IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, NEW ENGLAND CABLE & TELECOMMUNICATIONS ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

PHILIP B. SCOTT, in his official capacity as the Governor of Vermont; SUSANNE R. YOUNG, in her official capacity as the Secretary of Administration; JOHN J. QUINN III, in his official capacity as the Secretary and Chief Information Officer of the Vermont Agency of Digital Services; and JUNE E. TIERNEY, in her official capacity as the Commissioner of the Vermont Department of Public Service,

Defendants.

Case No. 2-18-cv-00167-CR

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO STAY

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INTRODUCTION

Defendants'[1] motion (ECF No. 24-1) represents an unwarranted attempt to forestall the Court's review of two plainly unconstitutional measures—an executive order and a statute imposing state-level net neutrality obligations that are preempted by federal law and that violate the dormant Commerce Clause. Defendants' contention that Plaintiffs[2] lack standing is meritless, and their request to stay the entire litigation while reserving the right to enforce these unconstitutional state measures is untenable. As set forth in Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, filed concurrently with this Opposition, this case is ripe for immediate resolution on the merits in Plaintiffs' favor. The Court should deny Defendants' motion and grant summary judgment for Plaintiffs by enjoining enforcement of the measures at issue.

The cursory objections to Plaintiffs' standing in Defendants' motion do not pass muster. The Complaint specifically alleges that Plaintiffs all represent Internet service providers ("ISPs") operating in Vermont, all of which will be harmed to the extent they bid on or win State broadband procurement contracts. Contrary to the State's attempts to manufacture heightened pleading requirements, such allegations are sufficient to plead associational standing under the standards articulated by this Court, the Second Circuit, and other courts. Nevertheless, for the avoidance of

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[1] "Defendants" in this case are Philip B. Scott, in his official capacity as the Governor of Vermont; Susanne R. Young, in her official capacity as the Secretary of Administration; John J. Quinn III, in his official capacity as the Secretary and Chief Information Officer of the Vermont Agency of Digital Services; and June E. Tierney, in her official capacity as the Commissioner of the Vermont Department of Public Service. Compl. ¶¶ 21-24, ECF No. 1.

[2] "Plaintiffs" in this case are the following trade associations representing providers of broadband Internet services in Vermont: American Cable Association ("ACA"), CTIA – The Wireless Association, NCTA – The Internet & Television Association, New England Cable & Telecommunications Association, and USTelecom – The Broadband Association. Compl. ¶¶ 15-20, 25.

doubt, Plaintiffs cite public records and provide declarations regarding member ISPs confirming that they operate in Vermont, are current State contractors and/or potential bidders on future State contracts, and face concrete harms caused by the State measures at issue.

Defendants further argue that Plaintiffs' members are not injured by the State's bans on blocking, throttling, and paid prioritization because ISPs have made public commitments not to violate consensus net neutrality principles, but that contention fails for multiple reasons. Most significantly, Defendants completely ignore the State's re-imposition of the overbroad and ambiguous "Internet Conduct Standard" that the Federal Communications Commission ("FCC") repealed in its 2018 *Restoring Internet Freedom* Order. *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) ("*2018 Order*"). The FCC expressly found that this standard—which vaguely prohibits ISPs from "unreasonably interfering with or unreasonably disadvantaging" end users' access to Internet content providers or Internet content providers' access to end users—imposes significant harms on ISPs, as it subjects them to "substantial regulatory uncertainty" and, when imposed at the federal level, led them to "forgo or delay innovative service offerings." *Id.* ¶¶ 247, 249. Plaintiffs' members have not made commitments to abide by this ambiguous "conduct standard," and it is impossible for ISPs to know what it proscribes. Defendants also make no effort to contest the Complaint's allegations that the re-imposition of this standard harms Plaintiffs' members. The State's prohibitions on blocking, throttling, and paid prioritization also would harm Plaintiffs' members if the State applies those prohibitions in novel ways that are inconsistent with ISPs' public commitments. And Defendants disregard that subjecting Plaintiffs' members to unconstitutional state measures alone constitutes cognizable injury. Plaintiffs plainly have standing.

Moreover, while Plaintiffs do not oppose a stay of discovery while the parties' dispositive motions are pending, Defendants' request for a stay of the *entire litigation* while the State's unconstitutional measures remain in force is patently unreasonable. Defendants base their request primarily on the pendency of the D.C. Circuit's review of the express preemption ruling in the FCC's *2018 Order*—arguing that this Court should not determine the lawfulness of the State measures at issue in this case before the D.C. Circuit acts. But any timing issue is entirely of the State's own making. The State could have waited to see if its challenge to the FCC's express preemption ruling succeeds before charging ahead with efforts to impose its own net neutrality requirements in direct contravention of federal law; indeed, as Defendants themselves point out, Vermont is one of 22 states challenging that ruling in the D.C. Circuit. Alternatively, the State could have asked the D.C. Circuit to stay the effectiveness of the FCC's express preemption ruling. But the State did neither. Instead, it decided to impose its net neutrality requirements immediately and in the teeth of the FCC's still-effective express preemption ruling. The State cannot have it both ways; it cannot rush to adopt measures that violate an FCC order *while* the State's challenge to that order is pending, but then ask this Court to delay its review of those unconstitutional measures until *after* the State's appeal is resolved.

Defendants' request for a stay of litigation is all the more unreasonable because the challenged measures would remain in effect and fully enforceable while the stay is pending—leaving Plaintiffs' members subject to, but unable to challenge, an unconstitutional executive order and statute for an indefinite period. This, too, is a problem that Defendants could have avoided. In a parallel lawsuit challenging California's net neutrality statute, the California defendants committed not to enforce the statute for the full duration of any judicial review of the *2018 Order*, including any Supreme Court review, in connection with a stipulated stay of litigation. Defendants

in this case could have done the same but have not. The Court should deny Defendants' motion to dismiss as well as their request to stay the litigation.

