

# 21-1975

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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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,  
*Plaintiffs-Appellees,*

v.

LETITIA A. JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL  
OF NEW YORK,  
*Defendant-Appellant.*

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On Appeal from the United States District Court for the  
Eastern District of New York, No. 21-cv-2389 (Hon. Denis R. Hurley)

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**BRIEF OF THE MULTICULTURAL MEDIA, TELECOM, AND  
INTERNET COUNCIL AND ALLVANZA AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS-APPELLEES**

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## **CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, amici state as follows:

The **Multicultural Media, Telecom, and Internet Council** (“MMTC”) has no parent corporation, issues no stock, and no publicly held corporation owns a ten percent or greater interest in it.

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

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## INTEREST OF THE AMICI CURIAE<sup>1</sup>

**MMTC** is the technology, media, and telecommunications industries' leading national non-partisan, non-profit diversity organization. Since its founding in 1986, MMTC has been dedicated to promoting and preserving equal opportunity and civil rights in the media and telecommunications industries. MMTC conducts civil rights advocacy, undertakes research and analysis centered particularly around broadband internet access services and broadband adoption, and participates in state and federal proceedings focused on the same. MMTC supports efforts to close the digital divide and bring broadband access to more people of color, as well as to other vulnerable populations.

**ALLvanza** is a non-partisan, forward-thinking, policy and action nonprofit organization that advocates for the success of Latinxs, and other underserved communities, in our innovation- and technology-based society. It advocates for regulatory policies that promote

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<sup>1</sup> 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.



equitable deployment of broadband to all communities, rural and urban alike, and works to make sure its constituent communities are part of the conversation at key policy discussions, industry gatherings, events, and conferences.

MMTC and ALLvanza (together, “amici”) concur with Plaintiffs-Appellees’ arguments that the law in question – New York’s “Affordable Broadband Act” or “ABA”<sup>2</sup> – is unlawful for the reasons they articulate. In this brief, amici address issues that are unique to their partners and constituents, and that may be of assistance to the Court and relevant to the disposition of this case. *See* Fed. R. App. 29(b)(2). Amici have participated in numerous Federal Communications Commission (“FCC”) proceedings relating to both broadband subsidization and the regulatory classification of broadband – vital underpinnings to the instant case. And amici have a demonstrated interest in the outcome of this proceeding: To protect the interests of historically disadvantaged groups, including those of their constituents and members who have

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<sup>2</sup> *See generally* N.Y. Gen. Bus. Law § 399-zzzzz.

limited or no access to broadband internet access services. *See* Fed. R. App. 29(b)(1).

## INTRODUCTION

The “digital divide” – the gap between those who have access to and can afford broadband, and those who do not and/or cannot – disproportionately impacts communities of color, and is among the greatest civil rights challenges of our day. While presumably well-intentioned, the ABA is unavoidably inimical to the closure of the digital divide, both in New York and elsewhere in the U.S. Broadband deployment across the U.S. has been among the marvels of our age, but the final push – bringing all Americans online, regardless of race, income, or geography – will require a concerted, nation-spanning effort. Such an effort is underway as we speak; the federal government is currently taking a multi-pronged approach to the issue, reliant on longstanding pro-competition policies and subsidy dollars alike. The ABA threatens to undermine this thoughtful approach. State-specific balkanization of broadband via rate caps is fundamentally harmful to closing the digital divide, and the district court was right to enjoin the law and declare it preempted.

## **ARGUMENT**

### **I. America's Digital Divide Is a Critical Civil Rights Challenge – One Requiring a Nationwide Solution**

#### **A. The Digital Divide Particularly Harms Communities of Color, and Other Vulnerable Americans**

Ensuring affordable broadband connectivity is a critical and urgent civil rights challenge. Broadband is a necessary prerequisite to civic and economic participation in 21<sup>st</sup>-century American life; to lack broadband access is to too often lack the ability to learn a new skill, obtain a valuable education, secure a quality and high-wage job, participate in civic dialogue, benefit from telemedicine – or even simply stay connected with loved ones at a distance. As increasingly wide swaths of our lives have moved online over the past two years in response to an unprecedented global pandemic, now more than ever high-speed internet access is fundamentally essential to everyday living.

