No. 20-1431

UNITED STATES COURT OF APPEALS

For the First Circuit

NCTA – THE INTERNET & TELEVISION ASSOCIATATION,

Plaintiff – Appellant,

v.

AARON M. FREY, in his official capacity as Attorney General of the State of Maine,

Defendant – Appellee

TOWN OF FREEPORT, MAINE; TOWN OF NORTH YARMOUTH, MAINE

Defendants.

ON APPEAL FROM THE DISTRICT OF MAINE (CASE NO. 2:19-cv-00420-NT)

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* SUPPORTING DEFENDANT

FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for amicus curiae states that all parties have consented to the filing of this brief.

Pursuant to FRAP 29(a)(4)(E), undersigned counsel for amicus curiae states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus contributed money that was intended to fund the preparing or submitting of this brief.

CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae certifies pursuant to FRAP 29(a)(4)(A) that the Public Knowledge is a non-profit organization that does not have any parent corporation or issues stock, so there is no publicly held corporation owning 10% or more of its stock.

Dated: September 23, 2020

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INTERESTS OF AMICUS

Public Knowledge (PK) is a 501(c)(3) non-profit organization that advocates for technology policy that serves the public interest. PK advocates before Congress, the courts, the Federal Communications Commission, and other governmental entities. Public Knowledge works to uphold and protect consumers' rights.

SUMMARY OF THE ARGUMENT

The District Court rejected NCTA's challenge to the PEG provisions of Maine's cable statute, finding that federal law did not preempt the state's regulation of consumer protection acting in its role as protecting the rights of subscribers to cable services to find and receive PEG channels. *NCTA-Internet & TV Ass'n v. Frey ("NCTA v. Frey")*, No. 2:19-cv-420-NT, 2020 U.S. Dist. LEXIS 41682 (D. Me. Mar. 11, 2020). On appeal, NCTA reiterates the arguments rejected by the District Court. First, NCTA argues that various provisions of the Communications Act of 1934 preempt 30-A M.R.S. §§ 3008(5)(D)(1), 3010(5-A), 3010(5-B) (collectively "PEG provisions"). Additionally, on the assumption that the PEG provisions can only stand as an exercise of Maine's consumer protection authority, NCTA argues that the PEG provisions cannot be classified as a "consumer protection" pursuant to 47 U.S.C. § 552(d). Lastly, NCTA argues that the line extension provisions must also fail because they are preempted by the 1984 Cable Act.

NCTA errs on all counts. As the District Court properly found, federal law will only preempt state law where federal law either expressly preempts local law, where the regulatory scheme is sufficiently comprehensive as to leave no place for state regulation, or where state law directly conflicts with federal law. *NCTA v. Frey*, 2020 Dist. LEXIS 41682 at *9-10. NCTA seeks to portray the 1984 Cable Act as imposing new limitations on state franchising authorities

and bifurcating the authority of states to direct state franchising authority. Brief of Plaintiff-Appellant at 27-29, *NCTA v. Frey*, No. 20-1431 (1st Cir. July 16, 2020) As the District Court found, this runs contrary to the plain language of the statute and to the legislative history of the 1984 Cable Act.

Amicus Public Knowledge files to emphasize the importance of Maine's interest in promoting both diversity of voices and engagement by citizens on local and state government by providing access to quality PEG channels.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE FEDERAL CABLE ACT DOES NOT PREEMPT THE MAINE ACT'S PEG PROVISIONS.

The state of Maine has a substantial interest in ensuring its population has access to a variety of quality news and information sources, including sources like PEG channels. This interest has become particularly important with the decline of local newspapers, rendering PEG channels an even more important means for citizens to keep abreast of important local news developments. As discussed in greater detail below, the Supreme Court and Congress have both long acknowledged that access to diverse perspectives on local news and events is critical to democracy and self-governance. *Turner Broad. Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 633-34 (1994); *Turner Broad. Sys., Inc. v. FCC ("Turner II")*, 520 U.S. 180, 192-93 (1997). Congress sought to promote PEG channels as a means of facilitating this important state interest. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 798 (1996). Congress acknowledged that many states and local franchises required PEG channels as a condition of granting a franchise, and the legislative history of the 1984 Cable Act shows that Congress had no intention of preempting state authority in the manner described by Appellants. *Id*. at 791-92.