BACKGROUND

Plaintiffs are associations representing the broadband Internet service provider industry.[3] Compl. ¶¶ 15-20, 25-26. As set forth in the Complaint, this case concerns two interrelated attempts by the State of Vermont to impose unconstitutional legal requirements on the provision of broadband Internet services by Plaintiffs' member companies. *See* Compl. ¶ 1. Vermont's Executive Order No. 2-18 ("Executive Order") and Senate Bill 289 ("S. 289") impose obligations that the FCC's *2018 Order* and the federal Communications Act of 1934, as amended (the "Communications Act"), prohibit states from imposing, and are therefore preempted under the Supremacy Clause of the United States Constitution. The Executive Order and S. 289 are unconstitutional for the additional reason that, by purporting to regulate an inherently interstate communications service, they regulate outside the borders of the State of Vermont and burden interstate commerce in violation of the dormant Commerce Clause of the United States Constitution.

The State adopted these unconstitutional measures based on a disagreement with controlling federal law and policy concerning broadband Internet services. The FCC's *2018 Order* established "a calibrated federal regulatory regime" for mass-market broadband Internet access service ("broadband") "based on the pro-competitive, deregulatory goals of the 1996 [Telecommunications] Act." *2018 Order* ¶ 194. In the *2018 Order*, the FCC chose to protect

[3] The Complaint uses the term "broadband Internet service" to refer to any broadband service that provides access to the Internet and that is offered by an Internet service provider ("ISP"). The term encompasses not only mass-market broadband Internet access services sold to residential and small business customers (defined as "broadband" herein), but also enterprise broadband Internet services sold to government agencies and large businesses.

Internet openness with a regime of transparency and disclosure, backed by case-by-case Federal Trade Commission oversight to prevent unfair or deceptive practices or unfair methods of competition, rather than common carrier mandates designed for telephone providers. The *2018 Order* also reaffirmed that mass-market broadband, like all other broadband Internet services, is an inherently interstate "information service," *id.* ¶¶ 20, 199, and in doing so reversed an aberrational 2015 FCC ruling that deemed broadband a common carrier "telecommunications service," *see Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶¶ 306-308 (2015) ("*2015 Order*"). Based on its transparency regime and statutory classification ruling, the *2018 Order* repealed certain "net neutrality" rules that were adopted in the *2015 Order* and predicated on the classification of broadband as a common carrier service. The *2015 Order* had imposed a no-blocking rule, a no-throttling rule, a no-paid-prioritization rule, and a general "Internet Conduct Standard," and the *2018 Order* repealed each of these measures, finding that they inflicted various harms on ISPs and were inconsistent with federal law and policy mandating a light-touch regulatory approach to broadband. *See 2018 Order* ¶¶ 1-5; *see also* Compl. ¶¶ 31-34. To ensure that states would not re-impose the same rules the FCC found so burdensome, the FCC included a broadly worded, express preemption provision that preempted "any state or local measures that effectively impose rules or requirements that [the FCC has] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service" addressed in the order. Compl. ¶ 35 (quoting *2018 Order* ¶ 195).

In direct contravention of this express preemption ruling, Vermont adopted two such measures when it enacted S. 289 and the Governor issued Executive Order No. 2-18. Both of these measures impose the same obligations (nearly verbatim) originally imposed by the *2015 Order* but

repealed by the *2018 Order*, all at the moment an ISP signs a service contract with the State. Compl. ¶ 6. Plaintiffs, on behalf of their members, brought this challenge contending that the measures violate the Supremacy Clause (because they are preempted by the *2018 Order* as well as the Communications Act) and the dormant Commerce Clause (because, as regulations of members' provision of broadband Internet services, which are inherently interstate services, they regulate extraterritorially and unduly burden interstate commerce). Compl. ¶¶ 8-11.

Plaintiffs have standing to bring these claims because "each of the Associations have members that currently and routinely enter and maintain such contracts with such entities in Vermont." Compl. ¶ 6; *see also* Compl. ¶¶ 25, 64. With the requirements imposed by the Executive Order and S. 289, Plaintiffs' members thus face injury because, among other things, (a) the measures subject them to unconstitutional legal requirements, a cognizable injury itself, Compl. ¶ 65; (b) the "vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty," causing ISPs "to forgo or delay innovative service offerings or different pricing plans," Compl. ¶ 66 (quoting *2018 Order* ¶¶ 247, 249); (c) members will lose business opportunities if they do not accede to the State's demands or risk enforcement (including potentially the loss of business they previously won) resulting from alleged non-compliance with the State's undefined rules, Compl. ¶ 67; and (d) compliance with a patchwork of different and potentially conflicting state laws presents tremendous operational burdens and harms, Compl. ¶ 68, particularly since "it is impossible or impracticable for ISPs . . . to apply different rules" for Internet traffic in different states, Compl. ¶ 26 (quoting *2018 Order* ¶ 200).

LEGAL STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), when a defendant challenges standing based on alleged deficiencies in the complaint, the plaintiff need only meet "a low threshold" to establish standing. *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d

Cir. 2017) (quoting *WC Capital Mgmt., LLC v. UBS Sec., LLC*, 711 F.3d 322, 329 (2d Cir. 2013)). In particular, "a plaintiff need only allege facts that establish a plausible claim to standing." *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 618 (D. Vt. 2015) (Reiss, C.J.); *see also Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 111 (2d Cir. 2018) ("Unless an allegation of injury is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy, the mere fact that it raises a federal question confers power on a federal court to decide that it has no merit, as well as to decide that it has." (internal citations, alterations, and quotation marks omitted)). The Court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Carver v. City of N.Y.*, 621 F.3d 221, 225 (2d Cir. 2010) (quoting *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008)). Further, when reviewing such allegations, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the Court "presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). The Second Circuit has consistently explained that "[t]he injury-in-fact necessary for standing need not be large[;] an identifiable trifle will suffice." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 105 (2d Cir. 2013) (quoting *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002)).

