect June 15, 2021, as scheduled.

3. Hughes currently operates throughout New York State and providing voice and broadband services for more than twenty thousand subscribers.

4. Hughes stands to incur multiple irreparable harms if required to comply with the Rate Regulation.

5. The cost to Hughes for an average subscriber is seventeen hundred and thirty-six dollars ($1,736).[1] The Rate Regulation requires a $15 service plan that is "inclusive of any recurring taxes and fees such as recurring rental fees for service provider equipment required to obtain broadband service and usage fees." At the Rate Regulation monthly required amount of $15, Hughes would incur a loss of eleven hundred and ninety-six dollars for ($1,196) over 36 months. Under the Rate Regulation $15 service plan, the loss to Hughes will continue to grow with each month of service for subscribers who maintain service past this 36-month period.

6. Furthermore, the dollar amounts demonstrated above are exclusive of taxes which when applied for New York would further diminish the totals above. The monthly cost of broadband service per customer in New York including external costs like taxes and equipment rental greatly exceeds the $15. Therefore, every customer — including every new customer — that obtains service for which the company only receives $15 will cause a monetary loss to Hughes.

7. Compliance with the Rate Regulation will also entail costly administrative expenditures. The Rate Regulation conditions customers' eligibility for the discounted rates on their eligibility for other state and federal benefits. But unlike the federal government, which has created a National Verifier that Hughes Network Systems, LLC can use to determine who is eligible for the Emergency Broadband Benefit, New York has not created any such system. Therefore, the Rate Regulation will require Hughes Network Systems, LLC to develop its own

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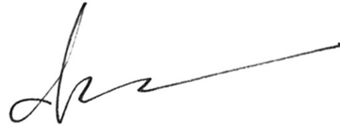
[1] There are significant upfront costs to Hughes to install and test a new customer's satellite dish, modem and related equipment.

eligibility verification system, which will likely prove complex and expensive, in order to determine which customers fall within its terms. Additionally, the Rate Regulation requires providers to advertise the availability of discounted service to low-income consumers. Hughes Network Systems, LLC therefore must also incur the costs of this mandatory advertising.

8. If the Court allows the Rate Regulation to go into effect but later holds that the Rate Regulation is preempted, Hughes Network Systems, LLC will likely have a substantial number of customers who had been receiving substantially discounted broadband service as a result of the Rate Regulation. At that point, Hughes Network Systems, LLC will either have to continue providing those discounts voluntarily — incurring all of the harms set forth above — or will cease providing the discounts, creating harm to Hughes Network System LLC's reputation and customer goodwill.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29th day of April 2021 in Germantown, Maryland.



Jennifer A. Manner

Declaration of Jason Miller
(Exhibit E)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF JASON MILLER IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Jason Miller, declare as follows.

1. I, Jason Miller, am Vice President/General Manager for Delhi Telephone Company ("Delhi Telephone"), a family-owned company since 1897. In that role, I am responsible for operating both Delhi Telephone (an incumbent local exchange company) and its affiliate DTC Cable, Inc. (a competitive local exchange company) (collectively, "DTC"). DTC provides broadband internet access service to over 3,700 customers in rural areas of New York.

2. DTC would incur irreparable harms if Part NN of New York State Budget Bill S2506-C (the "Rate Regulation") is permitted to take effect on June 15, 2021, as scheduled. The Rate Regulation would force DTC to cut its prices for the lowest-tier of broadband Internet

service to far below what it costs DTC to provide that service, and cause DTC to suffer significant losses of revenues. That loss of revenue would be irreparable—there would be no practical way for DTC to recover those losses even if Plaintiffs prevail in this litigation. Moreover, as a result of those revenue losses, DTC would be forced to abandon efforts to expand its rural broadband coverage, which would permanently set it back in terms of growing its subscriber base.

3. DTC serves customers in four New York counties: Broome, Chenango, Delaware, and Otsego. These counties are predominantly rural and building and maintaining broadband infrastructure in these regions is extremely expensive. Over the past five years, DTC has invested more than $20 million in building and improving its broadband network. It has also added over 17 employees to serve its growing customer base.

4. In building its broadband network, DTC has participated in contractual public-private partnerships with the State of New York, in particular the Broadband Program Office's Broadband Expansion Project. Under these projects, DTC received certain funds from the State, conditioned on DTC offering at least 25/4 Mbps service for no more than $60 per month. However, DTC was required to invest large amounts of its own money toward these projects. It borrowed more than $15 million to pay its share of the project capital costs.

5. Households in the counties DTC serves also have more limited incomes than households in the rest of New York. In 2019, the median household income in Delaware County (which comprises over 90% of DTC's service territory) was $49,544 — well below the $63,998 median income of the State of New York as a whole. Delaware County also suffers from significant poverty — estimates of the county's poverty rate range from 12.6% to 16.5%, compared to the 10.5% national average. Moreover, according to the New York State Well-Being Indicators

Clearinghouse, 49 percent of the children in the Delaware County area are eligible for free and reduced-price school lunch.

6. Due to the limited financial means of the population DTC serves, a large number of DTC's current and potential broadband customers would likely qualify for discounted service under the Rate Regulation. For example, under the Rate Regulation, households with students eligible for free and reduced-price school lunch — half of the students in Delaware County — would qualify as "low-income" households eligible for $15-per-month service.

7. Providing broadband service at the discounts the Rate Regulation mandates would have several adverse negative effects on DTC's business, creating irreparable harms. I estimate that compliance with the Rate Regulation would cause DTC to suffer a net income loss of about $1 million per year (or $90,000 per month). That is assuming half of DTC's customers qualify for discounted service under the Rate Regulation — a reasonable assumption given the economic characteristics of the areas in which DTC operates. The Rate Regulation would leave DTC with no avenue for recouping these costs. The Rate Regulation offers no alternative revenue sources for providers who would suffer large revenue losses due to significant numbers of low-income customers being eligible for the $15-per-month service. Moreover, DTC could not make up those revenue losses by charging more to customers in the relatively low-income counties that DTC serves. Those customers would likely switch to competing services, such as satellite, or drop down to a more affordable tier of service, offsetting any price increases.

8. Such revenue losses would have adverse negative effects on DTC's finances. DTC must make regular payments of interest and principal on the $15 million it borrowed to finance construction of its network. If DTC's net income declined by $1 million per year, it would be unable to make required payments on its debt. DTC also would have no choice but to

drastically reduce costs to ensure its economic survival. It would have to halt investments into growing its network and its business in New York. It would also need to reduce the size of its workforce to cut costs.

9. Compliance with the Rate Regulation would render it infeasible to build and maintain DTC's extensive rural service network. Providing service in a predominantly rural region is extremely expensive. DTC currently serves, on average, fewer than four customers per mile of fiber-optic cable, which means that the costs of building and maintaining a given amount of infrastructure is spread out over relatively few customers. Rural providers like DTC also suffer from high taxes and fees. For example, DTC relies on utility poles to carry the fiber cables over which it provides service. It pays a rental fee, called a pole attachment fee, for each pole on which it has fiber lines. Since DTC serves relatively few customers per mile of fiber, the pole attachment fees per customer are high. Between pole attachments, middle mile transport, and Internet bandwidth from a tier 1 provider, the reduction in revenues from complying with the Rate Regulation would leave DTC with insufficient revenue to cover these and other costs — such as customer service, engineering, network maintenance, and operating taxes — that DTC incurs in providing broadband service. These shortfalls would force DTC to restructure its business further, such as by laying off workers, which would harm its service and its customers. A more limited workforce would, for example, make it hard for DTC to promptly conduct repairs and restore service after storm damage, or to quickly address customer service tickets. Such loss of service quality would cost DTC substantial customer goodwill it has built up over generations.