Maine's laws to protect this "government purpose of the highest order," *See Turner II*, 520 U.S. at 190, are a classic example of the state's consumer protection power. Maine responded to multiple complaints from consumers actively trying to find PEG programming and wishing to view it in the same manner, and at the same quality, as other programming. *NCTA v. Frey,* U.S. Dist. LEXIS 41682 at *26. Maine's laws ensuring that Maine's cable subscribers get the PEG programming they paid for (by preventing cable operators from degrading the signal or from moving the programming from the basic tier) are straightforward applications of consumer protection law. *Id.* at *26-27. But in addition, the interest of the state of Maine in encouraging the broadest viewership of PEG similarly falls within the definition of consumer protection law as used in 47 U.S.C. §552(d).

A. Both the Plain Language and the Legislative History Contradict NCTA's Theory of Preemption.

NCTA essentially argues that any right not granted by the Communications Act to local franchising authorities is "inconsistent" with federal law and therefore preempted. Brief of Plaintiff-Appellant at 27-29, *NCTA v. Frey*, No. 20-1431 (1st Cir. July 16, 2020). This precisely reverses the relationship between the Cable Act and federal authority – particularly with regard to PEG and state consumer protection law. The statute states clearly that only where a direct conflict exists between federal law and state authority over franchising does an "inconsistency" exist that requires preemption. 47 U.S.C. §556(c). NCTA's theory that states may only engage in activities *authorized* by the statute runs contrary to this plain language. Additionally, nothing in the plain language of the statute supports NCTA's further contention that Congress intended to preclude states from exercising authority over local franchising authorities. Rather, NCTA's reading would run counter to both the legislative history and case precedent, most notably

Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (10th Amendment prohibits Congress from banning state consideration of laws) and *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 (2019) (implied preemption is especially disfavored where it would intrude on areas of traditional state legislation.) *See also Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S at 763 (1996) (discussing history of PEG access) and at 788-89 (Kennedy, J. concurring in part, dissenting in part) (same).

i. The Legislative History Shows Congress Did Not Intend to Limit or Preempt State Authority to Protect Consumers with Regard to PEG Services.

The legislative history of the 1984 Cable Act strongly supports the District Court's findings. The 1984 House Report recognized local franchising as the primary regulator of cable operators, H.R. Rep. No. 98-934, at 19 (1984) ("1984 House Report"), and explicitly sought to preserve that structure. *Id*. at 24. Although the Report often speaks of the "local" franchise authority and for the need to make decisions at the franchise level, Congress was well aware that various states "have acted to regulate the franchise process, either directly . . . or indirectly through state statutes specifying terms" that local authorities must include in franchises. *Id*. at 23. Nothing in the legislative history demonstrates any desire by Congress to intrude on the relationship between state and local authorities by creating the binary choice of state-only franchising or local franchising. To the contrary, the Report stresses that the drafters intended, among other goals, to protect local prerogatives from federal intrusion. *Id*. at 19, 24. With regard to limitation on local and state authority, the legislative history reveals the drafters intended to curtail demands for specific programming channels, *Id.* at 26, or imposing capacity conditions that would render operation of cable systems unprofitable and therefore non-viable -- not radically restructure the relationship between states and local franchising authorities. *Id.* at 21-22.