Moreover, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement" as to other named plaintiffs. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that, where one of several named plaintiffs had standing, the Court "need not consider the standing issue as to" the other named plaintiffs); *Green Mountain Chrysler Plymouth*

Dodge Jeep v. Dalmasse, No. 2:05-cv-302, 2006 WL 3469622, at *4 n.5 (D. Vt. Nov. 30, 2006) (explaining that, where one plaintiff "ha[s] Article III standing, it is unnecessary to address the standing of other plaintiffs").

When a party seeks a stay, the "proponent of [the] stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). "Courts consider five factors when deciding whether to grant a stay: (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Clift v. City of Burlington, Vt.*, No. 2:12-cv-214, 2013 WL 12347196, at *1 (D. Vt. Apr. 8, 2013) (quoting *Volmar Distribs., Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993)).[4] "Balancing these factors is a case-by-case determination, with the basic goal being to avoid prejudice." *Volmar*, 152 F.R.D. at 39. A stay of a civil case is "an extraordinary remedy." *Jackson v. Johnson*, 985 F. Supp. 422, 424 (S.D.N.Y. 1997) (citation omitted).

[4] The standard cited by Defendants is different. *See* Mot. 8 (citing *Mountain Cable Co. v. Pub. Serv. Bd. of State of Vt.*, No. 1:03-cv-219, 2003 WL 23273428, at *4 (D. Vt. Nov. 4, 2003) (applying three factors: "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and a trial date has been set")). It appears that standard is *sui generis* for patent cases in which a stay is sought pending a ruling of the Patent and Trademark Office ("PTO"). *See, e.g.*, *PPC Broadband, Inc. v. Corning Gilbert, Inc.*, No. 5:12-cv-0911 (GLS/DEP), 2014 WL 12599388, at *4 (N.D.N.Y. Mar. 13, 2014) (quoting *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 404, 406-07 (W.D.N.Y. 1999)) ("As motions for stays of patent infringement actions during the pendency of PTO proceedings have become more prevalent, courts have settled upon a three-factor test to evaluate them, examining '(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.'"). *Mountain Cable Co.* was not a patent case, but the court applied the patent standard because the parties agreed on its application. *See Mountain Cable Co.*, 2003 WL 23273428, at *4. The parties have not done so here, and *Clift* is more recent (and relevant) precedent outlining the correct standard.

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED ASSOCIATIONAL STANDING

Defendants contend that the Plaintiff associations lack standing because (1) the Complaint supposedly does not identify members affected by the Executive Order and S. 289, and (2) the various injuries identified in the Complaint—and recognized by the expert federal agency—are somehow not cognizable. These arguments are meritless; they not only rest on mischaracterizations of law, but also disregard many of the key allegations in the Complaint. The Complaint's allegations of injury to Plaintiffs' members are more than sufficient to withstand a challenge under Rule 12(b)(1).

A. Plaintiffs Have Adequately Alleged That the Executive Order and S. 289 Injure Their Members

Defendants first argue that Plaintiffs lack standing because the Complaint does not "identify a specific member of any Plaintiff" affected by S. 289 or the Executive Order, Mot. 4-5, but this contention misses the mark. Defendants do not dispute that Plaintiffs' members include ISPs that provide broadband Internet services in Vermont and either have bid or intend to bid on contracts to provide State entities with such services, as the Complaint clearly alleges. *See* Compl. ¶ 25. Nor could Defendants plausibly dispute these allegations, as Defendants oversee State entities that solicit such bids and are counterparties to the resulting contracts with Plaintiffs' members. The Complaint also establishes that these members are subject to the harms set forth in the Complaint to the extent they bid on and win State contracts. *See, e.g.*, Compl. ¶ 67 ("Members thus face significant harm to the extent that they are prevented from offering services to State entities because of the Executive Order and S. 289."); *see also* Compl. ¶ 66 ("[T]he specific requirements that both the Executive Order and S. 289 impose will cause irreparable injury to the businesses of Associations' members that bid on and win state contracts.").

Instead of disputing these allegations, Defendants make the formalistic claim that, despite the acknowledged existence of such members, Plaintiffs were obligated to identify them by name in the Complaint. But that is not the law. The Second Circuit has explicitly rejected Defendants' theory that a complaint's lack of specific *names* equates to a failure to identify specific *members*. In *Building and Construction Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Development, Inc.*, a labor organization claimed that development corporations and agencies violated various environmental laws when seeking to redevelop a former industrial site. 448 F.3d 138, 142-43 (2d Cir. 2006). The organization alleged that many of its members resided and worked near the site. *Id.* at 143. The district court dismissed the complaint on the grounds that, as Defendants argue here, the organization failed to name specific members who would be harmed by the defendants' actions. *Id.* at 144. But the Second Circuit explicitly rejected that reasoning, holding that an association need only allege that one or more of its members has suffered or likely will suffer injury. *Id.* at 145. That requirement—which *Summers* did not alter—is not a "heightened pleading requirement" demanding that an association "'name names' in a complaint in order properly to allege injury in fact to its members." *Id.*; *see also Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (explaining that *Summers* does not require naming any specific member "[w]here it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury"); *New York v. U.S. Dept. of Commerce*, No. 18-cv-2921, 2019 U.S. Dist. LEXIS 6954, at *272 n.48 (S.D.N.Y. Jan. 15, 2019) (rejecting the argument that "an organization must identify particular members by name in order to have associational standing to pursue claims on their behalf," and explaining that it would "overread" *Summers* "to require an organization to *name*

the member who might have standing in his or her own right"). These rulings are consistent with the basic purpose of the standing inquiry: to ensure that the challenged action affects a party differently from the general public and that the party is not presenting a generalized grievance. *See Lance v. Coffman*, 549 U.S. 437, 439-40 (2007) (per curiam).