10. DTC has dedicated significant resources and investments over the past five years to get broadband to as many households as possible, extending the network over 900 miles.

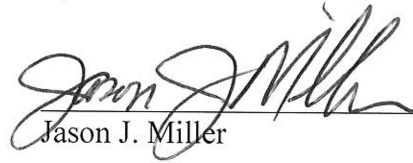
Under the current legislation, DTC would halt further expansion and look to remove unprofitable fiber optic lines.

11. These harms would all be irreparable. Given the economic circumstances of its customer base, DTC could not feasibly recover revenues by charging customers more after-the-fact in the event Plaintiffs in this case prevail. Any attempt to do so would cause customers to leave or to drop down to lower tiers of service. Indeed, even if DTC did not attempt to recoup revenue lost during this litigation, customer goodwill would be impaired if DTC lowered prices to an unsustainable $15-per-month level, only to have to raise them again in the event the Rate Regulation is found to be illegal. Additionally, any harms resulting from defaulting on debt or being unable to timely make payments would be irreparable. The company's creditworthiness could not be easily rehabilitated even if Plaintiffs prevail in this suit. Foregone opportunities to expand the network would similarly create irreparable harms. And lost customer goodwill due to having to scale back maintenance and cut customer service would be hard to reverse. Especially in the tight-knit, rural counties in which DTC operates, it is hard to rehabilitate the reputation of a company that has lost goodwill among its customers.

12. Finally, DTC understands that the Rate Regulation includes a discretionary exemption for broadband providers that serve fewer than 20,000 households. While DTC has less than 20,000 subscribers (3,730 internet subscribers as of 12/31/20), it cannot avoid the above-described irreparable harms by assuming that it will qualify for an exemption. The New York Department of Public Service has not announced any standards for evaluating exemption requests, and DTC may not qualify for one. Given the massive penalties associated with non-compliance, including possibly even the loss of DTC's franchise, DTC would have no choice but to comply with the Rate Regulation, and to bear the attendant irreparable harms.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of April, 2021 in Delhi, New York.



Jason J. Miller

Declaration of Mark T. Webster
(Exhibit F)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., CTIA – THE WIRELESS ASSOCIATION, ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, USTELECOM – THE BROADBAND ASSOCIATION, NCTA — THE RURAL BROADBAND ASSOCIATION, and SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION, on behalf of their respective members, Plaintiffs, v. LETITIA A. JAMES, in her official capacity as Attorney General of New York, Defendant.	Case No. 2:21-cv-2389-DRH-AKT

DECLARATION OF MARK T. WEBSTER
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Mark T. Webster, declare as follows.

1. I, Mark T. Webster, am the Controller for The Champlain Telephone Company. As controller, I am responsible for financial reporting, the development and implementations of budgets, and interactions with state and federal regulatory authorities for the Champlain Telephone Company, a rate of return regulated local exchange carrier, and its subsidiaries, including CTC Internet, Inc., an internet service provider.

2. I submit this declaration to address the harms that The Champlain Telephone Company and its subsidiary companies would incur if Part NN of New York State Budget Bill S2506-C (the "Rate Regulation") took effect June 15, 2021, as scheduled.

3. The Champlain Telephone Company and its subsidiary company, CTC Internet, Inc., operate in the Towns of Altona, Champlain, and Mooers in Clinton County, New York. The Champlain Telephone Company wholesales internet access to its wholly owned subsidiary, CTC Internet, Inc. CTC Internet, Inc. is the retail provider of internet access service to the Company's end users. The Company currently provides broadband service to fewer than 3,000 customers in its service area. The Champlain Telephone Company principally offers broadband services using aDSL technology. To increase the speeds available to its customers, the Company is investing significant funds to update its telecommunications plant with vDSL and Fiber-to-the-Home technologies. Prior to the implementation of the Rate Regulation, the Company's long-term plan was to overbuild its entire network with fiberoptic cable and offer Fiber-to-the-Home to all customers.

4. Based on information from the National Center for Education Statistics, *see* https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=3621250&ID=362125003019, I estimate that at least approximately 48% of the households in the Company's service area will qualify for discounts under the Rate Regulation. In the Northeastern Clinton Central School District which covers most of the Company's service area, 48% of the students qualify for free or reduced-price school lunches. Approximately 49% of the students in the Northern Adirondack Central School District, which covers a small area of the company's service territory, receive free or reduced-price school lunches.

5. The Champlain Telephone Company stands to incur multiple irreparable harms if required to comply with the Rate Regulation.

6. As noted above, The Champlain Telephone Company estimates that nearly half of The Champlain Telephone Company's existing broadband customers will qualify for

discounted rates under the Rate Regulation. Based on this estimate, The Champlain Telephone Company and its subsidiaries will lose approximately $80,000 in annual revenues as a result of providing service to these customers at the required discounts. That loss of revenue would harm The Champlain Telephone Company because the revenue generated from the discounted broadband service will not cover the company's internal costs to provide the service. The Rate Regulation would essentially force the company to provide its services at a loss.

7. The Champlain Telephone Company's monthly cost of broadband service per customer in this area — including external costs like state right of way charges and other taxes and pole attachment costs — exceeds the $15 or $20 cost to consumers the statute requires. The Company will pay more to vendors, federal and state tax authorities, the Federal Universal Service Fund, and the National Exchange Carrier Association (for regulatory charges in the interstate pool) than it will receive from its customers for broadband-only services under the Rate Regulation. With the reduced revenues resulting from the Rate Regulation, after the vendors, federal and state tax authorities, the National Exchange Carrier Association, and the Federal Universal Service Fund are paid, there will be no funds for employee payroll, maintenance, upgrades, and new capital construction, further deepening the loss. Finally, in addition to the ongoing monthly charges to provide service, there are significant one-time installation costs to provide new service. These services include installing fiberoptic drops and fiberoptic electronic equipment with backup batteries, and modems for aDSL and vDSL services. Depending on the type of service being installed, the cost may exceed $1,000 each. Under the Rate Regulation, The Champlain Telephone Company will never recover the cost of the equipment and installation with the capped prices. Therefore, every customer — including every new customer

— that obtains service for which the company only receives $15 or $20 will cause a monetary loss to The Champlain Telephone Company.

8. The Champlain Telephone Company and its subsidiary CTC Internet, Inc. operate in a very rural area of Upstate New York. Due to the rural area's low population density, the cost to provide service is much higher than for larger telecommunication companies and internet service providers that operate in urban or suburban areas. With the company's other major revenue source — local telephone service — under New York State Public Service Commission regulation, the Company cannot simply raise the price from other services to cover the revenue shortfall. Nor can the Company make up for the revenue loss by selling broadband services to new customers, as each new customer under the Rate Regulation will increase the Company's loss.

9. Compliance with the Rate Regulation will also entail costly administrative expenditures. The Rate Regulation conditions customers' eligibility for the discounted rates on their eligibility for other state and federal benefits. But unlike the federal government, which has created a National Verifier that The Champlain Telephone Company can use to determine who is eligible for federal benefits like Lifeline and the Emergency Broadband Benefit, New York has not created any such system. Therefore, the Rate Regulation will require The Champlain Telephone Company to develop its own eligibility verification system, which will likely prove complex and expensive, in order to determine which customers are eligible. The Rate Regulation has significant reporting requirements that will also be complex and expensive to develop and maintain. Additionally, the Rate Regulation requires providers to advertise the availability of discounted service to low-income consumers. The Champlain Telephone Company therefore must also incur the costs of this mandatory advertising. All these

administrative costs, taken together, would be substantial for a smaller telecommunications company like The Champlain Telephone Company.

