21-1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

On appeal from United States District Court
for the Eastern District of New York

BRIEF OF ACCESS NOW, CENTER FOR MEDIA JUSTICE DBA MEDIAJUSTICE, COMMON SENSE, NATIONAL CONSUMER LAW CENTER, NATIONAL DIGITAL INCLUSION ALLIANCE, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, NEXT CENTURY CITIES, AND UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATION, INC., AS AMICI CURIAE IN SUPPORT OF DEFENDANT - APPELLANT

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December 1, 2021

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Access Now, Center for Media Justice dba MediaJustice, Common Sense, National Consumer Law Center, National Digital Inclusion Alliance, New America's Open Technology Institute, Next Century Cities, and the United Church of Christ Office of Communication, Inc., hereby states as follows:

Access Now has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

Center for Media Justice dba MediaJustice has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

Common Sense has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

National Consumer Law Center has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

National Digital Inclusion Alliance has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

New America's Open Technology Institute has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

Next Century Cities has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

The United Church of Christ, Office of Communication, Inc., has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

/s/Andrew Jay Schwartzman

Andrew Jay Schwartzman
Attorney for Amici Curiae

Date: December 1, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

Regulations

Administrative Materials

INTEREST OF AMICUS CURIAE

Amici curiae [1] are non-profit advocacy organizations and online companies that have for many years supported low-income broadband access programs to ensure all consumers can afford access to high-speed broadband internet. Amici curiae thus have an established interest in the outcome and potential ramifications of this proceeding, support implementation of the statute under review, and believe that their expertise on affordable broadband for low-income consumers will aid the Court and provide a fuller view of what is at stake in this case. Listed in alphabetical order, these groups are the following:

Access Now is an international civil society organization registered as a 501(c)(3) non-profit in the U.S., and focuses on defending and extending the digital rights of users at risk around the world. Access Now has filed several comments at the Federal Communications Commission covering the Lifeline program and the Emergency Broadband Benefit.

Center for Media Justice dba MediaJustice is a non-profit, 501(c)(3) Cthrough policies and practices that, among other things, ensure democratic media

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[1] No party’s counsel authored this brief in whole or in part, and no person other than amici, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to its filing.

ownership, fundamental communication rights, universal media and technology access at affordable prices. MediaJustice has a network of over one hundred local, regional, or statewide affiliate social-justice organizations. MediaJustice seeks to build a movement for a more just and participatory digital world.

Common Sense is the nation's leading independent nonprofit organization dedicated to helping kids and families thrive in a world of media and technology. We empower parents, teachers, and policymakers by providing unbiased information, trusted advice, and innovative tools to help them harness the power of media and technology as a positive force in all kids' lives. Common Sense has an uncommon reach among parents and teachers, with over 100 million users and half a million educators across its network. Common Sense has long been committed to advocating for broadband connectivity for all children and families, in schools and in homes, regardless of their socioeconomic status and geographic location.

National Consumer Law Center ("NCLC") has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and utility publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the

nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC has been active in several FCC proceedings related to, for example, Lifeline and the Emergency Broadband Benefit.

National Digital Inclusion Alliance is a non-profit, 501(c)(3) organization supporting a community of digital inclusion practitioners and advocates who engage in local and state-level efforts across the U.S. to promote equitable internet access, adoption, and use for low- and moderate-income households and communities, whether urban, rural, or Tribal. It acts on behalf of its 625 affiliate organizations in various policy proceedings relating to broadband deployment and connectivity. It also advances digital equity by supporting and promoting the work of organizations engaged in digital inclusion work and educating policymakers and the public about digital equity.

New America's Open Technology Institute ("OTI") is a 501(c)(3) non-profit organization in the U.S. that works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. OTI is a program within New America, a Washington, DC-based think tank and civil enterprise dedicated to the renewal of American politics, prosperity and purpose in the Digital Age. OTI strongly supports affordable

broadband access, and has filed several comments on the issue as recently as this year at the Federal Communications Commission

Next Century Cities ("NCC") is a 501(c)(3) non-profit organization based in the United States of America. NCC's work focuses on elevating local leadership and documenting community-based insights in state and federal broadband proceedings. NCC has filed multiple comments before the Federal Communications Commission on proposals that impact the Lifeline program, Emergency Broadband Benefit, and Emergency Connectivity Fund.