Unfortunately, this reality is accompanied by a second, harsher truth: Too many Americans still lack the option or ability to connect to modern, high-speed networks. And the negative consequences of this “divide” are not felt equally; they disproportionately impact communities of color, as well as other vulnerable populations. Over thirty percent (each) of Black, Latinx, and Tribal families lack high-

speed home internet, as do over forty-four percent of families that earn less than \$25,000 annually.<sup>3</sup> Even in urban metropolitan areas, where deployment incentives for providers are higher due to population density, more than one-fifth of all residents lack access to high-speed internet at home.<sup>4</sup>

It is this policy landscape that the ABA must be contextualized within – one of massive challenge, but also one of massive opportunity to comprehensively improve one aspect of equality and equity in our nation. While much work remains to be done, these issues have not gone unnoticed or unaddressed at the federal level.

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<sup>3</sup> John B. Horrigan, *Students of Color Caught in the Homework Gap*, at 2-3, tbls.2-3, ALLIANCE FOR EXCELLENT EDUCATION (July 20, 2020), [https://futureready.org/wp-content/uploads/2020/07/HomeworkGap\\_FINAL7.20.2020.pdf](https://futureready.org/wp-content/uploads/2020/07/HomeworkGap_FINAL7.20.2020.pdf); Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban and Suburban America*, PEW RESEARCH CENTER (Aug. 19, 2021), <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america>; see also Michael Martin, *Computer and Internet Use in the United States, 2018*, U.S. CENSUS BUREAU (Apr. 21, 2021), <https://www.census.gov/library/publications/2021/acs/acs-49.html> (providing the latest figures collected and published by the U.S. Census Bureau).

<sup>4</sup> Horrigan, *supra* note 3, at 3 tbl.3.

**B. A Range of Federal Efforts – Including New Ones Funded by Congress – Are Underway to Comprehensively Address the Digital Divide**

Federal lawmakers and regulators have not overlooked the ongoing challenges presented by the digital divide, using targeted subsidies to balance the need to buttress pro-investment policies without eliminating their benefits. In past and present alike, monetary support for solutions to improve connectivity have taken many forms, ranging from federal taxation on everyday consumers generally (fueling direct Congressional appropriations), to revenue-related charges levied against telecommunications companies specifically (via the FCC’s “Universal Service Fund” assessments<sup>5</sup>).

Ongoing efforts with historic roots include the FCC’s various Universal Service programs, such as “Lifeline” (a discount service for low-income consumers, started in 1985 and more recently comprehensively reformed in 2016),<sup>6</sup> the “Connect America Fund” (a

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<sup>5</sup> See generally FCC, *Universal Service Fund*, <https://www.fcc.gov/general/universal-service-fund> (last visited Mar. 1, 2022).

<sup>6</sup> See generally FCC, *Lifeline Program for Low-Income Consumers* (Feb. 16, 2022), <https://www.fcc.gov/general/lifeline-program-low->

multi-phase distribution of billions of dollars in subsidies to fund deployment to high-cost areas),<sup>7</sup> and more recently the “Rural Digital Opportunity Fund” (a \$20.4 billion effort to “bring high speed fixed broadband services to rural homes and small businesses that lack it”).<sup>8</sup>

More recently, Congress has again used its power-of-the-purse – a purse which draws from the pockets of all Americans – to try and further tackle the digital divide. These efforts have included allocating \$3.2 billion for a new “Emergency Broadband Benefit” (“EBB”) program last year,<sup>9</sup> the Infrastructure Investment and Jobs Act’s additional \$14 billion to transition the temporary EBB into the long-term

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income-consumers (providing an overview of the Lifeline program, and more granular details on recent FCC actions).

<sup>7</sup> See, e.g., FCC, *Connect America Fund Phase II Auction (Auction 903)* (Dec. 8, 2021), <https://www.fcc.gov/auction/903> (providing an overview of the Connect America Fund, and more granular details on recent FCC actions).

<sup>8</sup> See FCC, *Auction 904: Rural Digital Opportunity Fund*, <https://www.fcc.gov/auction/904> (last visited Mar. 1, 2022).

<sup>9</sup> See FCC, *Emergency Broadband Benefit* (Feb. 4, 2021), <https://www.fcc.gov/broadbandbenefit>.

Affordable Connectivity Program (“ACP”),<sup>10</sup> and a massive \$42.25 billion for the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) to administer the brand-new “Broadband Equity Access and Deployment” or “BEAD” Program.<sup>11</sup>

Taken collectively, in the past two years alone Congress has anted up over \$65 billion to address broadband access and digital inclusion. These new nationwide initiatives by the federal government represent the best approach to tackling the digital divide: Comprehensive, coast-to-coast solutions reliant on nationwide data<sup>12</sup> to optimize access for *all* Americans, not just those lucky enough to live in specific geographies.