10. If the Court allows the Rate Regulation to go into effect but later holds that the Rate Regulation is preempted, The Champlain Telephone Company will likely have a substantial number of customers who had been receiving substantially discounted broadband service because of the Rate Regulation. At that point, The Champlain Telephone Company will either have to continue providing those discounts voluntarily — incurring all of the harms set forth above — or will cease providing the discounts, creating harm to The Champlain Telephone Company's reputation and customer goodwill.

11. I understand that the Rate Regulation authorizes the New York Department of Public Service ("DPS") to grant exceptions to broadband providers that serve fewer than 20,000 households. On April 26, 2021, the DPS Staff issued a one-page document outlining the information that must be included in any request to obtain an exemption, which must be filed by May 14, 2021 to obtain a decision before the Rate Regulation takes effect. The Staff's guidance does not state the standards that the Commission will apply in evaluating such applications. Therefore, while The Champlain Telephone Company intends to seek such an exception, it must begin taking steps now in order to ensure that it will be in compliance with the Rate Regulation by June 15, 2021, if it does not receive an exception.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April, 2021 in Champlain, New York.

Mark T. Webster

EXHIBIT 10

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.

DECLARATION OF WADE NORTHRUP IN SUPPORT OF 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

DECLARATION OF WADE NORTHRUP

I, Wade Northrup, declare as follows.

1. I, Wade Northrup, am the Controller for The Champlain Telephone Company. As controller, I am responsible for financial reporting, the development and implementations of budgets, and interactions with state and federal regulatory authorities for the Champlain Telephone Company, a rate of return regulated local exchange carrier, and its subsidiaries, including CTC Internet, Inc., an internet service provider.

2. I submit this declaration to address the harms that The Champlain Telephone Company and its subsidiaries would incur if the New York Attorney General begins to enforce Part NN of New York State Budget Bill S2506-C, N.Y. Gen. Bus. Law § 399-zzzzz (which the New York Attorney General in litigation has referred to as the "Affordable Broadband Act" or "ABA").

3. The Champlain Telephone Company and its subsidiary, CTC Internet, Inc., operate in the Towns of Altona, Champlain, and Mooers in Clinton County, New York. CTC Internet, Inc. is the retail provider of broadband internet access service to the Company's end users, which it provides over the Company's last-mile facilities connecting to end users' premises, access to which CTC Internet purchases at wholesale from the Company. The Company currently provides broadband service to fewer than 2,000 customers in its service area. The Champlain Telephone Company principally offers broadband internet access services using aDSL technology. To increase the speeds available to its customers, the Company is investing significant funds to update its telecommunications plant with vDSL and Fiber-to-the-Home technologies. Before New York enacted the ABA, the Company's long-term plan was to overbuild its entire network with fiber optic cable and offer broadband service over Fiber-to-the-Home facilities to all customers. Over the last three years, while the ABA was enjoined, the Company has executed that plan and significantly

expanded its fiber network. Since 2021, the Company has doubled the number of households it serves with fiber.

4. Based on information from the Benton Institute for Broadband & Society, *see* https://www.benton.org/acp_tool, I estimate that approximately 53% of the households in the Company's service area will qualify for discounts under the ABA. Approximately 53% of the households in the Company's service area qualified for the Affordable Connectivity Program in May 2023.

5. The Champlain Telephone Company stands to incur multiple irreparable harms if required to comply with the ABA.

6. As noted above, The Champlain Telephone Company estimates that over half of its existing broadband customers will qualify for discounted rates under the ABA. Based on this estimate, The Champlain Telephone Company and its subsidiaries will lose approximately $182,000 in annual revenues as a result of providing service to these customers at the required discounted prices. That loss of revenue would harm The Champlain Telephone Company because the revenue generated from the discounted broadband service will not cover the Company's internal costs to provide the service. The ABA would essentially force the company to provide its services at a loss.

7. The Champlain Telephone Company's monthly cost of broadband service per customer in this area — including external costs like state right of way charges and other taxes and pole attachment costs — exceeds the $15 or $20 cost to consumers the statute requires. The Company will pay more to vendors, federal and state tax authorities, the Federal Universal Service Fund, and the National Exchange Carrier Association (for regulatory charges in the interstate pool) than it will receive from its customers for broadband-only services under the Rate Regulation.

8. With the reduced revenues resulting from the ABA, after the vendors, federal and state tax authorities, the National Exchange Carrier Association, and the Federal Universal Service

Fund are paid, the Company will lack the funds necessary for employee payroll, maintenance, upgrades, and new capital construction, further deepening the loss.

9. Finally, in addition to the ongoing monthly charges to provide service, there are significant one-time installation costs to provide new service. These services include installing fiber optic drops to and fiber optic electronic equipment with backup batteries at customer premises for customers receiving broadband over Fiber-to-the-Home facilities, and modems for aDSL and vDSL services for customers receiving broadband over copper facilities. For customers served over fiber, the cost is nearly $1,000 per new household served. For customers served over DSL services, modem and install costs are typically $260 per new household. Under the ABA, The Champlain Telephone Company will never recover the cost of the equipment and installation. Therefore, every customer — including every new customer — that obtains service for which the company only receives $15 or $20 will cause a monetary loss to the Company. For the $15 customers, the Company faces $42.35 in incremental loss per month.

10. The ABA would especially burden the Champlain Telephone Company because, as an incumbent local exchange carrier that participates in the National Exchange Carrier Association ("NECA"), the Company must, under NECA rules, couple broadband transmission service (that is, the "last-mile" broadband connection between the customer's premises and the Company's network) with a local voice service access line. The Company must also contribute to the NECA revenue pool and pay applicable taxes on those services. If all of the Company's customers were to drop the underlying telephone line and sign up for $15 broadband-only service, the Company will lose approximately an additional $235,000 in annual revenues — increasing the total annual revenue loss to approximately $417,000. The ABA does not anticipate this additional cost with its $15 broadband-only service mandate. The ABA also requires covered providers to allow customers purchase broadband internet access service on a standalone basis, separate from phone service. *See*

N.Y. Gen. Bus. Law § 399-zzzzz(3). The ABA thus requires the Company to violate the NECA tariff, which requires it to sell voice service to every customer that purchases a broadband internet access service that uses its tariffed, last-mile, high-speed transmission service.

11. The Champlain Telephone Company and its subsidiary CTC Internet, Inc. operate in a very rural area of Upstate New York. Due to the rural area's low population density, the cost to provide service is much higher than for larger telecommunications companies and internet service providers that operate in urban or suburban areas. With the Company's other major revenue source — local telephone service — under New York State Public Service Commission regulation, the Company cannot raise the price of other services to cover the revenue shortfall. Nor can the Company make up for the revenue loss by selling broadband services to new customers, as each new customer eligible to purchase at ABA-regulated prices will increase the Company's loss. The Company likewise cannot raise prices to ABA-ineligible households to make up the losses, as it would make its services uncompetitive compared to other options, like fixed wireless or satellite, which can spread the losses the ABA imposes over a much larger customer base. Even if the Company is exempted from the ABA and allowed to raise prices, it will lose ABA-eligible customers to non-exempt providers that service the same areas but are forced to provide below-cost broadband services.