Further evidence that Congress never intended a Manichean separation between state authority and delegated "franchise" authority comes from the definition of "franchise authority." The definition in 47 U.S.C. § 521(10) is deliberately broad – "any governmental entity empowered by federal, state or local law to grant a franchise." The Committee Report on this specific section again reflects Congress' awareness of "mixed model" franchising authorities where states exercised supervision over local franchising authorities, and the drafters' desire to include these mixed models as legitimate "franchise authorit[ies]." 1984 House Report at 45.

Finally, in the specific section addressing PEG, the House Report explicitly acknowledges that franchise authorities remain subject to any conditions or limitations imposed by the state. "Subsection 611(b) does not give the franchising authority the power to override state law." *Id.* at 46. Here, NCTA makes the exact argument rejected by the House Report. According to NCTA, Congress through Section 611 (codified at 47 U.S.C § 531) made the franchising authority the exclusive regulator of all things PEG, and only by enacting a state franchising law may Maine enact legislation bearing on PEG. Brief of Plaintiff-Appellant at 29, *NCTA v. Frey*, No. 20-1431 (1st Cir. July 16, 2020). As the legislative history shows, NCTA's interpretation stands Congress' intent on its head, and the Court should reject it accordingly.

As the Supreme Court has cautioned, where Congress does not explicitly preempt state authority over an area of traditional state jurisdiction, courts should not read a desire to preempt simply from the complexity of the statutory scheme or in the belief that national preemption would be better policy. *Va. Uranium, Inc.*, 139 S. Ct. at 1908 ("in piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text . . . we may only wind up displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see"). This is especially true when such a reading

would intrude into a state's legislative process with regard to how it regulates its own subdivisions. *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism"). S*ee also Murphy v. NCAA*, 138 S. Ct. at 1481 (Congress may not dictate to a state how to draft its laws). This Court should not impute any intention by Congress to strictly bifurcate authority between state and local franchising authorities, or to preempt state consumer protection authority, where Congress has not made such intention clear in the plain language of the statute.

B. Maine's Interest in PEG Channels Is "A Government Purpose of the Highest Order."

Congress and the Supreme Court have both recognized the vital interest of states and localities in promoting PEG. This flows not simply from exposure to the diverse views provided by public access (the "P" in PEG), but also by creating an informed citizenry (the "E" in PEG) and providing the public with the ability to observe government hearings or other official actions (the "G" in PEG) and to hold their elected officials accountable for these actions. 1984 House Report at 30. ("PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.") *See also Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 790 (Kennedy, J. concurring in part, dissenting in part) (describing the different interests served by PEG).

For over 80 years, Congress and the Supreme Court have recognized the importance of maintaining an informed citizenry as essential to our democracy and ability to govern ourselves. *See Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390-91 (1969); *Turner II,* 520 U.S. at 190-93; 1984 House Report at 31-36; *See also*

47 U.S.C. § 257(b) (noting policy of promoting diversity in media). The Supreme Court has called maintaining access to a diversity of views a "government purpose of the highest order." *Turner II*, 520 U.S. at 190. "Speech concerning public affairs is more than self-expression; it is the essence of self-government. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broad. Co.* 395 U.S. at 390 (citations omitted). Maine's efforts to ensure that all citizens who subscribe to cable can easily find PEG channels, and removing the artificial impediment of cable operators downgrading the signal, serve this "government purpose of the highest order."

ii. The Decline of Local Media and the COVID Pandemic Make the Need for Maine's PEG Protections Even More Urgent.

Maine's interest in protecting cable subscriber access to PEG channels has become more urgent as local news continues to consolidate or disappear altogether. According to one study, the United States has lost over 2,100 newspapers -- or one-fourth of them – in the last 15 years. About 1,800 of the communities that have lost a paper since 2004 do not have easy access to any local news source – such as a local online news site or a local radio station.[1] Many of the 6,700 surviving newspapers have become "ghost newspapers" – mere shells of their former selves, with greatly diminished newsrooms and readership...due to strategic decisions to close small weeklies and dailies, discontinue distribution of large dailies to outlying regions of the state, and lay off reporters.[2] In 2018, Maine saw substantial consolidation in its newspaper market, with 7 out of 8 daily newspapers in Maine, and 21 of approximately 30 weekly newspapers, owned by a

