No. 24A138

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.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR A STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT UPON THE GRANTING OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENTS

Applicants' Statements pursuant to Rule 29.6 were set forth at pages i-ii of the stay application, and there are no amendments to those Statements.

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

New York had the opportunity in August to argue that applicants do not satisfy the factors for granting a stay while this Court considers their petition for a writ of certiorari. Rather than take that opportunity, New York stipulated that it would not enforce the Affordable Broadband Act ("ABA") against applicants' members.[1] That stipulation ends "30 days after the date when [this] Court decides whether to grant or deny the . . . petition for a writ of certiorari."[2]

Applicants thus do not need a stay *pending* this Court's decision to grant or deny their petition for a writ of certiorari (No. 24-161). Applicants already *have* that relief. The only open question is whether, if this Court grants that petition, New York should be prohibited from enforcing the ABA while this Court considers whether federal law preempts the ABA's first-of-its-kind broadband rate regulation, as the dissenting Judge below and the district court correctly held.

The answer is yes. The combination of a grant of certiorari and the "considered analysis" in Judge Sullivan's dissent and Judge Hurley's order granting a preliminary injunction raises "a fair prospect that this Court will reverse the

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[1] *See* Jt. Ltr. from Counsel for Pet'rs and Resp., *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 24A138 (U.S. Aug. 8, 2024).

[2] *Id.* Attach., Supplemental Stipulation ¶ 3.

decision below." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Applicants have also demonstrated that enforcement of the ABA would cause them irreparable harm and that a stay is in the public interest — points New York conceded by stipulating in 2021 to a permanent injunction and twice stipulating in 2024 not to enforce the ABA despite the Second Circuit's ruling in New York's favor.

Although New York willingly stipulated to a stay that lasts while the Court considers the certiorari petition — but drew the line at a continued stay if the Court grants that petition — New York's opposition noticeably lacks any explanation for its line drawing. Nor does New York cite a single instance in which an applicant obtained a stay while the Court considers a certiorari petition without also maintaining that relief once the petition is granted. On the contrary, the Court's normal practice where "the petition is granted" is for the stay to remain in effect while the Court considers the merits and "terminate upon the sending down of the judgment of this Court." *E.g.*, *Ohio v. EPA*, 144 S. Ct. 2040, 2058 (2024).[3] The Court should follow that practice here.

ARGUMENT

1. New York's stipulation materially alters the considerations pertinent to this stay application. Normally, a party seeking "a stay pending the filing and disposition of a petition for a writ of certiorari" must first show "a reasonable

[3] *See also*, *e.g.*, *Garland v. Vanderstok*, 144 S. Ct. 44 (2023); *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022); *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 416 (2021); *Ross v. National Urb. League*, 141 S. Ct. 18 (2020).

probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). But New York voluntarily gave applicants relief that lasts through — and 30 days beyond — the Court's decision on whether to grant certiorari. Therefore, New York's arguments (at 16-20) that the Court should deny certiorari are irrelevant to this motion.[4]

2. The next consideration is whether there is "a fair prospect" — not a substantial likelihood or even reasonable probability — "that a majority of the Court will vote to reverse the judgment below." *Hollingsworth*, 558 U.S. at 190; *accord Merrill v. Milligan,* 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). But that factor is important "in cases presented on direct appeal — where [the Court] lack[s] the discretionary power to refuse to decide the merits." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

By contrast, in cases where "review is sought by the more discretionary avenue of writ of certiorari," "the consideration of prospects for reversal dovetails" with the question whether the Court will hear the case and so "has less independent significance." *In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers). Because applicants seek relief that will apply only after the Court grants certiorari, there is little work for the second criterion to perform. Indeed, the decision to grant certiorari implies the existence of a fair prospect of reversal of the Second Circuit's

[4] New York's arguments are wrong, as applicants explain in their contemporaneously filed reply brief in support of their petition for a writ of certiorari.

judgment. In addition, the presence of "considered analysis . . . on the other side" — here, found in Judge Sullivan's dissent and Judge Hurley's preliminary injunction decision — is sufficient to establish "a fair prospect that this Court will reverse the decision below." *King*, 567 U.S. at 1303. New York's arguments (at 20-27) that applicants "would [not] be likely to prevail" on the merits misstate the standard.[5]

3. The third factor requires showing "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. Applicants' members' declarations satisfy that requirement. They identify the likely cancellation of existing network expansion plans, unrecoverable losses of revenue and administrative costs, and the loss of goodwill should the law temporarily take effect before this Court holds that federal law preempts it. *See* Stay App. 21-24. Against this showing, New York raises the same arguments that the district court rejected, *see New York State Telecomms. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 276-79 (E.D.N.Y. 2021) ("*NYSTA I*") (Stay App. Ex. 1), and that New York abandoned when it stipulated to the entry of a permanent injunction, *see* Stay App. Ex. 4.

For example, New York again notes (at 30-31) that, in 2021, many smaller providers received temporary exemptions from the ABA. But as Judge Hurley explained, the "granted temporary exemptions . . . do not guarantee that [those companies] will avoid irreparable injury," as the "temporary exemptions merely give the [state agency] more time to decide (viz. potentially deny) the requests, pursuant to 'criteria and factors' not yet identified." *NYSTA I*, 544 F. Supp. 3d at 278. New

[5] They, too, are wrong for the reasons in applicants' reply brief in support of their petition for a writ of certiorari.