12. Complying with the ABA will also entail costly administrative expenditures. The ABA conditions customers' eligibility for the discounted rates on their eligibility for other state and federal benefits. But unlike the federal government, which has created a National Verifier that The Champlain Telephone Company can use to determine who is eligible for federal benefits like Lifeline and, previously, the Emergency Broadband Benefit and Affordable Connectivity Program, New York has not created any such system. Therefore, the ABA will require The Champlain Telephone Company to develop its own eligibility verification system, which will likely prove

complex and expensive, in order to determine which customers are eligible. The ABA has significant reporting requirements that will also be complex and expensive to develop and maintain. Additionally, the ABA requires providers to advertise the availability of discounted service to low-income consumers. The Champlain Telephone Company therefore must also incur the costs of this mandatory advertising. All these administrative costs, taken together, would be substantial for a smaller telecommunications company like The Champlain Telephone Company.

13. If the Court allows the ABA to go into effect but later holds that the ABA is preempted, The Champlain Telephone Company will likely have a substantial number of customers who had been receiving substantially discounted broadband service because of the ABA. At that point, The Champlain Telephone Company will either have to continue providing those discounts voluntarily — incurring all of the harms set forth above — or will cease providing the discounts, creating harm to The Champlain Telephone Company's reputation and customer goodwill.

14. I understand that the ABA authorizes the New York Department of Public Service ("DPS") to grant exceptions to broadband providers that serve fewer than 20,000 households. On May 14, 2021, the Company and CTC Internet timely filed an exemption request. On May 20, 2021, the DPS Staff granted the Company a temporary exemption to allow for the "orderly review and evaluation" of the exemption request. On May 27, 2021, the DPS Staff issued an erratum also providing that temporary exemption to CTC Internet. On June 21, 2021, however, the DPS Staff suspended that proceeding without reaching any final decision, in light of the order preliminarily enjoining enforcement of the ABA.

15. Shortly after the Second Circuit ruled, the DPS opened a new docket (24-M-0255). But no action has been taken in that proceeding. Nor has the DPS revived the original proceeding. It is thus unclear whether the temporary exemptions provided are still effective; how long it will take the DPS to reach a final determination; or even what criteria the DPS will use.

16. Faced with this uncertainty, the Company cannot make forward-looking plans based on the assumption that it will receive a final decision granting it such an exemption. Therefore, it must begin taking steps now in order to ensure that it will be in compliance with the ABA.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 31 day of July 2024 in Champlain, New York.

/s/

Wade Northrup

EXHIBIT 11

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.

DECLARATION OF GLEN FAULKNER IN SUPPORT OF 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

DECLARATION OF GLEN FAULKNER,
PRESIDENT AND GENERAL MANAGER, MTC CABLE

I, Glen Faulkner, hereby state as follows:

1. I am President and General Manager of Heart of the Catskills Communications, Inc. d/b/a MTC Cable. MTC Cable is a wholly-owned subsidiary of Margaretville Telephone Company, Inc. ("MTC"), which is itself 100 percent employee-owned.

2. Founded in 1916, Margaretville Telephone Company has long provided telephone service in and around Margaretville, New York. Its subsidiary, MTC Cable, provides broadband Internet access, video, and VoIP phone service to over 8,800 customers in the predominantly rural Central Catskill Mountain region of New York.

3. For the reasons explained in detail below, Part NN of New York State Budget Bill S2506-C, N.Y. Gen. Bus. Law § 399-zzzzz ("Affordable Broadband Act" or "ABA") threatens to inflict irreparable harm on MTC Cable. The regulation will require MTC Cable to offer broadband Internet access service to certain low-income customers at a price of no more than $15 per month—a 75% discount on its current lowest pricing, and just one-third of its average cost of providing service. Compliance with the ABA would slash MTC Cable's revenues, jeopardizing its ability to make obligatory payments on debt it took on to construct its broadband network. Compliance would also require the company to forgo expansion of its network and impose unrecoverable administrative costs. Those losses would be unrecoverable from the State, and any attempt to recover them from customers by raising prices after-the-fact would severely damage customer goodwill and subscribership.

4. As also explained below, the ABA's exemption for smaller broadband providers, which may or may not be granted at the sole discretion of the New York Department of Public

Services, does not obviate those irreparable harms (and is highly unlikely based upon the recent experiences stated in Section 22).

<u>MTC Cable's Deployment of Broadband Service to Underserved New York Communities</u>

5. Since 1916, MTC has provided telephone services in and around Margaretville, New York. From 2014 to 2023, through its subsidiary MTC Cable, it undertook a major, capital-intensive campaign to deploy broadband service via cable and fiber to underserved communities across the Central Catskills region. It entered into public-private partnership contracts with the State of New York as part of the Broadband Program Office's ("BPO") Broadband Expansion Project and Connect NY Broadband Grant Project. In addition, MTC entered into a public / private partnership with the FCC as part of a Rural Digital Opportunity Fund (RDOF) award and the municipality of Greene County in support of broadband expansion initiatives. Pursuant to these public-private partnerships, MTC Cable built more than 1,000 miles of fiber over a six-year period, passing 16,000 households. That broadband build-out has provided major benefits to the region, bringing Internet access as fast as one gigabit per second to homes and businesses in rural communities—many of which were not previously served by any wired broadband options whatsoever.

6. Building broadband in rural areas such as the Central Catskills is extremely costly. MTC Cable's service area—which includes portions of Delaware, Greene, Schoharie, and Ulster counties, in New York—is predominantly rural. A single mile of fiber plant serves on average just 5.4 customers but can cost over $55,000 to construct in today's costs. In total, MTC Cable spent more than $42 million from 2014-2023 to construct its broadband network. While the State of New York made significant financial contributions to those projects—the broadband expansion

would have been totally infeasible without government support—under the contracts MTC Cable was required to invest large amounts of its own capital. The company invested over $22 million, of which over $12 million was financed by taking on bank debt. In addition, as a condition for approval by the NYS Department of Public Service to allow the Company to finalize the transition to 100% employee-owned, the Company is required to spend $4.2M over the next 9 years on new broadband expansion projects. MTC Cable also had to significantly expand its workforce to execute the projects—increasing its headcount from 18 employees to 47.

7. Rural broadband networks are not only expensive to build, but also costly to operate. Expenses such as maintenance of fiber and cable plant are high for systems that extend over large geographic areas. Expenses such as pole attachment fees—rental fees broadband providers must pay to utility pole owners—are also high for such systems. Such fees are typically assessed on a per-pole basis, and a rural broadband provider must make use of many utility poles to cover its whole service area. Meanwhile, low population densities means that rural providers have few customers per mile of infrastructure from which to recover those costs. Additionally, while MTC Cable received funding from State sources in connection with deployment of its network in the Central Catskills region, MTC Cable alone is responsible for the ongoing operational costs.

8. While deploying broadband in the Central Catskills is expensive, households in the region have less financial ability to pay for broadband service than households in the rest of New York State. As shown in the table below, the four counties encompassing MTC Cable's service area have a median household income 7-28% lower than for the State as a whole. Indeed, most of MTC Cable's customers are in Delaware County, which has the lowest median income. Addition-

ally, due to the large number of low-income households in these counties, *all students* in the public-school districts in MTC Cable's service area receive free lunch at school.

Location	Median Household Income (2020)
Delaware County	$54,440
Greene County	$60,163
Schoharie County	$59,744
Ulster County	$66,060
New York State	$77,440

9. In view of affordability concerns, the public-private partnership contracts between MTC Cable and the State of New York all impose restrictions on the pricing of broadband service deployed pursuant to the contracts. The contracts require MTC Cable to provide, in connection with service constructed leveraging State funds, a "Required Pricing Tier" that "provide[s] for broadband Internet service at minimum speeds of 25/4 Mbps (download/upload), at a monthly rate not to exceed $60" (inclusive of taxes and fees with CPI adjustments). The contracts also preclude bandwidth usage fees and data caps for such service. Because nearly all of MTC Cable's broadband network was built pursuant to these contracts, nearly all of its customers (99.5%) are eligible to receive 25/4 Mbps service for at most $60 per month. MTC Cable expressly relied on the $60 contractual price point (for the minimum tier of service) when it decided to enter into these contracts and take on the debt for its share of construction costs.