Here, associational standing is self-evident because Plaintiffs' members are the *direct targets* of the challenged State measures. Plaintiffs' members "provide broadband Internet services to government entities in Vermont, and either have bid (since the effective date of the Executive Order), or intend to bid on contracts with State entities to provide such services in the future." Compl. ¶ 25. Further, the Complaint explains that "certain Association members have been in active negotiations with governmental entities in Vermont regarding the terms of broadband service contracts." Compl. ¶ 64. These allegations are just as specific (if not more so) than allegations by trade associations that this Court previously held to be sufficient to establish standing. *See, e.g.*, *Grocery Mfrs. Ass'n*, 102 F. Supp. 3d at 619 (holding that the National Association of Manufacturers ("NAM") established standing to challenge a Vermont law mandating labeling of genetically engineered foods when the complaint "alleg[ed] that members of the NAM include small and large manufacturers in all 50 states and in every industrial sector, including the food and beverage industry, and further assert[ed] that NAM members in the food manufacturing industry sell foods containing ingredients derived from genetically engineered plants and will be directly, immediately, and substantially affected by the Act" (internal quotation marks omitted)). It defies common sense for Defendants to claim that, among the five Plaintiff associations representing the broadband industry, no individual member is affected, or that representatives of the broadband industry cannot challenge State measures that impose

burdensome mandates on the provision of broadband service. Indeed, courts routinely hold that it is "*obvious*" that trade associations can challenge regulations that plainly affect their industry.[5]

In any event, individual members of the Plaintiff associations operating in Vermont have publicly documented the harms inflicted on them by the repealed FCC rules that S. 289 and the Executive Order purport to re-impose.[6] Moreover, according to the State's own official website,

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[5] *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (holding that it was "obvious" that the national trade association for trucking had standing to challenge an agency rule that impacts truckers); *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1327-28 (11th Cir. 2014) (finding that trade association established standing when it was obvious that the challenged statute would apply to members and relying only on the allegations in the complaint as well as a general declaration by the association's vice president); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756-57 (10th Cir. 2010) (concluding that business associations established standing to challenge Oklahoma law requiring public contractors to adopt a program to verify employees' immigration status when they alleged that their membership included "companies that currently have contracts with public employers in Oklahoma and hope to enter into such contracts in the future but will be ineligible under [the statute] unless they adopt [the program]").

[6] *See* Comments of Comcast Corp., WC Docket No. 17-108, at 37, 45, 72 (July 17, 2017) (explaining how the Internet Conduct Standard "chills ISPs' incentive to innovate" as new products and services must be evaluated for compliance with an undefined standard "and then designed or redesigned to minimize those risks," such as when Comcast's Stream TV cable service was investigated for well over a year by the FCC for compliance); Comments of Charter Commc'ns, Inc., WC Docket No. 17-108, at 11 (July 17, 2017) (asserting that it "put on hold a project to build out its out-of-home Wi-Fi network, due in part to concerns about whether future interpretations of Title II would allow Charter to continue to offer its Wi-Fi network as a benefit to its existing subscribers" and that "[s]imilar concerns about the potential consequences of applying Title II obligations to Charter's own networks also contributed to Charter's decision, last year, to delay and then move more slowly with plans to launch a wireless service"); Comments of American Cable Association, WC Docket No. 17-108, Exhibits A and D (July 17, 2017) (attaching exhibits from ACA member companies explaining that the uncertainty caused by the Internet Conduct Standard deterred them from employing better network management tools and deploying innovative caching devices); Comments of AT&T, WC Docket No. 17-108, at 55-59 (July 17, 2017) (explaining how "allowing the Commission to enforce open-ended Title II regulation against broadband ISPs," such as when AT&T's "Data Free TV" service was investigated by the FCC for compliance, will "deter broadband providers from offering welfare-enhancing price concessions to consumers"); Comments of Verizon, WC Docket No. 17-108, at 10-15, Exhibit A (July 17, 2017) (attaching expert analysis explaining that "the significant ambiguity regarding what provider practices are permitted under Title II likely will inhibit new, innovative business models, arrangements, and services," including "'sponsored data' or 'free data' programs (such as

several members of the Plaintiff associations have existing service contracts with the State[7]—to say nothing of the even larger number of members that have bid or intend to bid on such contracts. And, to avoid any doubt, Plaintiffs now submit declarations regarding additional member ISPs specifically stating that they operate in Vermont, are potential bidders on State contracts for broadband Internet services, and face concrete harms caused by the State measures at issue.[8] Even if Defendants were correct that associations must specifically "name" affected members to establish standing, these materials, taken together, plainly suffice to meet any such standard. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1269-70 (2015) (instructing that, if standing turns on facts regarding an organization's members, "principles of procedural fairness requir[e] the court to give the plaintiff opportunity to present information regarding members").[9]

Verizon's FreeBee Data 360 program)"); Comments of T-Mobile, WC Docket No. 17-108, at 8-11 (July 17, 2017) (explaining that "the vague general conduct standard" produces "uncertainty"—such as when the FCC's investigation of T-Mobile's "Binge On" zero-rating plan put the popular plan "at risk"—that "will continue to blunt innovation and impede market-based efforts to provide additional value to consumers").