[1] PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE?, Univ. N.C. AT CHAPEL HILL, at 11 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf.
[2] PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE?, Univ. N.C. AT CHAPEL HILL, at 21 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf.

single individual.[3] Local television news has also consolidated enormously in recent years. Recent relaxation of media ownership rules by the FCC has allowed local consolidation to reach unprecedented levels.[4] As a result, production of local news has declined and viewpoint diversity has dramatically diminished.[5]

This resulting loss in both local news and diversity of views increases the need for Maine to protect the availability of PEG to Maine's cable subscribers. In addition, the COVID pandemic has curtailed the ability of Maine citizens to attend local hearings and to participate in in-person educational opportunities. Even with relaxation of stay at home orders, many Maine residents – especially those in high-risk categories – are no longer attending in-person meetings or classes. The combination of consolidation and COVID makes Maine residents even more dependent and PEG to provide them with access to local government events, local educational opportunities, and local perspectives.

Maine's PEG provisions facilitate the ability of Maine's cable subscribers to reliably find PEG channels, and prevents cable operators from taking action to discourage subscribers from viewing PEG. Maine's interest in promoting PEG viewership serves the "government purpose of the highest order" recognized by both Congress and the Supreme Court.

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[3] Casey Kelly, *The man behind Maine's unparalleled consolidation of local news*, COLUMBIA JOURNALISM REVIEW. (Sep. 6. 2018) https://www.cjr.org/united_states_project/reade-brower-maine.php.

[4] *See* Sara Fischer, *The local TV consolidation race is here,* AXIOS (Aug. 10, 2018), https://www.axios.com/the-local-tv-consolidation-war-is-here-7c65f3fb-eaab-43c4-9a00-81303867dbee.html; Tom Wheeler, *A shameless effort to consolidate control of local broadcasters,* BROOKINGS (June 27, 2018), https://www.brookings.edu/blog/techtank/2018/06/27/a-shameless-effort-to-consolidate-control-of-local-broadcasters/.

[5] *See* Edmund L. Andrews, *Media Consolidation Means Less Local News, More Right Wing Slant,* STANFORD BUSINESS (July 30. 2019), https://www.gsb.stanford.edu/insights/media-consolidation-means-less-local-news-more-right-wing-slant; Laura K. Smith, *Consolidation and News Content: How Broadcast Ownership Policy Impacts Local Television News and Public Interests,* 10 JOURNALISM & COMMC'N MONOGRAPHS 387 (2009).

C. Congress Recognized This Strong Interest by Protecting the Power of Sates to Regulate PEG and Protect Consumers.

As Congress and the Supreme Court have noted, the requirement for cable operators to provide PEG channels predates the 1984 Cable Act. 1984 House Report at 30; *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S., at 788-89. The 1984 House Report praised the public access provisions (as well as the educational and government access provided by PEG) as appropriate uses of state power to be protected and encouraged by the Cable Act. 1984 House Report at 30-36. The Committee therefore included provisions to make any commitments by cable operators above the minimum imposed PEG obligations fully enforceable, to force cable operators to cease use of unused "dark" PEG channels when demanded by the franchise authority, and to keep PEG channels free from any editorial interference by cable operators. 1984 House Report at 46-47. The statute also clarified that requirements for PEG facilities and equipment are not part of the franchise fee, and the House Report makes clear that the law intended to promote PEG access by allowing franchise authorities to demand that cable operators provide facilities – including studios for the production of PEG programming – at the cable operator's expense. 1984 House Report at 68.