10. Given the financial need in the rural communities it serves, MTC Cable has long sought to make broadband service affordable—while preserving its ability to build and offer that service in the first place. MTC Cable has signed up to participate in existing state and federal programs to provide broadband service to low-income customers. It will participate in the State of New York's Connect ED program, which will offer free broadband service to low-income households with school-aged children. It also will participate in the Federal Communications

Commission's Emergency Broadband Benefit ("EBB") Program, which will provide broadband service to low-income households during the COVID-19 pandemic. These programs offer government support in connection with obligations for broadband providers to offer free or discounted service to low-income customers. Unlike the ABA, they do not impose the significant (and unbearable) costs of providing such service entirely on the broadband providers.

Irreparable Harm to MTC Cable from the ABA

11. MTC Cable understands that, on April 16, 2021, New York Governor Andrew Cuomo signed NYS Budget Bill S2506-C. Section 1 of Part NN of the bill amends New York's General Business Law with a new regulation, § 399-zzzzz. The ABA requires "broadband service" providers (including MTC Cable) to offer certain "low-income consumers" broadband Internet access service at a download speed of (1) at least 25 Mbps at a cost of no more than $15 per month, or (2) at least 200 Mbps at a cost of no more than $20 per month, inclusive of recurring taxes and fees. § 399-zzzzz, ¶¶ 2-4. It defines "low-income consumers" to include anyone in a household with (a) children eligible for free or reduced-price school lunch; (b) children eligible for supplemental nutrition program benefits; (c) anyone eligible for Medicaid benefits; (d) senior citizens eligible for rent protections; (e) anyone eligible for rent protections due to disability; and (f) anyone receiving affordability benefits from a utility. *Id.*, ¶ 2. The statute also restricts when, and by how much, broadband providers can increase their prices. *Id.*, ¶¶ 3-4. And it requires providers to "make all commercially reasonable efforts to promote and advertise the availability of broadband service for low-income consumers." *Id.*, ¶ 7. Broadband providers must come into compliance with these requirements no later than June 15, 2021. While enforcement of the law was temporarily stayed pending certain federal court proceedings, I understand that the temporary

stay will expire on August 15, 2024, and the New York Attorney General may then enforce the law against providers such as MTC Cable.

12. MTC Cable understands that the ABA provides for enforcement by the New York Attorney General, with remedies for non-compliance including restitution and civil penalties of up to $1,000 per violation. § 399-zzzzz, ¶ 10. MTC Cable is also aware that Governor Cuomo has vowed to aggressively enforce the ABA—for example, by rescinding franchises under state law from broadband providers who do not comply.

13. If permitted to go into effect, the ABA will inflict irreparable harm on MTC Cable. On one hand, non-compliance is not an option. If the company chooses not to comply with the ABA, it will be subject to massive civil penalties. The penalties could amount to millions of dollars if the failure to offer the $15 rate to each of thousands of customers is treated as a distinct "violation" subject to a $1,000 fine. And recission of state franchises, as Governor Cuomo has threatened, would be a "death penalty" for a broadband provider like MTC Cable—completely barring it from offering service. MTC Cable simply cannot risk those outcomes.

14. Harms from attempting to comply with the regulation would be no less ruinous. Consistent with the $60 ceiling set forth in its public-private partnership contracts with the State of New York. Complying with § 399-zzzzz would force the company to discount that price *by about 75%*, without providing any avenue for MTC Cable to recover that lost revenue from other sources.

15. The $15 rate would not only be a major discount from MTC Cable's current rates, but it would also drive the price far below the cost of providing service. As explained above, broadband networks in sparse rural areas are expensive both to build and to operate. MTC Cable must not only recoup its large investment into network construction but must also pay higher costs

for ongoing maintenance, upstream bandwidth, etc. MTC Cable's average cost to provide service is approximately $44 per month per household—*triple* the ABA's $15 celling. The $15 price point is thus utterly divorced from any rational calculation of the costs of providing service for rural providers like MTC Cable. Comparing the $15 rate in § 399-zzzzz with the $60 rate in the public-private partnership contracts makes that plainly apparent. Just a couple of years ago, the State contracted with MTC Cable to deploy broadband throughout rural New York based on a $60 price ceiling for the cheapest service tier. Now it demands that MTC Cable cut that price by about 75%, to $15 per month, with no explanation for the apparent change in the State's view of the economically reasonable price point for such service.

16. Not only would compliance with the ABA require MTC Cable to make massive rate cuts, those cuts would likely affect a large number of subscribers. The ABA defines as "low income" anyone in a household with a child "eligible for free or reduced-priced lunch through the National School Lunch Program." § 399-zzzzz, ¶2. In the four counties MTC Cable serves, *all students* are eligible for free or reduced-priced lunch. That eligibility criterion alone would cover approximately 20% of MTC Cable's broadband customers. As another data point, about one-quarter of MTC Cable's subscribers purchase 25 Mbps service at or near the minimum $60 price point. Insofar as households purchase that cheapest service tier due to limited incomes, a quarter of the company's customers could be eligible for, and switch to, the $15 per month tier mandated under § 399-zzzzz. Additionally, a $15 per month minimum tier would also cause new low-income customers to sign up for service. Given the $44-per-customer average cost for MTC Cable to provide service, MTC Cable would be signing up new customers at a price less than the cost of serving those customers. That would further reduce the company's cash flow, driving it even deeper toward and into the red.

17. The combined effect of massive discounts and a large number of customers eligible for discounted pricing will be a large loss of total revenue. MTC Cable estimates that top-line revenue will decrease by $1,268,000, and net cash flow will decrease by $1,268,000. The statute offers no way to offset lost revenues, and it would be infeasible to offset lost revenues by charging higher income customers higher prices. If MTC Cable seeks to offset losses by charging higher prices to customers who do not qualify for the $15 rate, those higher-income customers may switch to competing providers, such as satellite broadband providers with which MTC Cable competes throughout its service area. Alternatively, those customers may drop down to a lower service tier with lower pricing—for example, dropping from gigabit service to 100 Mbps service, or dropping premium cable channels. Those possibilities are especially significant given that MTC Cable's service area has lower median incomes than the State as a whole. That makes it much more likely that customers who do not qualify for the $15 rate (but who are still price sensitive) will switch to another provider or a lower tier of service in response to any price increase.

18. Revenue and cash-flow reductions of that magnitude would have major impacts on MTC Cable's business. First, it would jeopardize MTC Cable's ability to make regular payments on its debt. As explained above, MTC Cable borrowed more than $12 million to build out its broadband network. After an initial period during which the company was required only to pay only interest, the company is now obligated to make regular payments of interest and principal on that debt. Those payments are *in excess of* what MTC Cable could bear in the face of the projected decline in revenues. When MTC Cable entered into public-private partnership contracts with the State to build broadband—and borrowed millions of dollars to pay for its share of construction costs—it did so in reliance on the $60-per-month ceiling in those contracts. Cutting the price by

three-quarters would obliterate the financial assumptions on which MTC Cable's broadband network was built and financed, and risks making it unviable entirely.