The United Church of Christ, Office of Communication, Inc. ("UCC OC Inc.") is the United Church of Christ Media Justice Ministry. The United Church of Christ is a faith community rooted in justice that recognizes the unique power of the media and communications to shape public understanding and thus society and participation in society. Established in 1959, UCC OC Inc. established the right of all citizens to participate at the Federal Communications Commission as part of its efforts to ensure a television broadcaster in Jackson, MS served its African-American viewers during the civil rights movement and continues to press for media justice and communications rights in the present day.

ARGUMENT

New York's Affordable Broadband Act is necessary to help address the broadband affordability gap in the state. Federal benefit programs, while being helpful and effective, have not fully solved our nation's, or New York's, broadband affordability problem. New York's law is complementary to, and consistent with, federal efforts to address the cost of broadband internet access.

I. Broadband Internet Adoption is Essential and Cost is a Key Barrier

Access to a broadband connection has been pivotal to living in the twenty-first century, and the urgency of getting online has never been greater. The past few years have taught us what we already knew: broadband is a necessity. Jonathan Sallet, *Broadband for America's Future: A Vision for the 2020s*, Benton Institute for Broadband & Society (Oct. 2019), https://bit.ly/3o37kgv, at 12. It has become part of virtually every economic and social activity. Further, it is imperative for growing the American economy, strengthening our communities, and empowering our workers. *Id*. at 11-12. It has become even more essential during the COVID-19 pandemic, with 90% of Pew Research survey respondents claiming the internet has been essential or important to them during the pandemic. Colleen McClain *et al*., *The Internet and the Pandemic*, Pew Research (Sept. 1, 2021), https://pewrsr.ch/3lihJTS. Despite the internet's importance, FCC data from December 2019 shows that only 77.3% of New Yorkers subscribe to a 25

megabits-per-second (mbps) or faster broadband service. *Fourteenth Broadband Deployment Report*, 36 FCC Rcd 836, 1120 (Appendix G) (2021), https://bit.ly/3FYUtlO.

Cost is the primary barrier to broadband adoption, Sallet, *Broadband for America's Future*, *supra* at 65 ("the price of fixed-network subscriptions is now the primary reason that some people do not subscribe"), and whether a person subscribes to broadband is closely tied to income level—consumer protection laws like New York's are designed to address this issue. Studies have revealed that only 57% of U.S. adults with annual household incomes below $30,000 have home broadband service, compared with 83% of adults with annual incomes between $30,000 and $99,000, and 93% of adults with annual income above $100,000. Monica Anderson & Madhumitha Kumar, *Digital Make Gains in Tech Adoption*, Pew Research Center (May 7, 2019), https://pewrsr.ch/31dcjCw. And 27% of adults earning less than $30,000 rely on a smartphone for internet access, which is not a full replacement for home broadband. *Id.* ("reliance on smartphones also means that the less affluent are more likely to use them for tasks traditionally reserved for larger screens" such as "seeking out and applying for jobs."). In New York, approximately 6.4 million people had broadband internet access in 2019, yet only 5% earned less than $10,000 per year, and approximately 70% earned more than $50,000 per year. Household Income in the Past 12 Months (in 2019 Inflation-

Adjusted Dollars) by Presence and Type of Internet Subscription in Household, Table B28004, U.S. Census Bureau, https://data.census.gov/cedsci/table?q=Telephone,%20Computer,%20and%20Internet%20Access&t=Telephone,%20Computer,%20and%20Internet%20Access&g=0400000US36&tid=ACSDT1Y2019.B28004&hidePreview=true.

Lowering the cost barrier has long been a goal of state and federal governments. They have used different approaches, and there is no silver bullet. One approach, which has been the traditional and primary approach taken by the federal government, is to offer direct benefits to consumers as described in more detail below.

The State of New York recognized the cost barrier, *see* Brief for Appellant, at 16-17, but took a different approach. Instead of offering direct-to-consumer payments, New York enacted a statute requiring internet service providers ("ISPs") in New York to offer low-income New Yorkers a broadband service (25 mbps download speeds) at a price of $15/month, inclusive of rental and other fees. Affordable Broadband Act, General Business Law §399-zzzzz (2)-(3) ("ABA"). In the alternative, an ISP can comply with the law by offering a 200 mbps download service for $20. ABA at (4). These affordable price points will likely encourage more low-income New Yorkers finally to get online and be able to take advantage of all the internet has to offer.