Finally, 47 U.S.C. § 521 lists several purposes of the Cable Act that bear directly on the ability of states to promote diversity and protect subscribers. Congress intended that the Cable Act "assure that cable systems are responsive to the needs and interests of the local community." 521(2). Congress also intended the Cable Act to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 521(4). The Maine PEG provisions directly address and further both these purposes. The Court should therefore reject NCTA's argument that the PEG provisions conflict with – and are preempted by – the statute.

D. The District Court Properly Found That Maine's PEG Statute Is an Exercise of Its Consumer Protection Power.

In addition to arguing for preemption, NCTA challenges the PEG provisions as not being a "consumer protection law" under 47 U.S.C. § 552(d)(1). NCTA appears to argue either that the PEG provisions are preempted – and therefore prohibited by the text of 552(d)(1) – or that the PEG provisions do not meet the definition of "consumer protection law." Neither argument survives a plain reading of the statute and the legislative history.[6]

The term "consumer protection law" is not defined in the Cable Act, or anywhere else in the Communications Act. Turning to the legislative history, it appears that Congress had no interest in intruding on general state authority beyond two specific concerns: preventing local franchising authorities from requiring specific programming channels, and prohibiting rate regulation. 1984 House Report at 69. In describing what sort of consumer protection would be inconsistent with the Cable Act, and therefore preempted, the Committee explained that a state could not "regulate rates for cable services in violation of Section 623 of Title VI and attempt to justify it as a 'consumer protection' measure." 1984 House Report at 79. As this example illustrates, Congress intended a narrow preemption of consumer protection laws, limited to state laws that plainly and directly contradicted explicit provisions of the Cable Act. Congress clearly did not intend the wide preemption that NCTA argues for, and the District Court properly rejected this argument.

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[6] It should be noted that even if Maine were exercising its franchise authority rather than its consumer protection powers, its actions would be lawful. Unlike the technical provision in Section 544, the broad authority to regulate PEG channels granted in Section 531 is not limited by the FCC's effective competition finding. Further, Section 531 specifically authorizes the regulation of the "designation or use of channel capacity," 47 U.S.C. § 531, and regulation of channel placement, signal quality, and electronic guide information plainly relate to the placement and use of PEG channels.

Additionally, the PEG provisions clearly fall within the classic realm of state consumer protection. In addition to providing subscribers with access to a greater diversity of news sources and perspectives as discussed above, the PEG provisions ensure that consumers receive the full value of the services they pay for – a classic state consumer protection provision. Cable subscribers pay for transmission of PEG channels as part of the cable service. This is one of the features that distinguishes cable from satellite services. *Compare* 47 U.S.C. § 335(b) (non-commercial set-aside for satellite providers) *with* 47 U.S.C. § 531. As the District Court noted, Maine responded directly to consumer complaints that cable operators were degrading the visual quality of PEG channels received in high definition and were taking other steps to make it more difficult for interested subscribers to find PEG channels or find specific events or programs featured on PEG. *NCTA v. Frey,* U.S. Dist. LEXIS 41682 at *27 Nor are these problems a few isolated incidents. For years, cable operators have used the switch to digital technology to engage in a pattern of anti-PEG behavior, including the same types of behaviors addressed by the Maine PEG provisions: moving PEG channels to "outer Siberia," shifting the channel position of PEG channels while leaving other channels stable, providing inadequate information in program guides, and down converting high definition PEG to make the picture smaller and grainier than on other channels. *See Public, Educational, and Governmental (PEG) Services in the Digital TV Age: Hearing Before the Subcomm. on Telecommunications and the Internet of the H.Comm. on Energy and Commerce*, 110th Cong (2008).