19. Compliance also will create other harms. MTC Cable plans to conduct service expansions (funded by MTC Cable itself) to reach pockets of customers who remain unserved. MTC Cable will have to halt such efforts to manage cash flow. MTC Cable will also have to incur administrative costs to offer and bill for the $15-per-month service tier. Computer billing systems, marketing materials, and the like will have to be updated. The ABA also requires providers to advertise the $15-per-month service, which will require MTC Cable to incur additional marketing expenses. § 399-zzzzz, ¶ 7.

20. These harms to MTC Cable will be irreparable. If MTC Cable incurs any civil penalties, or worse suffers catastrophic losses from losing its franchise, it could not recover such losses as damages from the State, given the State's Eleventh Amendment immunities. And if MTC Cable complies, there is no way for it to recover losses from being forced to offer below-cost service to low-income customers. It is plainly implausible (and would be cruel to suggest) that MTC Cable could recover losses from the low-income customers themselves after this litigation. Customers with limited incomes would likely be unable to pay any surcharge beyond MTC Cable's normal rates to recover losses. Any attempt to do so would likely result in significant loses of subscribership as customers who could afford service at $60 per month are forced to give up service at a higher price point. It would also be grossly unfair to surprise lower-income customers with an unexpected bill for past services. Nor would it be possible to recover the amounts from higher-income customers. As explained above, in a competitive market, those customers could switch to alternatives such as satellite, or drop down to cheaper service tiers. Any attempt to recover lost revenues from customers, moreover, either lower-income or higher-income customers,

would likely result in lost subscribership that could not be easily reversed, and loss of customer goodwill.

21. Compliance would also impose other irreparable harms. Even if Plaintiffs' prevail in this litigation, MTC Cable will suffer a large loss of customer goodwill, and probably a loss of subscribers as well, if it is forced to lower prices to $15 for many customers only to raise them to the prior levels after this litigation. Goodwill will be injured even if MTC Cable does not attempt to recover revenues lost during the pendency of this litigation. MTC Cable, moreover, has no remedy for the adverse financial consequences to the company if it is unable to make payments on its debt due to losses in revenue. Damage to the company's credit, relationships with lenders, and commercial reputation from any default on debt would be irreversible. Finally, if MTC Cable forgoes opportunities to expand its network during the pendency of this litigation, those missed opportunities will produce lasting harms. Not only will the company have forgone revenue it could have earned during that period; it also will have suffered competitive harms from customers signing up with competitors, such as satellite competitors, in the meantime. Those competitive harms will not only be lasting; they will be impossible to quantify.

22. MTC Cable understands that the ABA provides for a discretionary exemption to its requirements. The regulation empowers the New York Department of Public Services ("DPS") to waive, at its discretion, the statutory requirement if a broadband provider has less than 20,000 customers *and* it finds that enforcement "would result in unreasonable and unsustainable financial impact on the broadband service provider." § 399-zzzzz, ¶ 5. However, on June 21, 2021, the DPS issued a notice staying the process for granting waiver requests. Shortly after the Second Circuit ruled, the DPS opened a new docket (24-M-0255), but no action has been taken in that proceeding and the DPS has not revived the original proceeding. To date, DPS has not granted MTC a waiver.

Nor has DPS articulated the standards it will use to evaluate waiver requests—such as how it will determine whether providers would suffer "unreasonable or unsustainable financial impact" justifying waiving the regulation. The speculative availability of the waiver, therefore, does not obviate MTC Cable's irreparable harms. Indeed, MTC's experience with DPS suggests that DPS may impose financially burdensome conditions in connection with waiver requests. For example, DPS recently imposed burdensome and over-reaching conditions on MTC in connection with approval of a simple stock repurchase transaction. In the event DPS uses the waiver process to impose different conditions and burdens on providers, the financial relief promised by the § 399-zzzzz, ¶5 waiver would not materialize, and MTC's harm would not be mitigated. Regardless, MTC Cable cannot risk failing to comply in hopes that it will be granted a waiver—it must proceed with compliance and incur the above-described irreparable harms regardless.

August 1, 2024

Glen Faulkner
MTC Cable
P.O. Box 260
50 Swart Street
Margaretville, NY 12455

EXHIBIT 12

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.

DECLARATION OF JASON MILLER IN SUPPORT OF 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

DECLARATION OF JASON MILLER

I, Jason Miller, declare as follows.

1. I, Jason Miller, am Vice President/General Manager for Delhi Telephone Company ("Delhi Telephone"). In that role, I am responsible for operating both Delhi Telephone (an incumbent local exchange company) and its affiliate DTC Cable, Inc. (a competitive local exchange company) (collectively, "DTC"). DTC provides broadband internet access service to customers in rural areas of New York.

2. DTC would incur irreparable harms if Part NN of New York State Budget Bill S2506-C (the "Affordable Broadband Act") is permitted to take effect. The Affordable Broadband Act would force DTC to cut its prices for the lowest-tier of broadband Internet service to below what it costs DTC to provide that service, and cause DTC to suffer significant losses of revenues. That loss of revenue would be irreparable—there would be no practical way for DTC to recover those losses even if Plaintiffs prevail in this litigation. Moreover, as a result of those revenue losses, DTC would be forced to abandon efforts to expand its coverage, which would permanently set it back in terms of growing its subscriber base.

3. DTC serves customers in four New York counties: Broome, Chenango, Delaware, and Otsego. These counties are predominantly rural and building and maintaining broadband infrastructure in these regions is extremely expensive. Over the past eight years, DTC has invested more than $20 million in building and improving its broadband network. It has also added over 17 employees to serve its growing customer base.

4. In building its broadband network, DTC has participated in contractual public-private partnerships with the State of New York, in particular the Broadband Programs Office's Broadband Expansion Project. Under these projects, DTC received certain funds from the State,

conditioned on DTC offering at least 25/4 Mbps service for at most $60 per month. However, DTC was required to invest large amounts of its own money toward these projects. It borrowed more than $15 million to pay its share of the project capital costs.

5. Households in the counties DTC serves also have more limited incomes than households in the rest of New York. In 2020, the median household income in Delaware County (which comprises over 90% of DTC's service territory) was $54,440 - well below the $68,660 median income of the State of New York as a whole. Delaware County also suffers from significant poverty—estimates of the county's poverty rate range from 12.6% to 16.5%, compared to the 11.5% national average. Moreover, according to the New York State Well-Being Indicators Clearinghouse, 48 percent of the children in Delaware County area are eligible for the free and reduced-price school lunch.

6. Due to the limited financial means of the population DTC serves, a large number of DTC's current and potential broadband customers would likely qualify for discounted service under the Affordable Broadband Act. For example, under the Affordable Broadband Act, households with students eligible for free and reduced-price school lunch — half of the students in Delaware County — would qualify as "low-income" households eligible for $15-per-month service.

7. Providing broadband service at the discounts the Affordable Broadband Act mandates would have several adverse negative effects on DTC's business, creating irreparable harms. I estimate that compliance with the Affordable Broadband Act would cause DTC to suffer a net income loss of about $1.8 million per year (or $150,000 per month), which would be a 90% reduction in net income. That is assuming half of DTC's customers qualify for discounted service under the Affordable Broadband Act - a reasonable assumption given the economic characteristics

of the areas in which DTC operates. The Affordable Broadband Act would leave DTC with no avenue for recouping these costs. The Affordable Broadband Act offers no alternative revenue sources for providers who would suffer large revenue losses due to significant numbers of low-income customers being eligible for the $15-per-month service. Moreover, DTC could not make up those revenue losses by charging more to customers in the relatively low-income counties that DTC serves. Those customers would likely switch to competing services, such as satellite, or drop down to a more affordable tier of service in order, offsetting any price increases.