All of these efforts can coexist harmoniously, in a combined effort to address different parts of the broadband affordability problem and to ensure the maximum number of people can get online through whichever program is best for them.

II. Internet Service in the United States is Unaffordable, Particularly for Low-Income Consumers

Consumer research consistently demonstrates that the cost of internet service in the United States is unaffordable. For example, New America's Open Technology Institute recently studied 760 internet plans across Europe, Asia, and North America and found substantial evidence of an affordability crisis in the United States. The overwhelming majority of the U.S. plans ranked in the bottom half for average monthly costs. Only 110 of the 290 U.S. plans in the study had advertised initial promotional prices of $50 or less—and only 64 of those plans advertised speeds that were above 25 mbps speeds, the Federal Communications Commission's ("FCC") minimum definition for broadband. U.S. plans that advertised promotional rates then increased by an average of $22.25 per month after the promotional period expired. Becky Chao & Claire Park, *The Cost of Connectivity 2020*, New America's Open Technology Institute (July 2020), https://bit.ly/3FTZo7x, at 57. Moreover, U.S. plans typically contain additional costs, such as hidden fees for equipment and activation, that can more than double the actual monthly cost to the consumer. *Id.* at 61. These findings are consistent

with the pricing identified in a recent survey by Consumer Reports. James K. Wilcox, *Millions of Americans Lack Fast Internet Service, CR Survey Shows*, Consumer Reports (Aug. 3, 2021), https://bit.ly/3rerGpc ("According to [our] survey, the median monthly broadband bill, including taxes and fees, is about $70.").

Moreover, the U.S. broadband market lacks competition, which would bring down prices over time. *See generally* H. Trostle *et al.*, *Profiles of Monopoly*, Institute for Local Self-Reliance (Aug. 2020), https://bit.ly/3I0OjU3 at 1-2. After a wave of consolidation over the past decade, the market for internet service in the U.S. broadly is now an oligopoly dominated by a few large providers, including in New York. Most New Yorkers have, at most, only one or two high-speed internet providers that serve their home. *See* Jonathan Sallet, Written Statement for the Reimagine New York Commission Meeting, Benton Institute for Broadband & Society (Aug. 10, 2020), https://bit.ly/3xECYUN (stating "[t]he competition problem arises from the fact that . . . about 30% of New Yorkers live in a monopoly market and another 50% face a duopoly—both short of what is generally considered a competitive market" and that there are "[a]bout thirty counties in New York [that] entirely lack a third [broadband] competitor.").

FCC data, which overcounts broadband deployment and competition, *see* Sallet, *Broadband for America's Future*, *supra* at 27-28, at a national level shows

weak competition for all levels of broadband service. At the minimum broadband speed of 25 mbps download, the requirement in the New York statute, 2018 FCC data suggested that at least 18 million Americans (5.6%) still lacked even one provider, and 87 million Americans (26.6%) are under a monopoly. Fixed Coverage Updates as of YE2018, FCC, https://bit.ly/3cXALKP at 2. For a 100 Mbps download connection, FCC data for 2018 suggests that 9.5% of the population has zero options at this speed, with 39% having one option, and 41% having two options. *Id.*

Further, there is a history of cable providers, in particular, dividing up the country and servicing only their regions. As Professor Susan Crawford explained in 2010,

> The major cable providers in this country do not compete with one another. The operators clustered all cable into regional monopolies during the summer of 1997—Leo Hindery, then-President of Tele-Communications, Inc., and the architect of the effort, calls that summer the "Summer of Love"—pursuing swaps and partnerships that put every market in the United States except four in the hands of a single operator. Clustering continued when bankrupt Adelphia Communication's assets were divided between Comcast and Time Warner Cable in 2006. In general, non-competing cable systems have at least 70% of the potential video customers in most of the largest metropolitan areas in the U.S.

Susan Crawford, *The Looming Cable Monopoly*, 29 Yale L. & Pol'y Rev. 34 (2010), https://bit.ly/3D3mSoY (footnotes omitted). *See generally* Philip J. Reny & Michael A. Williams, *The Deterrent Effect of Cable System Clustering on Overbuilders: An Economic Analysis of* Behrend v. Comcast, Economics Bulletin,

Volume 35, Issue 1 (2015), https://bit.ly/3rl3fpW (describing how "cable clustering," or having a single operator serve a contiguous area, in the 1990s and 2000s led to higher prices and reduced chance of competitive entry); Karl Bode, *Could New York City Fix What Ails American Broadband?*, Protocol (Feb. 12, 2020), https://bit.ly/3llUnwE ("Verizon and Spectrum enjoy a duopoly over residential broadband across much of [New York C]ity, leading to higher prices, patchy availability and poor customer service.").