[7] *See, e.g.*, State of Vermont, Agency of Administration, Buildings and General Services, "Communications Contracts," *available at* https://bgs.vermont.gov/content/communications-contracts (last visited Jan. 23, 2018) (indicating that members of USTelecom and CTIA currently have contracts with the State, including AT&T, Verizon, and Sprint, and linking to the State's contracts with those ISPs). Because this information is posted on a page of the "Vermont Official State Website," this Court may take judicial notice of it under Federal Rule of Evidence 201(b)(2). *See, e.g., Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (explaining that it is "clearly proper to take judicial notice" of "documents retrieved from official government websites" as well as "information publicly announced on a party's website").

[8] *See* Declaration of Mark Reilly, Senior Vice President, Government and Regulatory Relations, Northeast Division, Comcast Cable, attached hereto as Exhibit A; Declaration of Ross Lieberman, Senior Vice President, Government Affairs, ACA, attached hereto as Exhibit B.

[9] Contrary to Defendants' assertions, "robust" discovery in response to these declarations is unnecessary and would waste the parties' and the Court's resources. Mot. 15. Defendants cannot seriously contend that discovery is necessary to determine whether *any* ISPs have bid or intend to bid on State contracts; the State would not have established the challenged procurement conditions if it believed no ISP would be subject to them. Defendants' request for jurisdictional

Again, any finding that even one Plaintiff has standing establishes an Article III "case or controversy." *Rumsfeld*, 547 U.S. at 52 n.2.

B. Defendants Ignore and Thus Do Not Dispute Key Injuries Identified in the Complaint

Additionally, Defendants argue that the Complaint does not establish a cognizable injury because Plaintiffs have not established that a member has or plans to engage in proscribed conduct, will change existing business practices, or will forgo a State contract in response to S. 289 or the Executive Order. Mot. 6-7. Those arguments not only misapprehend the law but also deliberately overlook key injuries specifically articulated in the Complaint.

Defendants argue that, to establish injury, Plaintiffs must allege that their members "had 'concrete' future plans to engage in blocking, throttling or paid prioritization" or changed their business practices. Mot. 7. This argument fails for multiple reasons. Most notably, while Defendants focus on the State's bans on blocking, throttling, and paid prioritization, they ignore the State restriction that most obviously harms ISPs—the re-imposition of the overbroad and ambiguous "Internet Conduct Standard" that the FCC repealed in its *2018 Order*. That standard prohibited ISPs from "unreasonably interfering with or unreasonably disadvantaging" end users' access to Internet content providers or Internet content providers' access to end users, *see* Compl. ¶ 29 (quoting *2015 Order* ¶ 21), and both S. 289 and the Executive Order now revive this standard for any ISP that contracts with the State, *see id.* ¶¶ 37, 42. The FCC specifically found that the imposition of the Internet Conduct Standard harms ISPs—explaining that this "vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty," *2018 Order* ¶ 247, and

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discovery is little more than a ploy to delay the Court's consideration of the merits of this case—and given the Court's "leeway as to the procedure it wishes to follow" to determine standing, *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006), the Court plainly can and should reject Defendants' request.

that while it was in place at the federal level, "ISPs . . . of all sizes have foregone . . . innovative service offerings or different pricing plans that benefit consumers, citing regulatory uncertainty under the Internet Conduct Standard in particular," *id.* ¶ 249. Plaintiffs' Complaint specifically relies on and further corroborates these findings in describing the harms to the associations' members stemming from the Internet Conduct Standard. *See* Compl. ¶ 66.

Defendants make no effort to contest these harms. Again, their motion to dismiss does not even *mention* the Internet Content Standard. And while they highlight ISPs' commitments to abide by consensus principles of Internet openness, *see* Mot. 7, ISPs have *not* made commitments to abide by the Internet Conduct Standard precisely because it is impossible to know what the standard proscribes.[10] Consider zero-rating, for example—a practice that allows ISPs to exclude certain content from an end user's monthly data usage allowance. When adopting the Internet Conduct Standard, the *2015 Order* asserted that zero-rating plans may or may not run afoul of the standard. *See 2015 Order* ¶ 152. ISPs then faced an FCC investigation lasting more than a year as to whether certain zero-rating plans violated the standard, with the FCC ultimately unable to reach a definitive conclusion. *See 2018 Order* ¶ 250. As the FCC explained when repealing the standard, that investigation (and others like it) "demonstrated that under the Internet Conduct Standard ISPs have faced two options: either wait for a regulatory enforcement action that could arrive at some unspecified future point or stop providing consumers with innovative offerings." *Id.* The Executive Order and S. 289 subject ISPs to the same Hobson's choice and cause harm that

[10] Even former FCC Chairman Tom Wheeler himself admitted, when asked what the Internet Conduct Standard adopted under his leadership would address, that "we don't really know. No blocking, no throttling, no fast lanes. Those can be bright-line rules because we know about those issues. But we don't know where things go next." Statement of Tom Wheeler, Former Chairman, FCC, Press Conference (Feb. 26, 2015), https://www.c-span.org/video/?c4534447/wheeler-general-conduct-standard.

is plainly sufficient to confer standing. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (challengers of Vermont statute banning transfer of certain content over the Internet stated Article III injury when the statute "presents plaintiffs with the choice of risking prosecution or censoring the content of their sites"); *N.Y. State Motor Truck Ass'n v. Pataki*, No. 03-cv-2386 (GBD), 2004 WL 2937803, at *8 (S.D.N.Y. Dec. 17, 2004) (explaining that "the knowledge, if not the fear, that the state mandates that [plaintiffs] conform their conduct consistent with the statute or risk [enforcement]" is sufficient to establish standing to challenge such a measure).