York concedes (at 10 n.6) that the state agency still has not even re-started, much less completed, its review of the exemption requests or specified the criteria and factors that will apply. And declarants for three of those companies each explain that the "uncertainty" about whether they will ultimately receive a permanent exemption prevents them from "mak[ing] forward-looking plans" now. Stay App. Ex. 10 ¶ 16 ("Northrup Decl."); *see id.* Ex. 12 ¶ 12 ("Miller Decl."); *id.* Ex. 11 ¶ 22 ("Faulkner Decl.") (noting that the continued failure to "articulate[] the standards" leaves open the likelihood the state agency will "impose financially burdensome conditions in connection with waiver requests").

As for AT&T and Verizon, New York does not dispute that they will suffer unrecoverable monthly, per-customer revenue losses of $30 to $60, for each customer who signs up for the ABA-mandated rates, plus $725,000 to $1,000,000 each in compliance costs. *See* Stay App. Ex. 13 ¶¶ 8-10 ("Coakley Decl."); Ex. 14 ¶¶ 3, 5 ("Wilkin Decl."). Instead, New York asserts (at 30 & n.14) that, as large companies, they can absorb those losses. But when monetary losses are unrecoverable — which the Eleventh Amendment makes so here, *see NYSTA I*, 544 F. Supp. 3d at 276 — it is not "the magnitude but the irreparability that counts." *Career Colls. & Schs. of Texas v. U.S. Dep't of Educ.*, 98 F.4th 220, 238 (5th Cir. 2024); *see also*, *e.g.*, *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 218 (4th Cir. 2019) (explaining that, where "monetary damages will be

unavailable," "there is no bar to treating [monetary] losses as irreparable injury justifying preliminary relief").[6]

New York dismisses (at 32) as "speculative" the loss of goodwill that providers would face should they revert to their existing marketplace offerings after the ABA briefly requires them to offer broadband at lower prices and on different terms. But there is nothing speculative about it. The ABA's rates and terms are inconsistent with providers' existing offerings. *See* Stay App. Ex. 10 ¶ 9 (Northrup Decl.); Ex. 11 ¶¶ 14-17 (Faulkner Decl.); Ex. 12 ¶¶ 2, 7-8 (Miller Decl.); Ex. 13 ¶¶ 9-10 (Coakley Decl.); Ex. 14 ¶ 3 (Wilkin Decl.). Those providers would likely revert to offerings consistent with marketplace conditions after the Court strikes down the ABA, costing them consumers' goodwill. *See id.* Ex. 10 ¶ 13 (Northrup Decl.); Ex. 11 ¶¶ 20-21 (Faulkner Decl.); Ex. 12 ¶ 11 (Miller Decl.); Ex. 13 ¶ 11 (Coakley Decl.); Ex. 14 ¶ 4 (Wilkin Decl.).

4. Finally, in "close cases" the Court also "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*,

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[6] New York also discusses (at 29-30) Charter and Altice, which are not members of any petitioning association (though New York has agreed not to enforce the ABA against members of their trade association (NCTA) on the same terms as in its stipulation with applicants here). Those cable companies' low-income offerings are not voluntary, but the result of a condition New York imposed when approving two separate 2016 mergers. When that condition expired, Charter increased the price (and speed) of its offering. *See* Order Adopting 2024 Settlement Agreement at 5-6, Case 15-M-0388 (N.Y.P.S.C. Aug. 15, 2024). New York, however, claimed the condition "had no expiration date" — that is, that its merger condition had required Charter to sell its low-income offering at $14.99 per month in perpetuity. *Id.* at 11. Charter settled that dispute by agreeing to extend the condition for four more years. *See id.* Attach. As New York notes, Altice has since requested the same outcome. *See* Galasso Decl. ¶ 20.

558 U.S. at 190. Here, the case is not close, but the balancing is easy. New York acknowledges (at 29) that nearly all New Yorkers already have at least one affordable broadband option available to them, without the ABA. And New York twice agreed *not* to enforce the ABA in 2024, despite the Second Circuit's ruling in its favor, instead allowing marketplace conditions to persist. *See* Stay App. Ex. 5 (Stipulation (June 11, 2024)); Supplemental Stipulation (Aug. 7, 2024). New York offers no explanation why this Court's *grant* of certiorari could swing the balance of equities in favor of a first-of-its-kind intrusion into the marketplace. On the contrary, New York has acknowledged the benefit of "avoid[ing] potential uncertainty or confusion about the effect of the Affordable Broadband Act" while litigation continues. Stipulation at 3. If this Court grants certiorari, that "potential uncertainty" will persist. Therefore, the ABA should remain stayed — as it has been since mid-2021 — until this Court resolves this case on the merits.

CONCLUSION

As explained in the petition for a writ of certiorari and reply, the Court should grant the petition. Once it does so, the Court should also stay the Second Circuit's decision — thereby preventing the ABA from taking effect — until this Court sends down its judgment.

Respectfully submitted,

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