The lack of choice directly affects the cost and quality of internet service, allowing providers to charge inflated prices without fear of losing customers. *See, e.g.*, Thomas Phillipon, *The Great Reversal* (Cambridge, MA, 2019). The anticompetitive broadband market and the inflated prices it fuels harm low-income Americans most acutely. Dharma Dailey *et al.*, *Broadband Adoption in Low-Income Communities*, Social Science Research Council (Mar. 2010), https://bit.ly/3ljFMSb at 6 ("High-priced monthly subscriptions are very difficult for low-income households to sustain."), especially because "broadband at home is often a choice between having Internet service and having food." Colin Rhinesmith, *Digital Inclusion and Meaningful Broadband Adoption Initiatives*, Benton Foundation (January 2016), https://bit.ly/32CfOCZ, at 15. One analysis of low-income plans showed that $10 per month is an affordable benchmark, and

"even increasing the cost to $20 per month would be difficult" for low-income budgets. *Id*. at 16. But virtually no broadband provider offers service at that rate.

When New York lawmakers enacted a new broadband affordability law earlier this year, they were responding to a real and urgent crisis.

III. The New York $15 Broadband Requirement Complements Various Federal Broadband Benefit Programs

Several federal programs, some new, attempt to address broadband affordability. They provide significant benefits but still have not closed the digital divide.

A. The Lifeline Program Delivers Significant Benefits but Has Not Solved the Broadband Digital Divide

1. The Lifeline Program Primarily Delivers Wireless Voice and Data Bundles, Not Robust Broadband Service

The federal Lifeline program was established in the mid-1980s, at a time when landline telephone service through copper wires was the dominant mode of communications service. Lifeline is one of the four programs in the Universal Service Fund, which is funded through contributions from telecommunications providers based on an assessment on their interstate and international end-user revenues. 47 U.S.C. §254(d). In 1986, the Federal Communications Commission ("FCC") adopted a recommendation that the agency implement a support program to help low-income households afford basic phone service after the divestiture of AT&T. MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of

the Commission's Rules and Establishment of a Joint Board, Decision and Order, 51 Fed. Reg. 1371 (1985), https://bit.ly/3xDtvgw.

A decade later, Congress codified the commitment to universal service in the Telecommunications Act of 1996, which included advancing the availability of telecommunications services, an evolving term, to low-income consumers. 47 U.S.C. §254. The FCC then codified the Lifeline program to help low-income households in all regions of the nation afford essential communications service. 47 C.F.R. §54.400 *et seq*.

Today, the Lifeline program provides a $9.25 reduction in monthly subscription rates for combined voice and data services, which makes up 92% of Lifeline service, or broadband service, which makes up 0.5% of Lifeline service, and a $5.25 reduction in monthly subscription rates for voice-only services, which is 7.5% of all Lifeline service. High Cost and Low Income Committee Briefing Book, USAC (Oct. 25, 2021), https://bit.ly/3FXIpRN, at page 55 of 58. As a result, Lifeline is used primarily for people to better afford a combination of voice service and data service, typically on a mobile phone.[2]

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[2] The D.C. Circuit recently questioned whether broadband providers legally qualify for the benefit based on the prior administration's classification decisions. *See Mozilla v. FCC*, 940 F.3d 1, 68-70, 69 (D.C. Cir. 2019) ("As a matter of plain statutory text, the 2018 [Restoring Internet Freedom] Order's reclassification of broadband—the decision to strip it of Title II common-carrier status—facially

2. Lifeline Has Barriers to Participation, Resulting in a 22% New York and 20% Nationwide Participation Rate

The Lifeline program does not reach all eligible consumers. The estimated participation rate of eligible New Yorkers in the Lifeline program is only 22%, which is marginally higher than the national average of 20%. Program Data, Lifeline Participation Table, USAC, https://bit.ly/3rkHPJU. There are several reasons for this phenomenon.