Moreover, contrary to Defendants' contentions, ISPs' commitments to abide by consensus net neutrality principles do not deprive them of standing to challenge the State's prohibitions on blocking, throttling, and paid prioritization. As the Complaint explains, and as Defendants do not dispute, the FCC found that state-level net neutrality requirements "impair the provision of broadband Internet access service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all the different jurisdictions in which it operates." Compl. ¶ 68 (quoting *2018 Order* ¶ 194); *see also Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) (explaining that state regulation of the Internet harms those regulated because "[h]aphazard and uncoordinated state regulation can only frustrate the growth of cyberspace"). The harms posed by patchwork, state-by-state net neutrality regulation arise not only when the requirements themselves differ, but also when similar requirements are enforced in inconsistent ways. Compl. ¶ 68. What a particular state considers "throttling," for instance, may well differ from what another state considers to be "throttling" or how an ISP uses the term in making its commitments to end users.[11] Plaintiffs' members thus still face harm to the extent the

[11] The term "throttling" in particular is one that can carry a wide range of meanings. The FCC defines "throttling" as a "practice (other than reasonable network management elsewhere

State enforces these so-called "bright-line" restrictions in a manner inconsistent with ISPs' commitments.

Defendants also argue that Plaintiffs are not injured because they "do not allege that any of their members have forgone State work." Mot. 6. But the case law is clear that, when the government places unlawful or unconstitutional restrictions on public contracts, a plaintiff may establish standing by showing that it will likely bid on a contract that will be subject to the challenged restrictions. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (contractor that challenged federal contracting requirements had standing for prospective relief when it showed "that sometime in the relatively near future it will bid on another Government contract"); *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47 (2d Cir. 2017) (explaining that, in cases challenging public contracting requirements, "courts have required that a plaintiff who challenges a barrier to bidding on public contracts actually make a bid on the contracts at issue, or at least establish standing by proving that it very likely would have bid on the contract but for the alleged discrimination"). Plaintiffs have specifically alleged that their members either have bid or intend to bid on State contracts that are governed by S. 289 and the Executive Order. Compl. ¶¶ 25, 64. Plaintiffs also have alleged that these State measures put their members to the choice of forgoing business opportunities with the State or being forced to accept unconstitutional restrictions. *See* Compl. ¶ 67 (stating that members "will be subject to lost business opportunities if they do not accede to the unlawful conditions set forth in the Executive Order and S. 289, which prohibit non-compliant ISPs from entering into service contracts with

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disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device." *2018 Order* ¶ 220. But the term also is often used colloquially to describe *any* slowing down of Internet traffic, even when done on a content- or application-neutral basis as part of a data plan that includes clearly disclosed data allowances.

governmental entities," and thus "face significant harm to the extent that they are prevented from offering services to State entities because of the Executive Order and S. 289"). These allegations plainly satisfy the applicable standard.

Finally, Plaintiffs have explained, and Defendants do not dispute, that being subject to unconstitutional and *ultra vires* State measures is an injury in and of itself. Compl. ¶ 65. As many courts have held, the likelihood of being subject to a state law that the state has no constitutional power to enact (whether due to the Supremacy Clause or the dormant Commerce Clause) is a cognizable injury—one even sufficient to warrant the extraordinary remedy of a preliminary injunction. *See Conn. Dep't of Envtl. Protection v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury." (citation and quotation marks omitted)).[12] This injury, as well as those discussed above, thoroughly establish Plaintiffs' standing and warrant denial of Defendants' motion to dismiss.

II. A STAY OF THE ENTIRE LITIGATION WITHOUT A CONCOMITANT STAY OF ENFORCEMENT WOULD BE UNREASONABLE

Defendants also seek a stay of the case pending either the Court's resolution of Defendants' motion to dismiss or the ruling of the D.C. Circuit in a challenge to the validity of the *2018 Order*.[13]

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[12] *See also Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (concluding that a trucking association challenging mandatory concession agreements as preempted and violative of the dormant Commerce Clause would face irreparable injury if members signed unconstitutional agreements); *Am. Libraries Ass'n*, 969 F. Supp. at 168 ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury."); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (enforcement of state laws regulating airlines "would violate the Supremacy Clause, causing irreparable injury to the airlines" by "depriving [them] of a federally created right to have only one regulator").

[13] The motion is not clear as to whether Defendants seek a stay that lasts until the Court rules on their motion to dismiss or until the D.C. Circuit issues a ruling in the case challenging the FCC Order; at times they seem to ask for both. *Compare* Mot. 2 (asking for a stay "while Defendants' motion to dismiss is pending"), *with* Mot. 3 (asking for a stay "pending a ruling by the D.C. Circuit"). As explained herein, Defendants are not entitled to a blanket stay of any duration.

A stay of litigation is an "extraordinary remedy," *Jackson*, 985 F. Supp. at 424, and as the proponents of the stay, Defendants have "the burden of establishing its need." *Clinton*, 520 U.S. at 707. Defendants fall well short of meeting this burden. Most significantly, granting the requested stay would result in prejudice to Plaintiffs and their members—by forcing them to endure the risk of enforcement of the Executive Order (and, starting in April 2019, S. 289) for a potentially lengthy period while depriving them of their only avenue to seek relief from that harm: this lawsuit. Defendants' attempt to leverage their pending D.C. Circuit appeal of the *2018 Order* as grounds for a stay—when the State could have waited to see if it prevailed on that appeal before adopting the measures at issue, or at least could have established a later effective date that would have avoided subjecting ISPs to state-level mandates during the pendency of that appeal—is unavailing. And the pendency of a motion to dismiss does not merit a stay of the *entire litigation*. While Plaintiffs agree that *discovery* should be stayed while dispositive motions are pending, Defendants' request for an indefinite stay of the entire case while they remain free to enforce unconstitutional State measures against Plaintiffs' members is unreasonable and should be denied.

A. This Court's Five-Factor Test Weighs Heavily Against Granting a Stay Pending the D.C. Circuit's Ruling While the Challenged Measures Remain Enforceable

As noted above, this Court "consider[s] five factors when deciding whether to grant a stay: (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Clift*, 2013 WL 12347196, at *1 (quoting *Volmar*, 152 F.R.D. at 39). On balance, these factors weigh strongly against granting a stay of litigation pending the D.C. Circuit's review of the *2018 Order* while enabling Defendants to continue enforcing the challenged measures.