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<sup>10</sup> See FCC, *Affordability Connectivity Program* (Feb. 24, 2022), <https://www.fcc.gov/acp>.

<sup>11</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. F, tit. I (2021) (“IIJA”); NTIA, *Grants*, <https://www.ntia.doc.gov/category/grants> (last visited Mar. 1, 2022) (describing the funds given to NTIA in the IIJA, and detailing in particular the nature of the BEAD Program).

<sup>12</sup> See, e.g., Broadband Deployment Accuracy and Technological Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-46) (the “Broadband DATA Act,” mandating – and funding – creation of a comprehensive nationwide broadband mapping system containing detailed, precise information on the availability of fixed and mobile services).

Such subsidy dollars alone, however – while necessary – are incomplete tools for closing the digital divide. Communities on the wrong side of the digital divide also need the same robust, competitive broadband market that has deployed fixed services to ninety-six percent of all Americans<sup>13</sup> to continue its work towards the ever-closer goal of one hundred percent. And that requires consistent, nationwide regulatory certainty.

**C. The Certainty Provided by the FCC’s Pro-Investment Approach to Broadband Enables Such Solutions for Bridging the Digital Divide**

By any measure, America’s broadband economy is an almost unparalleled success, a world-envied example of permissionless innovation riding ovetop private networks for the public good. It is broadband’s fundamental success in general – its inextricable intertwining with all aspects of everyday life – that makes closing the digital divide a key civil rights concern. But this success was not accidental or coincidental. It has been, and remains, the direct result of

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<sup>13</sup> *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, 36 FCC Rcd 836, 854 ¶ 33 (2021) (“Fourteenth Broadband Deployment Report”).



carefully tailored FCC efforts to further Congress’s intent to “promote competition and reduce regulation[.]”<sup>14</sup>

These efforts have been particularly embodied by the FCC’s pro-investment approach to regulating broadband<sup>15</sup> – a far different tactic from the complex rate-setting regulations once applied to telephony monopolies, or currently applied in some energy markets. In the FCC’s own words:

For decades, the [FCC’s] lodestar . . . was a light-touch, market-based approach [to broadband]. This approach debuted at the dawn of the commercial Internet during the Clinton Administration, when an overwhelming

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<sup>14</sup> Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>15</sup> MMTC has long advocated that the FCC’s “Section 706” authority – supplemented by a consumer-friendly, probable cause enforcement mechanism like Title VII of the 1964 Civil Rights Act – are the best tools to protect broadband consumers, including via the banning of digital redlining. *See, e.g.*, Letter from Kim Keenan, President & CEO, MMTC, to the Hon. Tom Wheeler, Chairman, FCC (Feb. 18, 2015), [http://mmtconline.org/wp-content/uploads/2015/02/OpenInternet\\_ExParte\\_021815\\_FINAL.pdf](http://mmtconline.org/wp-content/uploads/2015/02/OpenInternet_ExParte_021815_FINAL.pdf); Comments of the National Multicultural Organizations, FCC Docket No. 17-108 (July 17, 2017), <https://www.mmtconline.org/wp-content/uploads/2017/07/National-Multicultural-Organizations-Comments-Restoring-Internet-Freedom-071717.pdf> (a filing to which MMTC was a signatory and co-author). ALLvanza similarly opposes digital redlining. *See, e.g.*, ALLVANZA, *Free and Open Internet*, <https://allvanza.org/issue-6> (last visited Mar. 2, 2022).

bipartisan consensus made it national policy *to preserve a digital free market unfettered by Federal or State regulation*. It continued during the Bush Administration, as reflected in the ‘Four Freedoms’ articulated by Chairman Powell in 2004 and was then formally adopted by a unanimous [FCC] in 2005 as well as in a series of classification decisions . . . . And it continued for the first six years of the Obama Administration.<sup>16</sup>

Thus, the FCC’s much-discussed decision in 2018 to “eliminate burdensome regulation that stifles innovation and deters investment” that was imposed three years prior, and to adopt a “framework [to] promote investment and innovation,”<sup>17</sup> represented a nationwide return to form – and an express policy decision to further the public good.