First, the benefit is relatively small. After all the work to find a provider, determine eligibility through either a computer eligibility match or through the provision of documentation via the National Verifier, the person is eligible for only a $9.25/month discount on very modest broadband services that are expensive. Thus, potential applicants may decide the work may not be worth the benefit. Additionally, many potential subscribers who lack strong literacy skills or may not speak English as their primary language confront even more difficulties, as program information is not always available in their language (Spanish and English are the primary languages for the Lifeline application form).

Second, not all broadband providers provide a Lifeline service, and qualifying people can apply the benefit only to services offered by providers who

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disqualifies broadband from inclusion in the Lifeline Program"). The issue remains pending on remand before the FCC.

have elected to participate in the program. *See* Companies Near Me, USAC, https://bit.ly/3I3UAOz. For providers to participate in and receive reimbursement from the Lifeline program, they must be an "eligible telecommunications provider" or "ETC." 47 U.S.C. §254(e) ("only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support."); 47 C.F.R. §54.407 (reimbursement to ETCs for Lifeline). The ABA, on the other hand, would require all large broadband providers in New York to provide the $15/month service. ABA at (2).

Third, Lifeline providers are primarily wireless providers, which comprise approximately 96% of the program. *See* Lifeline Data and Statistics, Universal Service Administrative Company, https://bit.ly/3I5MftI ("Historical Support Distribution" tab showing that in 2021, wireless companies accounted for $406 million of a total of $423 million Lifeline payments). A low-income person may be seeking a fixed internet connection for a variety of reasons, but because wired connections tend to be more expensive than plans sold via the Lifeline program, they may not go through the process. The ABA, on the other hand, applies to all wired providers. ABA at (2).

Fourth, low Lifeline participation is in part due to a lack of awareness. Only ETCs are required to advertise the Lifeline program. The FCC has not funded trusted community-based organizations to perform critical outreach to the eligible

populations. Therefore, ETCs are the primary avenue through which consumers can learn about eligibility and enrollment requirements for Lifeline. The low enrollment rate reflects a failure of public and private sector actors to raise awareness of the program's existence and importance. The ABA, however, requires ISPs to advertise their low-income programs. ABA at (7).

B. The Emergency Broadband Benefit and its Successor, the Affordable Connectivity Program, Will Not Satisfy Low-Income New Yorkers' Need for Affordable Internet Service

On May 12, 2021, after the COVID-19 pandemic demonstrated the necessity of broadband internet access, the federal government launched the Emergency Broadband Benefit ("EBB"), a temporary $3.2 billion program, to help qualifying low-income households pay for internet service during the pandemic by providing a monthly benefit of up to $50 or up to $75 on Tribal lands. Consolidated Appropriations Act of 2021, Public L. No. 116-260, Div. N, §904. The Infrastructure Investment and Jobs Act (IIJA), *see* Infrastructure Investment and Jobs Act, 2021, Pub. L. No. 117-58, §60501 et seq. (ACP provision), which was signed into law on November 15, 2021, renamed this program the Affordable Connectivity Program (ACP) and provided additional funding that will begin in early 2022. The IIJA also reduced the monthly benefit amount to up to $30/month. The ACP has the potential to help some New York households, but it will not eliminate the need for the New York law.

The EBB and ACP may not fully address the digital divide in New York. First, EBB and ACP participation is completely voluntary for ISPs. Even if an ISP elects to participate, it may end its participation at any time for any reason. And, unlike the Lifeline program, the EBB and ACP do not have a permanent funding mechanism. The IIJA provided $14.2 billion for the ACP in a one-time appropriation. That funding could be exhausted in as little as two years, depending on the level of household participation, and nothing guarantees subsequent funding.

The ACP's monthly $30 benefit may not cover the full cost of internet service in many communities. Low-income consumers may be deterred from enrolling in a program that only provides a maximum $30/month discount, particularly for internet service, which is notoriously rife with hidden fees and surprise costs in monthly bills. Becky Chao & Claire Park, *The Cost of Connectivity 2020*, *supra* at 57-61. The New York law sets an all-inclusive rate of $15/month, better attracting low-income consumers.

Even when the ACP benefit is applied, the household cost of basic broadband service from many New York ISPs, including Spectrum and Verizon, will remain far above the $15 level provided by New York's law. Spectrum's

cheapest broadband-only service[3] costs $74.99 monthly after one promotional year. If a subscriber wants to use Wi-Fi, that raises the monthly cost to $79.99. Broadband Label Disclosure, Spectrum, https://bit.ly/3cXLrsH. A $30 monthly reduction would leave the household with a net bill of $45 or $50.