Maine's PEG provisions are consistent with the Cable Act's purposes of ensuring that cable providers "are responsive to the needs and interests of their local communities, 47 U.S.C. § 521(2), and assuring that cable operators provide "the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). Additionally, ensuring that subscribers

receive the full value for the services for which they pay is paradigmatic consumer protection legislation. Appellants do appear to acknowledge this. While Appellants try imply at one point that consumer protection laws may only be directed at dangerous and deceptive products, Brief of Plaintiff-Appellant at 25, NCTA v. Frey, No. 20-1431 (1st Cir. July 16, 2020), earlier in the same brief, they more accurately cite authority demonstrating that consumer protection laws can simply promote quality standards. Brief of Plaintiff-Appellant at 19, NCTA v. Frey, No. 20-1431 (1st Cir. July 16, 2020). *See also Deuteronomy* 25:13-16. (mandating standardized and "full" weights and measures). Accordingly, the Court should affirm the decision of the District Court and reject the arguments of Appellants.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CABLE ACT DOES NOT PREEMPT THE LINE EXTENSION PROVISION.

Appellants state that "[t]he Maine Act's line-extension requirement is unlawful in every case because it compels franchising authorities in each municipality to require line extension to 15 residences-per-mile regardless of whether it is cost-justified based on community needs and interests." Brief of Plaintiff-Appellant at 6, *NCTA v. Frey*, No. 20-1431 (1st Cir. July 16, 2020). This makes no sense. As noted above, Congress was fully aware that in some states specific statutes or state regulatory authorities required local franchise authorities to include certain specific conditions in local franchise agreements, House Report at 19, and that Congress had no desire to preempt this exercise of state control over local franchise authorities. House Report at 45-46.

Turning to the plain language of the statute, a density-based requirement is already community-specific, meaning that it is quite likely that a statewide density-based requirement is already justified in every case where is applies. Communities where such a buildout requirement

is not justified by the cost are likely under 15 residences-per-mile to begin with. But even if that were not the case, appellants attempt to argue that if the requirement cannot be justified in one community, it is invalid everywhere. Imagine 15 communities, and 15 franchising authorities, and only one of those franchising authorities is unable to properly justify the extension requirement. Under the district court's analysis, a cable company could challenge the requirement *in that community*. But the appellants would instead have it so that a requirement that was readily justified in almost every case could not be imposed anywhere, merely because the state has passed a law on the matter.

There is little logic to appellant's position for other reasons as well. The relevant statute states that a franchise authority is "any governmental entity empowered by federal, state or local law to provide a franchise." 47 U.S.C. § 522(10). When the state issues rules it can be seen as simply acting *as* a franchising authority itself, while delegating other franchising responsibilities to local authorities. This is because exactly how franchising works is entirely up to the state. Indeed, appellants appear to fundamentally misunderstand the relationship between municipalities (including local franchising authorities) and states. In the federal system, states are sovereign governments subject to the broader constitutional order, but they are not "creatures" of the federal government or mere administrative subdivisions. But that is exactly what municipal governments are, in relation to their states. The structure and size of municipal governments varies widely between states, and municipal governments have no powers except those granted to them by state law. Recognizing this, courts have been highly skeptical of attempts by federal agencies to interfere with the relationship between states and their administrative subdivisions—such as by granting municipalities the right to disregard state laws that frustrate a federal policy. *See Tennessee v. FCC*, 832 F.3d 597, 613 (2016) (the FCC may not preempt laws restricting

municipal broadband absent express statutory authority). Thus, even if a state is not acting as a franchising authority directly, it necessarily retains the right to supervise and direct the local authorities it has delegated authority to. If a cable company wants to challenge a specific franchise requirement in a specific community, it can, but the fact of state supervision of franchising is irrelevant to whatever argument it might want to make.

III. CONCLUSION

For the reasons set forth above Public Knowledge respectfully asks that the Court affirm the District Court's holding.

Respectfully Submitted: September 23, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Rule 32(a0(5) and the type-style requirements of Rule 32(a)(6). I further certify that all text in this opposition brief is in proportionally spaced Times New Roman Font and is 12 points in size. I further certify that according to the word count function of the word-processing software used to prepare this brief, this brief contains 4,156 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system which will send notification of such filing to all persons registered for ECF in this matter.

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