It was this regulatory approach that historically allowed for the broadband market’s development (and the digital divide’s commensurate narrowing) in the first place. And it was this regulatory approach that the FCC determined would best drive future innovation

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<sup>16</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 413-14 ¶ 207 (2018) (“2018 Order”) (emphasis added, citations omitted), *petitions for review granted in part and denied in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

<sup>17</sup> 2018 Order at 312 ¶ 2.

and investment – a determination affirmed by the D.C. Circuit as being backed by “substantial evidence.”<sup>18</sup>

The correctness of a pro-investment approach to broadband, specifically as a tool to further address the digital divide, has been borne out. The FCC’s latest official figures show that the “number of Americans living in areas without access” to broadband has “dropped from more than 18.1 million Americans . . . to fewer than 14.5 million . . . a decrease of more than 20%” in a single year alone.<sup>19</sup>

Unfortunately, and as noted above, these numbers paint an incomplete picture vis-à-vis the communities to which the benefits of broadband are accruing.<sup>20</sup> But the racial and economic disparities in the end result should not be read as requiring an abrupt *volte-face*, a re-pivot to the rate-cap regulations of yesteryear. Instead, communities of color need and deserve the benefits of the same market-based solutions

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<sup>18</sup> *Mozilla*, 940 F.3d at 49-50 (“the agency’s position as to the economic benefits” of abandoning “‘public-utility style regulation,’ which the Commission sees as ‘particularly inapt for a dynamic industry built on technological development and disruption,’ is supported by substantial evidence” (internal citations omitted)).

<sup>19</sup> Fourteenth Broadband Deployment Report at 837 ¶ 2.

<sup>20</sup> *See supra* notes 3 and 4.

other Americans are already receiving. They deserve the same high-quality broadband built through massive private investment,<sup>21</sup> and targeted government expenditure focused on enabling high-cost builds and boosting affordability<sup>22</sup> – not the cramped, less-than-best offerings that would almost inevitably emerge were rate caps to be imposed on broadband.<sup>23</sup>

This, then, is the economic and legal landscape around the digital divide into which the State of New York injected itself with the ABA: One where the civil rights deficit within communities of color and other historically disadvantaged and vulnerable groups is all too real – but also, where myriad interlocking solutions and systems are working to eliminate a nationwide problem on a nationwide basis.

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<sup>21</sup> Mike Saperstein, *2020: Broadband Providers Pump Another \$79.4 Billion Into America's Connectivity Infrastructure*, USTELECOM – THE BROADBAND ASSOCIATION (Sept. 22, 2021), <https://ustelecom.org/2020-broadband-providers-pump-another-79-4-billion-into-americas-connectivity-infrastructure/>.

<sup>22</sup> *See supra* Section I(B).

<sup>23</sup> *See infra* Section II(A).

## **II. The ABA’s Attempt at Prescriptive Rate Regulation Would Affirmatively Harm Vulnerable Communities – In New York and Elsewhere**

Unfortunately, the ABA would undermine nationwide progress towards closing of the digital divide. It would force providers to adopt inefficient strategies; likely harm service quality; decrease the ability of would-be nascent competitors to break through, scale up, and serve those currently on the wrong side of the digital divide; and risk regressive tacit taxation on non-New Yorkers.

### **A. Consumers of Color Would Disproportionately Bear the Negative Impacts of State Broadband Ratemaking Attempts**

As the district court recognized, the ABA would likely require providers to offer their “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[.]”<sup>24</sup> This is true, but incomplete. State rate caps on broadband, *period*, would inevitably cause such harms in-state – and are therefore fundamentally inimical to the closing of the digital

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<sup>24</sup> JA128.

divide. And once again, the cost of protracting the digital divide will be paid by those suffering from it.

Rate caps are an outmoded regulatory tool in a competitive market like broadband. This can readily be shown by their forcing smaller, would-be nascent competitors to abandon expansion plans.<sup>25</sup> At the risk of simplistic economic truism, no provider – especially no small provider – can afford to operate at a loss, and loss is exactly what rate caps like the ABA’s impose. The digital divide will not be closed by stripping communities desperately in need of deployment of the competitive marketplace they deserve.

Rate caps like the ABA’s also serve to unwind economic assumptions that made previous deployments and service pricings viable.<sup>26</sup> Already-disadvantaged communities do not benefit from laws that strip providers of incentives to provide superior service; capping rates will inevitably lead to inferior services, which disproportionately impact constituents like the amici’s. Communities of color deserve full-

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<sup>25</sup> See, e.g., Decl. of Jim Baase ¶¶ 5-7, 10 (JA13-15).