Per its website, Verizon currently offers its cheapest home Fios service for $39.99 monthly, with an additional $15 modem charge. Description of Fios Offerings, Verizon, https://vz.to/3I0QhUr. This $55/month plan, before any taxes or other surcharges, would leave a low-income household with a monthly cost of $25 after the ACP benefit. However, Verizon Fios is not available to many low-income New Yorkers, including most residents of the city of Buffalo. For these households, Verizon only offers slower, legacy "Digital Subscriber Line" or DSL service, which requires a phone line. The current "bundled" cost of DSL and phone is $74.99 for a new customer, "*for 1 year plus taxes, equip. charges & other fees*," and new customers may be charged a one-time fee of up-to $60. DSL Service Description, Verizon, https://vz.to/3o2C7Kr (click "Offer Details"). The total monthly cost for an existing customer household, including a number of fees and

[3] Spectrum's "Internet Assist" program for low-income households has very limited eligibility, only those on National School Lunch Program (NSLP), Community Eligibility Provision of NSLP, and Supplemental Security Income are eligible. Spectrum Internet Assist, Spectrum, https://bit.ly/3rp3zEa.

charges, is likely much higher, potentially $95/month. Even after applying a phone Lifeline discount in addition to the ACP benefit, a low-income Verizon DSL household would still face a monthly bill of at least $50 or more.

Even with the EBB's higher benefit rate of $50/month or $75/month on Tribal lands, the program is still far below full participation. As of November 28, 2021, there were 544,772 households in New York participating in the EBB, Emergency Broadband Benefit Program Enrollments and Claims Tracker, USAC, https://bit.ly/3o5a2Cs. Compare that to 496,713 New York Lifeline subscribers, totaling 22% of Lifeline eligible households in New York, Lifeline Program Data, USAC, https://bit.ly/3p9a1N4. The vast majority of eligible households are not being served by the EBB program, and should the EBB see a surge in participation rate, the finite funds will be drawn down more quickly. Moreover, because the new ACP eligibility increases from 135% to 200% of the federal poverty level, IIJA §60501(b), it could lead to more participation, which means the limited funds could potentially run out more quickly.

The EBB program and ACP are excellent programs that are making progress on connecting all Americans and New Yorkers to the internet. However, there are gaps in overall broadband affordability program coverage that further necessitate laws like New York's $15 broadband requirement.

C. The Emergency Connectivity Fund Is a Narrowly-Tailored, Temporary Program that Targets Schools and Libraries

The federal government also recently launched the Emergency Connectivity Fund ("ECF"), a temporary grant program to help schools and libraries provide broadband service and devices to students and library patrons. Congress created the program as part of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §7402, passed in response to the COVID-19 pandemic. *See generally Establishing Emergency Connectivity Fund to Close the Homework Gap*, 36 FCC Rcd 8696 (2021). The ECF is an emergency and time-limited program, funding services delivered between July 1, 2021, and June 30, 2022. *Id*. at 8734. Claims that the ECF will somehow meet New York residents' unmet broadband needs are thus not accurate. *See* Mem. in Sup. of Prelim. Inj. at 23, *N.Y. Telecomm. Ass'n et al. v. James*, No. 2:21-bv-2389-DRH-AKT (E.D.N.Y. May 6, 2021) (stating ECF will allow schools and libraries to "apply for additional funds to meet [students, staff, and patrons] remaining unmet needs.").

As a general matter, ECF is primarily an education benefit designed to support remote learning needs during the pandemic; it is not a program to make broadband service more affordable for the general population. Only students (K-12), school staff, and library patrons are eligible for its benefits, and the hotspots and laptops ECF will help reimburse may be subject to browsing restrictions that prevent users from accessing certain content, making the connectivity unusable for

general purpose internet access. *See* 36 FCC Rcd at 8746-48 (applying Children's Internet Protection Act requirements to school- and library-owned devices). These limitations narrow the scope of the relief and low-income benefits the ECF provides.