1. *Plaintiffs Would Face Prejudice If the Court Were To Stay the Litigation While Leaving the Challenged Measures in Effect*

As reflected in the Court's first factor, "the basic goal" of this balancing test is "to avoid prejudice." *Volmar*, 152 F.R.D. at 39. Yet Defendants ignore the prejudice to Plaintiffs' members that would result from staying the litigation while the Executive Order and S. 289 remain in effect and enforceable.

If the Court were to grant Defendants' request, Plaintiffs' members would remain subject to, but unable to challenge, the State measures at issue for a lengthy period of time—an untenable situation that would raise serious due process concerns. Defendants attempt to discount this prejudice by predicting that the D.C. Circuit will rule on the appeal of the *2018 Order* by May 1, 2019, *see* Mot. 10, but a three-month argument-to-decision timetable in this context bears no resemblance to historical experience. For example, the last time the D.C. Circuit heard a challenge to an FCC order regarding net neutrality, the court held oral argument on December 4, 2015 and then issued its opinion more than six months later, on June 14, 2016. *See USTelecom v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Defendants themselves acknowledge that the pending appeal of the *2018 Order* is significantly more complex than a typical D.C. Circuit case. Mot. 12 (calculating that the FCC order, dissenting materials, and principal parties' briefs "occupy nearly 1,000 printed pages" and noting that "[i]ntervenors or amici have also filed more than 40 briefs"). Thus, a six-month argument-to-decision timetable—double what Defendants suggest—may well be a *low-end* estimate (particularly given the strain on judicial resources due to the ongoing lapse in appropriations), and even then would result in a decision by August 2019 at the earliest. And after that, the case may prompt rehearing petitions and likely will be appealed to the U.S. Supreme Court, potentially taking even longer to resolve any uncertainty that may arise. Staying the case until the appellate process has concluded while continuing to allow enforcement of the challenged

measures would result in prejudice to Plaintiffs' members and, on its own, warrants denial of Defendants' request.

Notably, Defendants could have avoided subjecting Plaintiffs and their members to this prejudicial outcome but have refused to do so. Leaving aside that the State should have waited to see if it prevailed in the D.C. Circuit before attempting to impose state-level mandates in direct contravention of the *2018 Order*, the State at least could have committed not to enforce these measures during the pendency of any stay of this litigation. In a parallel lawsuit challenging California's net neutrality statute, the California defendants agreed not to enforce the statute for the full duration of any judicial review of the *2018 Order*, including any Supreme Court review, in connection with a stipulated stay of litigation. *See United States v. California*, No. 2:18-cv-2684-JAM-DB, ECF No. 36 (E.D. Cal. Oct. 26, 2018). Plaintiffs are willing to accept the same balanced approach here, as ISPs operating in Vermont would no longer face harm posed by potential enforcement of unconstitutional State measures during the stay period. But Defendants have not taken that approach, undermining the reasonableness of their request for a stay.

Because Plaintiffs are at risk of ongoing harm from the Executive Order and S. 289 and seek injunctive and declaratory relief to prevent that harm, the prejudicial effect of a stay here would be fundamentally different from the effect of a stay of a case involving claims for monetary damages. Delay generally does not prejudice a plaintiff seeking only damages because all harm alleged has already occurred and interest on any damages awarded is typically available to make up for any delay. But delay obviously prejudices a plaintiff seeking prospective relief from an ongoing harm by prolonging that harm. The cases cited by Defendants to support a stay on the basis of the pending D.C. Circuit case are therefore inapposite, because in each case, the plaintiff was seeking damages and accordingly was not prejudiced by delay of the opportunity to recover

those damages. *See Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 622 (S.D.N.Y. 2012) ("A stay is not likely to prejudice or cause hardship to the Plaintiffs, considering that the alleged conduct giving rise to their causes of action occurred more than twenty-seven years ago."); *Carter v. United States*, No. 106-cv-225, 2007 WL 2439500, at *1 (D. Vt. Aug. 23, 2007) (granting stay where plaintiff sought "compensatory damages of $600" and "$1,500 for his emotional distress" and where the "Court ha[d] essentially stayed the case already").[14] Here, a stay would prejudice Plaintiffs by creating an indefinite ongoing harm: being subject to the unconstitutional Executive Order and S. 289 with no way to seek relief. Defendants cite no case where a court has ever granted a stay in such circumstances absent a concomitant stay of enforcement or grant of preliminary injunctive relief, and Plaintiffs are aware of none.

2. *The Remaining Factors Likewise Do Not Support a Stay*

With respect to the second factor, any burden on Defendants associated with proceeding without a stay could easily have been avoided by the State—and thus also weighs against granting Defendants' stay request. The State itself created the supposed predicament that underlies the stay request. If the State believed that D.C. Circuit review of the *2018 Order*'s validity was necessary prior to the adjudication of its own net neutrality requirements, it should have waited for the D.C. Circuit to rule in its favor on the FCC's express preemption finding before enacting a statute and

[14] Notably, while Defendants cite *King v. Time Warner Cable Inc.*, 894 F.3d 473 (2d Cir. 2018), in support of this notion that stays pending judicial challenges to relevant FCC orders are common, the court in that case actually *denied* the defendant's motion to hold the case in abeyance pending the outcome of the D.C. Circuit's review of an FCC order. *See King v. Time Warner Cable Inc.*, No. 15-2474, ECF No. 48 (2d Cir. Dec. 9, 2015). To the extent the court later chose *sua sponte* to await the D.C. Circuit's ruling before issuing its own decision, the plaintiff/appellee in *King* was not prejudiced by the delay because she only sought monetary damages, there was a supersedeas bond in place, *see King v. Time Warner Cable Inc.*, No. 1:14-cv-02018-AKH, ECF No. 40 (S.D.N.Y. Aug. 6, 2015), and interest payments were available in the event the judgment had been affirmed. By contrast, delay in this case would be prejudicial.