<sup>26</sup> See, e.g., Decl. of Glen Faulkner ¶¶ 9-18 (JA30-35).

fledged access to modern broadband networks – not stunted products from companies hamstrung by governmental fiat.

Ultimately, a nationwide solution is needed for the nationwide problem of the digital divide. And that nationwide need is what the ABA puts at risk. If New York may impose losses in the form of rate caps on providers, might not fifty-five other states and territories? A \$25 rate cap in State A, a \$10 rate cap in State B; before long the competition-based approach adopted by Congress in 1996 – the result of which has been, as noted above, deployment to over ninety percent of Americans (albeit disproportionately *not* communities of color) courtesy of almost two trillion dollars' worth of private capital expenditure – would be completely undermined. The balkanization of pricing via state rate caps will ultimately lead to the balkanization of which services and which products are available where. Those that have reliable access to and the ability to pay for, broadband today may be fine with such an outcome. But communities on the wrong side of the digital divide can ill afford it.

Even as the digital divide continues to shrink in our country, it remains all too real for communities of color and other vulnerable

groups. These groups need the full-fledged benefit of broadband made available to other Americans – not the stripped-down services that rate caps inevitably incent, as carriers try to avoid loss and maximize returns under artificial ceilings. Fulfilling these communities’ needs requires the same pro-competitive approach that started the digital divide’s shrinking in the first place. Carefully crafted federal initiatives that increase affordability and help fund otherwise-difficult deployments – like Lifeline, the ACP, and NTIA’s forthcoming BEAD Program – strike the necessary balance between incenting investment and aiding the most vulnerable Americans where the market would otherwise fall short. The State of New York should not be permitted to undermine critical federal policy on this civil rights issue.

**B. Losses Imposed by the ABA Risk Regressive Taxation of Disadvantaged Consumers Outside New York**

Setting aside, *arguendo*, the prudence of broadband rate caps in general (as discussed above), the ABA’s rate caps in particular are problematic. The dollar figures set in the ABA are not the product of any meaningful analysis. They do not take into account providers’ ability to recover costs (necessary to ensure continuity of service, including for historically disadvantaged communities), providers’ plans



for future deployment (including capital expenditure-reliant deployments for the same communities), or even where broadband is or isn't available in the State of New York. As a result, the ABA will almost certainly impose losses on providers – a fact the district court rightly acknowledged.<sup>27</sup>

The impact of these losses will be wide-ranging. For providers with footprints outside of New York, the losses will at minimum incentivize rate increases in other states to offset the costs of complying with the ABA. As detailed above, *all* Americans already pay into a range of federal vehicles to address the digital divide; as a matter of basic fairness, it is unjust to require citizens of fifty-five other states and territories to further subsidize below-cost rate caps in New York. Doing so does not help close the digital divide in Illinois, or Florida, or Kansas, or anywhere else.

Worse, such external-to-New York rate increases flowing from costs imposed by the ABA would be most harmful to those citizens of other states who are already on the wrong side of the digital divide –

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<sup>27</sup> JA128-31.

again, a group disproportionately comprised of communities of color and other vulnerable groups. By doing so, the ABA would fundamentally operate as a regressive tax on non-New York communities *themselves in need of support*. This is not the way forward towards digital equity.

None of the above outcomes furthers civil rights by helping to close the digital divide – they only impede nationwide progress on a nationwide problem, in the name of a single state.

### **CONCLUSION**

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted,

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March 2, 2022

## **CERTIFICATE OF COMPLIANCE**

I certify, pursuant to Federal Rule of Appellate Procedure 32(g), that this brief complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4). Excluding portions of the brief exempted by Federal Rule of Appellate Procedure 32(f), the Brief contains 3,306 words. I also certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6), and Local Rule 32.1. It has been prepared using Microsoft Word (Version 2108) in a proportionally spaced typeface (Century Schoolbook, 14 point).

/s/ *Jennifer B. Tatel*  
Jennifer B. Tatel

March 2, 2022

## **CERTIFICATE OF SERVICE**

I certify that on March 2, 2022, I caused the foregoing Brief of the Multicultural Media, Telecom, and Internet Council and ALLvanza as Amici Curiae in Support of Plaintiffs-Appellees to be served electronically via the Court's CM/ECF system upon all counsel of record.

/s/ Jennifer B. Tatel  
Jennifer B. Tatel

March 2, 2022