8. Such revenue losses would have adverse negative effects on DTC's finances. First, DTC must make regular payments of interest and principal on the $15 million it borrowed to finance construction of its network. If DTC's net income declined by $1.8 million per year, it would be at risk of being unable to make payments on its debt. DTC also would thus have no choice but to drastically reduce costs to ensure its economic survival. It would have to halt investments into growing its network and its business in New York. It would also need to reduce the size of its workforce to cut costs.

9. Second, compliance with the Affordable Broadband Act would render it impossible to build and maintain DTC's extensive rural service network. Providing service in a predominantly rural region is extremely expensive. DTC currently serves, on average, fewer than four customers per mile of cable or fiber plant, which means that the costs of building and maintaining a given amount of infrastructure is spread out over relatively few customers. Rural providers like DTC also suffer from high taxes and fees. For example, DTC relies on utility poles to carry the fiber cables over which it provides service. It pays a rental fee, called a pole attachment fee, for each pole on which it has fiber lines. Since DTC serves relatively few customers per mile of fiber, the pole attachment fees per customer are high. Between pole attachments and other recurring direct

costs (middle mile transport and Internet bandwidth from a tier 1 provider), the facilities cost to DTC for each customer is approximately $29.76 per month. The reduction in revenues from complying with the Affordable Broadband Act would leave DTC with insufficient revenue to cover these and other costs — such as customer service, engineering, network maintenance, and operating taxes — that DTC incurs in providing broadband service. These shortfalls would force DTC to restructure its business further, such as by laying off workers, which would harm its service and its customers. A more limited workforce would, for example, make it hard for DTC to promptly conduct repairs and restore service after storm damage, or to quickly address customer service tickets. Such loss of service quality would cost DTC substantial customer goodwill it has built up over generations.

10. Third, DTC has dedicated significant resources and investments over the past eight years to get broadband to as many households as possible, extending the network over 700 miles. Under the current legislation, DTC would halt further expansion and look to remove unprofitable fiber optic lines.

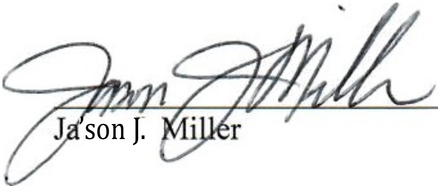
11. These harms would all be irreparable. Given the economic circumstances of its customer base, DTC could not feasibly recover revenues by charging customers more after-the-fact in the event Plaintiffs in this case prevail. Any attempt to do so would cause customers to leave or to drop down to lower tiers of service. Indeed, even if DTC did not attempt to recoup revenue lost during this litigation, customer goodwill would be impaired if DTC lowered prices to an unsustainable $15-per-month level, only to have to raise them again in the event the Affordable Broadband Act is found to be illegal. Additionally, any harms resulting from defaulting on debt or being unable to make payments would be irreparable. The company's creditworthiness could not be easily rehabilitated even if Plaintiffs prevail in this suit. Foregone opportunities to expand

the network would similarly create irreparable harms. And lost customer goodwill due to having to scale back maintenance and cut customer service would be hard to reverse. Especially in the tight-knit, rural counties in which DTC operates, it is hard to rehabilitate the reputation of a company that has lost goodwill among its customers.

12. Finally, DTC understands that the Affordable Broadband Act includes a discretionary exemption for broadband providers that serve fewer than 20,000 households. While DTC has less than 20,000 subscribers, it cannot avoid the above-described irreparable harms by assuming that it will qualify for an exemption. The New York Department of Public Services has not announced any standards for evaluating exemption requests, and DTC may not qualify. Given the massive penalties associated with non-compliance, including possibly even the loss of DTC's franchise, DTC would have no choice but to comply with the Affordable Broadband Act, and to bear the attendant irreparable harms, including the possibility of bankruptcy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of July, 2024 in Delhi, New York.



Jason J. Miller

EXHIBIT 13

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.

DECLARATION OF MATTHEW KRAMER COAKLEY IN SUPPORT OF 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

DECLARATION OF MATTHEW KRAMER COAKLEY

I, Matthew Kramer Coakley, declare as follows:

1. I am Matthew Kramer Coakley, Vice President for Consumer Marketing Strategy for the operating-company subsidiaries of Verizon Communications Inc. ("Verizon") that provide wireless and wireline telecommunications services throughout the United States. I make this declaration in support of the Associations' motion for a preliminary injunction and to describe the irreparable harms certain of those companies could suffer if the New York Attorney General were permitted to begin enforcing the requirements of Section 399-zzzzz of the New York General Business Law, as enacted by chapter 56 of the Laws of 2021 (the "Affordable Broadband Act" or "ABA"). The ABA would require all providers of wireline and fixed wireless service in New York State, including Verizon, to make available to qualifying consumers a broadband plan for no more than $15 or $20 month, depending on download speed.

2. Verizon offers several types of fixed broadband service in New York State. In some parts of the State, including in parts of New York City and the surrounding suburbs, and in certain areas Upstate, Verizon offers high speed broadband service through a fiber-optic network and markets this service under the brand name "Fios." Currently, Verizon provides high speed broadband access to approximately 1.7 million Fios customers in New York State. Verizon also provides Fixed Wireless Access service through its mobile network to qualified customers. This Fixed Wireless Access ("FWA") provides broadband access through a home-based router connected on either the Verizon Wireless 5G or 4G LTE cellular network. The availability of this service is limited to areas where the Verizon Wireless cellular network currently has the capacity to handle the increased network usage associated with this service. Verizon currently

has approximately 80,000 FWA subscribers and is available in over 1.6 million homes in New York.

Verizon Forward

3. Verizon is committed to helping customers who qualify for financial assistance obtain high speed broadband access. To that end, as described below, Verizon already has a program in place that provides fast and reliable internet service to eligible customers, in conjunction with existing federal programs. This program is known as Verizon Forward. The ABA in many ways duplicates those efforts. But to the extent it goes beyond those existing programs, the ABA imposes unfair and irreparable harms on Verizon.

4. Customers who qualify for Verizon Forward can obtain service either through Fios or FWA where those services are available. The cost to customers for this service is as low as $20 per month and thus generally satisfies the requirements of the ABA.

5. Verizon Forward is available to customers if they meet at least *one* of the following criteria:

(i) received a Federal Pell Grant within a year prior to application, or

(ii) qualified for a federal assistance program within 180 days prior to application, including the federal Lifeline telecommunications program, SNAP, Medicaid, or the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

ABA's Harm to Verizon

6. The ABA would require Verizon to make available qualifying broadband service to several categories of customers who may not currently qualify for the current Verizon Forward program. This would include individuals who are eligible for free or reduced lunch through the National School Lunch Program or are eligible for certain rent increase exemptions.

7. The ABA would also require Verizon to continue this program even if Verizon would otherwise choose to end or modify the Verizon Forward program. This imposes several sets of likely costs on Verizon.

8. First, Verizon would be required to spend time and resources to establish a system to verify whether customers in fact qualify for reduced cost service under the ABA. Unlike the federal Lifeline program that Verizon uses currently to verify eligibility for Verizon Forward in most cases, there is no centralized database against which Verizon can check whether a customer meets these qualifications, several of which are unique to the ABA. Accordingly, Verizon will have to design and implement such a verification system (or retain a third party to do so). This will include designating and training customer service representatives to review and approve the documentation necessary to demonstrate a customer is eligible to participate in the program. It may include systems integrations or verification processes with multiple federal and state agencies, which in turn could make it more time-consuming and complicated for consumers to verify eligibility, activate broadband service, and regularly re-verify their eligibility throughout their tenure. It will also require Verizon to securely retain this information. Verizon estimates the total personnel costs of this work to be $725,000 and potentially more, depending on the level of complexity encountered during the development process.