issuing an executive order that flatly contravene the *2018 Order*. As one of the 22 states challenging that FCC ruling in the D.C. Circuit appeal, the State was well aware of that case's progress. *See* Petition for Review, No. 18-1055 (D.C. Cir. Feb. 22, 2018) (including the State of Vermont among other state petitioners seeking review of the *2018 Order*). Relatedly, if the State had wanted to avoid the burden of litigating the express preemption issue in this case, it could have sought a stay of the effectiveness of the *2018 Order*'s express preemption ruling in the D.C. Circuit. Instead, however, the State decided to forge ahead with passing a statute and issuing an executive order in direct contravention of the *2018 Order*'s still-effective preemption ruling. The State—and, by extension, Defendants—have only themselves to blame, and any burdens they would now face in proceeding with this litigation are entirely self-inflicted.

While the third factor (the interest of the courts) is neutral, the fourth and fifth factors (the interest of non-parties and the public interest) also weigh against Defendants' request. To the extent that ISPs are harmed by state measures such as the Internet Conduct Standard—which the FCC has found has already deterred innovative service offerings that benefit consumers, *2018 Order* ¶¶ 247-249—their customers will be harmed as well. For the same reasons, staying the case without preventing harms stemming from enforcement of the Executive Order and S. 289 would contravene the public interest. As courts have explained, "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citation omitted). With four of the Court's factors weighing strongly against a stay and none weighing in favor, Defendants plainly cannot carry their burden to demonstrate that a stay is warranted.

B. Defendants' References to the Hobbs Act Undermine Rather Than Support Their Request To Stay the Litigation

Nor does the Hobbs Act merit a stay. *Cf.* Mot. 10-13. If anything, the Hobbs Act's requirement that the Court presume the validity of FCC orders prevents this Court from issuing a stay that would leave in place State measures that directly conflict with the *2018 Order*.

The Hobbs Act vests the federal courts of appeals with "exclusive jurisdiction . . . to determine the validity of . . . all final orders of the [FCC]." 28 U.S.C. § 2342(1); *see* 47 U.S.C. § 402(a). The State's blatant action in defiance of the *2018 Order* naturally puts Defendants in a difficult situation; as Defendants are aware, the Hobbs Act prevents them from attacking the validity of the FCC Order in this proceeding. *See In re FCC*, 217 F.3d 125, 136, 139 (2d Cir. 2000) (explaining that it is "outside the jurisdiction" of the district courts "to review the FCC's regulatory action"); *id.* at 139 (noting that the Hobbs Act applies to "defensive attack[s]" (quoting *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000))). Not only must the Court refrain from engaging in a collateral assessment of the validity of the FCC Order; it must "presume the validity of FCC . . . orders that are currently in effect." *CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.*, 880 F.3d 1048, 1062 (9th Cir. 2018). This Court thus is obliged to apply the *2018 Order*'s currently effective preemption ruling to strike down the Executive Order and S. 289, as Plaintiffs' concurrently filed motion for summary judgment explains.

Defendants' suggestion that the Supreme Court may issue guidance about the Hobbs Act in a pending case likewise does not support a stay. *Cf.* Mot. 14-15. Speculation about potential changes in the law cannot justify allowing a collateral attack on the validity of the FCC's preemption ruling in violation of existing law. Moreover, while a straightforward application of the *2018 Order*'s express preemption ruling to the State measures at issue should easily resolve this case in Plaintiffs' favor, the Complaint identifies additional, independent grounds for

invalidating these measures as well—conflict preemption and the dormant Commerce Clause, neither of which is likely to implicate the Hobbs Act. This case can and should be resolved without awaiting Supreme Court guidance on the application of the Hobbs Act in private civil actions.

C. The Court's Consideration of a Jurisdictional Question Does Not Support Staying the Entire Case

Defendants also vaguely suggest that their filing of a motion to dismiss under Rule 12(b)(1) warrants staying the litigation. *See* Mot. 9. But tellingly, the only cases that Defendants cite on this topic concern motions to *stay discovery*. *See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988) ("It is a recognized and appropriate procedure for a court to *limit discovery proceedings* at the outset to a determination of jurisdictional matters." (emphasis added)); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting the "requested stay of discovery pending disposition of the motion to dismiss"); *Grammer v. Colo. Hosp. Ass'n Shared Servs., Inc.*, No. 2:14-cv-1701-RFB-VCF, 2015 WL 268780, at *2 (D. Nev. Jan. 21, 2015) (granting a motion to stay discovery). Here, Plaintiffs recognize that they face "no evidentiary burden in opposing the motion" to dismiss, *Vt. All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227, 232 (D. Vt. 2017), *appeal dismissed sub nom. Vt. All. for Ethical Healthcare, Inc. v. van de Ven*, No. 17-1481, 2017 WL 3429397 (2d Cir. May 22, 2017), and agree that discovery is not necessary. Nevertheless, Defendants appear to ask this Court to venture far beyond the bounds of these decisions and stay the case entirely based on the pending Rule 12(b)(1) motion, but they do not cite a single case suggesting that a stay of the entire case is warranted in such circumstances. The Court thus should reject this request.

CONCLUSION

For the reasons set forth herein, the Court should deny the Defendants' motion to dismiss for lack of standing and deny its motion to stay the case.

Dated: January 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2019, I electronically submitted the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss and to Stay to the Clerk's Office using the U.S. District Court for the District of Vermont's Electronic Document Filing System (ECF).

/s/ David M. Pocius

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