Schools and libraries have to make difficult decisions when it comes to participating in emergency relief programs. For some, reporting and recordkeeping requirements that impact patrons' privacy rights have dissuaded them from participating. Susan Orr, *Federal Funds Help Libraries, Schools Provide Off-Campus Internet Access*, Indianapolis Bus. J. (June 25, 2021), https://bit.ly/3lk0CRt. Further, the ECF will not reimburse grant recipients for equipment or services that are paid for by other federal pandemic relief programs. Emergency Connectivity Fund Fact Sheet, FCC, https://bit.ly/3d1VmgM. As a result, some schools and libraries that may be eligible might decline to participate.

In addition to the barriers above, the ECF does not provide schools and libraries with the opportunity to provision their own networks unless they can prove there is no other service available in their area. 36 FCC Rcd at 8714. This is especially true in areas where schools and libraries have been unable or unwilling to apply for ECF funding.

While the ECF is a useful program, its limitations mean that it will not solve New York's digital divide.

IV. The New York Law Exempts Small ISPs, and Larger ISPs Can Otherwise Reasonably Comply

The New York law takes into account that small providers may not be able to offer the $15 service, and larger ISPs have not demonstrated that the law is overly burdensome.

The New York law exempts smaller ISPs that serve fewer than 20,000 customers if they cannot afford it—a threshold that covers most of the ISPs that submitted declarations to the trial court. ABA at (5) ("The requirements of subdivisions two and three of this section shall not apply to any broadband service provider providing service to no more than twenty thousand households, if the public service commission determines that compliance with such requirements would result in unreasonable or unsustainable financial impact on the broadband service provider."). Only two ISPs with more than 20,000 subscribers submitted declarations to the District Court: Verizon and HughesNet; Verizon already offers low-income discounts consistent with the New York law, *see* Verizon Lifeline, Verizon, https://vz.to/3pju3nT (offering 200 mbps plan for $19.99/month), which suggests that complying with the New York law would not be a significant burden.

Verizon stated that the New York law will create exorbitant new costs, but fails to put the costs in context. Verizon asserted the law will require up to $1 million in upfront costs. Declaration of Matthew Kramer Coakley, JA 21. This $1 million figure is dwarfed by the $3.11 billion Verizon spent on advertising last

year. Verizon's Advertising Spending in the United States from 2009-2020, Statistica (Nov. 2, 2021), https://bit.ly/3DZG3RL. Moreover, Verizon cited $250,000 for costs associated with verifying income eligibility, but Verizon already participates in several programs that require income eligibility; it is not clear how much of those expenses are not already incurred regardless of the New York law's obligations. Additionally, the federal Lifeline and EBB National Verifier process can be leveraged to relieve ISPs from needing to verify income. Verizon supported the creation of the National Verifier. Comments of Verizon, Dkt. No. 17-287 (Feb. 21, 2018), https://bit.ly/3cXLogH, at 2.

Hughes Network System also raised fears of new costs, but offered data that did not clearly address the actual cost to it of complying with the ABA.[4] The company asserted that, over 36 months, the "cost to Hughes for an average subscriber is $1,736" and that "[a]t the Rate Regulation monthly required amount of $15, Hughes would incur a loss of eleven hundred and ninety-six dollars for ($1,196)" over that time period. Declaration of Jennifer A. Manner, JA 41. It further argued that the loss will grow after that 36-month period. The declaration, however, provides little supporting evidence for any of these figures other than in a

[4] The record in this proceeding was developed in the context of an expedited motion for preliminary injunction. The methodology and data used in this calculation were not explored through discovery or hearing testimony.

footnote which states "[t]here are significant upfront costs to Hughes to install and test a new customer's satellite dish, modem and related equipment." *Id*. The real cost to Hughes of adding a new low-income customer is likely the actual incremental cost of that new customer (taking into account such matters as the depreciation deduction for a new satellite dish and excluding advertising and marketing costs not applicable to the New York program such as advertising high-end services), and the monthly cost of servicing the new account. The Court has nothing to help it determine whether Hughes' claims of the "average" cost of a user is applicable to this case, and thus whether Hughes will realistically sustain its claimed loss under the ABA.

Thus, the Court should be skeptical of the industry's claims regarding their ability to afford New York's $15 low-income broadband program.

CONCLUSION

As discussed above, New York's ABA is necessary to help address the broadband affordability gap in the state, and is complementary to the benefits that the federal government provides.

Wherefore, this Court should reverse the decision below and grant all such other relief as may be just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Andrew Jay Schwartzman hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,272 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ Andrew Jay Schwartzman

Date: December 1, 2021