9. Second, if customers meet the eligibility requirements for the ABA but are not eligible for the Verizon Forward plan currently, Verizon would suffer the loss of revenue between the normal charge that Verizon would collect for this service and the cost specified in the ABA. In the case of a Fios customer, this would be at least $30 per month per participating customer — the difference between what Verizon charges eligible customers for the Verizon Forward plan and what it charges non-eligible customers for the same service ($49.99 per month before any applicable taxes and fees).

10. The cost to Verizon would be even larger for FWA customers. Verizon currently offers FWA plans that retail at $80 or $60 per month depending on speed. For customers who are currently eligible for Verizon Forward, Verizon makes these plans available for $50 and $30 respectively. If the ABA were to go into effect and Verizon were to continue to offer these plans in New York, Verizon would suffer a non-recoverable loss of revenue of $30 per month for customers who are on the higher speed plans, and $15 per month for the other plans[1]. For customers who are not currently eligible for Verizon Forward but meet the eligibility requirements of the ABA and choose a FWA plan, Verizon would suffer an even greater non-recoverable loss. The loss would be $60 per month for those on the $80 retail plans and $45 per month for those on the $60 retail plans.[2]

11. If the Court later holds that the ABA is unlawful, Verizon would not be able to retroactively bill these customers who were only paying the lower amount allowed under the

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[1] Customers who also purchase Verizon Wireless mobile service are currently eligible for an additional $15 per month discount, so for those customers Verizon would only suffer a loss of $15 for Verizon Forward eligible customers on the high speed plan.

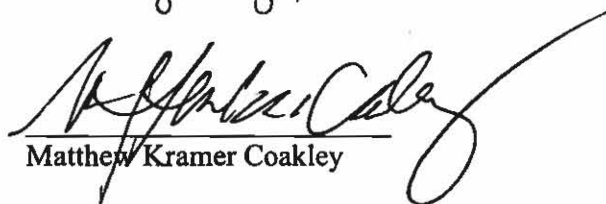
[2] This loss would be $15 per month less for those customers who purchase Verizon Wireless mobile service. In addition, Verizon offers a $10 per month credit for customers who use auto pay, and so if these customers use auto pay the loss would be $10 per month less. The auto pay discount is not applicable to the rates available to Verizon Forward customers.

ABA for the difference between that amount and what they would have paid in the absence of the Statute. Furthermore, going forward, Verizon would either have to continue providing those discounts voluntarily — incurring the harms set forth above — or cease providing the discounts, creating harm to Verizon's reputation and customer goodwill.

12. Finally, the Statute requires Verizon to "make commercially reasonable efforts to promote and advertise" the availability of its low-income broadband plan. The full scope of this requirement is vague. However, given Verizon's experience in promoting previously available federal programs as well as its own Fios Forward program, this could impose significant costs on Verizon, depending on the type of advertising involved, the channels required to reach customers throughout the State of New York, and how long the campaign runs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of August, 2024 in Basking Ridge, NJ.



Matthew Kramer Coakley

EXHIBIT 14

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.

DECLARATION OF ANGELA WILKIN IN SUPPORT OF 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

DECLARATION OF ANGELA WILKIN

I, Angela Wilkin, declare as follows:

1. I am Angela Wilkin, AVP, Product Management & Development, Mobile Broadband Network & Services for the operating companies of AT&T ("AT&T") that provide wireless and wireline telecommunications services throughout the United States. I make this declaration in support of the Associations' motion for a preliminary injunction and to describe the irreparable harms certain operating companies of AT&T could suffer if the Attorney General of New York begins to enforce the requirements of Section 399-zzzzz of the New York General Business Law, as enacted by chapter 56 of the Laws of 2021 (which the New York Attorney General in litigation has referred to as the "Affordable Broadband Act" or "ABA") on August 25, 2024. This bill would require all providers of wireline and fixed wireless service in New York State, including AT&T, to make available to qualifying consumers a broadband plan for no more than $15 or $20 month, depending on download speed. As discussed herein, the ABA imposes unfair and irreparable harms on AT&T.

2. AT&T offers broadband access to residential mass-market customers in some areas of New York through its AT&T Internet Air fixed wireless product; this service connects a fixed router in a customer's home to the internet through AT&T's 5G mobile network. The availability of AT&T Internet Air is limited to areas where the AT&T Wireless cellular network currently has the capacity to handle the increased network usage associated with this service. In those areas, the service currently meets the speed requirements in the Statute for the $15 low-income broadband plan. Although AT&T currently has relatively few Internet Air customers, our subscriber base in New York State is growing rapidly. We estimate that approximately 20 percent of consumers in New York meet eligibility criteria for low-cost service under the ABA.

3. Requiring AT&T to provide broadband to eligible customers at a cost of $15 would subject AT&T to irreparable harm. AT&T currently offers AT&T Internet Air service for a retail price of $60 (for customers with an Auto Bill Pay Pay discount, $65 for those not on autopay),[1] plus taxes and fees. For any customer who is eligible under the ABA and who would sign up for AT&T Internet Air at a cost of $15 per month, AT&T will suffer a non-recoverable loss of revenue of at least $45 per month (or $28 if they also are an AT&T Wireless customer). In fact, $15 is below AT&T's current cost associated with this service.

4. If the Court later holds that the ABA is unlawful, AT&T would not be able to retroactively bill AT&T Internet Air customers who were only paying $15 per month for the difference between that amount and what they would have paid in the absence of the Statute. Furthermore, going forward, AT&T would either be required to continue providing those discounts voluntarily — incurring the harms set forth above — or cease providing the discounts, creating harm to AT&T's reputation and customer goodwill.

5. Furthermore, because AT&T does not currently have a qualifying plan for AT&T Internet Air, AT&T would be required to incur costs associated with setting up such a plan. AT&T also would be required to spend time and resources to establish a system to verify whether customers in fact qualify for reduced cost service under the ABA. Unlike with the federal Affordable Connectivity program (ACP), there is no centralized database against which AT&T can check and verify whether a customer is eligible for or participating in federal or state-specific government assistance programs. Accordingly, AT&T will have to design and implement such a verification system to the best of their ability. This will include designating

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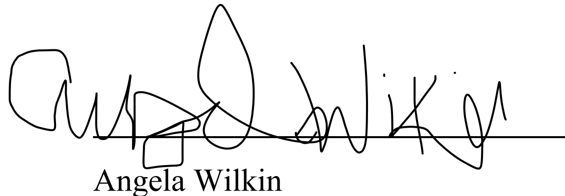
[1] Customers who also purchase AT&T Wireless mobile service are eligible for an additional $12 per month discount, making their add-on rate for AT&T Internet Air $53 per month, or $48 per month with autopay, plus taxes and fees.

and training customer service representatives to review and approve the documentation necessary to demonstrate a customer is eligible to participate in the program. It may include systems integrations or verification processes with multiple federal and state agencies, which in turn could make it more time-consuming and complicated for consumers to verify eligibility, activate broadband service, and regularly re-verify their eligibility throughout their tenure. It will also require AT&T to securely retain this information. AT&T estimates the total costs of this work would be approximately $1,000,000, and potentially more, depending on the level of complexity encountered during the development and marketing process. These costs represent the upfront costs of developing and launching a verification process; AT&T would continue to incur additional and on-going costs so long as the ABA is in effect. These costs too would be unrecoverable in the event the ABA is found to be unlawful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29th day of July 2024 in Atlanta, Georgia [city and state]



Angela Wilkin