

1 David B. Rosenbaum, 009819
2 Mary R. O’Grady, 011434
3 Eric M. Fraser, 027241
4 Grace E. Rebling, 028661
5 OSBORN MALEDON, P.A.
6 2929 North Central Avenue
7 21st Floor
8 Phoenix, Arizona 85012-2793
9 (602) 640-9000
10 drosenbaum@omlaw.com
11 mogradey@omlaw.com
12 efraser@omlaw.com
13 grebling@omlaw.com

14 Christopher J. Harvie (*pro hac vice application to be filed*)
15 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO
16 701 Pennsylvania Avenue N.W., Suite 900
17 Washington, DC 20004
18 (202) 434-7377
19 CJHarvie@mintz.com

20 Attorneys for Cox Communications Arizona, LLC

21 IN THE UNITED STATES DISTRICT COURT
22 FOR THE DISTRICT OF ARIZONA

23 Cox Communications Arizona, LLC,
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25 Plaintiff,
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27 vs.
28 City of Tempe, an Arizona Municipal
Corporation; Mark W. Mitchell, in his
official capacity as Mayor of the City of
Tempe;
Defendants.

No.
COMPLAINT
(Declaratory and Injunctive Relief)

Plaintiff Cox Communications Arizona, LLC (“Cox”) states its Complaint against Defendants City of Tempe and Mayor Mark W. Mitchell in his official capacity and alleges as follows:



NATURE OF THE ACTION

1
2 1. This lawsuit challenges the City of Tempe’s recently-enacted regulatory
3 regime that violates the uniform national framework established by the Cable
4 Communications Policy Act for regulation of cable television service. As set forth
5 below, the City has violated Federal law in a manner that directly harms Cox by
6 establishing a discriminatory regulatory framework. The City’s regulatory framework
7 imposes substantial statutory and regulatory obligations on providers of video services
8 that the City deems to be cable operators (such as Cox). The City exempts from such
9 rules and obligations providers of video services that the City deems *not* to be cable
10 operators (such as Google Fiber). Legally, however, Google Fiber’s proposed video
11 offering is indistinguishable from Cox’s cable service offering. The City therefore has
12 no authority or discretion under federal law to exempt Google from franchising and
13 other obligations applicable to cable operators.

14 2. Wireline providers of video programming to the public require authority
15 from the City in order to deploy their distribution facilities in the public rights-of-way.
16 Such licenses are often referred to as a “franchise” or “franchise agreement.” Federal
17 law requires a company to obtain a cable television franchise in order to distribute video
18 programming to the public in a manner that meets the definitions of providing “cable
19 service” over a “cable system.” Although state and local authorities may negotiate
20 franchises (called a “license” in Arizona) that vary from cable operator to cable operator
21 within the bounds of the federal Cable Act, they are not free to alter the scope or
22 applicability of the licensing scheme—or the cable television regulatory regime as a
23 whole—by exempting from its requirements a provider that meets the definition of a
24 “cable operator” providing “cable service” under the federal law. Tempe has violated
25 federal law because while both Cox and Google Fiber provide “cable service” over a
26 “cable system,” only Cox is subject to regulation as a cable operator. Federal law does
27 not permit such a result.

1 3. In December 2014, the City of Tempe amended its City Code by creating
2 a new category of license for “video services providers.” As required by state and
3 federal law, Tempe had long regulated cable operators, and its amendments retained that
4 classification. The recent amendments, in concert with a license granted by the City in
5 July 2015, purport to exempt Google Fiber from various rules and obligations that apply
6 specifically to cable operators. These requirements for cable operators are well
7 established under state and federal law. The July 2015 license expressly declares that
8 Google Fiber is not a cable operator, notwithstanding the absence of any factual basis or
9 legal authority for the City to make such a determination.

10 4. Tempe’s bald assertion that Google Fiber is not a cable operator is
11 incorrect. And based on this incorrect assertion, Tempe’s regulatory scheme allows
12 Google Fiber to provide video programming service to subscribers in Tempe under
13 terms and conditions that are far more favorable and far less burdensome than those
14 applicable to Cox and other cable operators, even though Cox and Google Fiber offer
15 video services that are legally indistinguishable. Some of the requirements that Tempe
16 purports to bypass are imposed on cable operators under state or local law, while others
17 are imposed by the comprehensive federal Cable Act.

18 5. The City’s decision to free Google Fiber from cable franchising and
19 regulatory requirements contravenes the Federal regulatory framework for cable
20 television established by Congress, grants Google Fiber an unfair competitive advantage
21 over existing cable operators, and deprives Tempe residents of the safeguards and
22 benefits of the national framework established for regulation of cable operators. As a
23 result, Tempe’s regulatory scheme now violates and is preempted by the federal Cable
24 Act because Tempe’s regulatory scheme conflicts with that federal law, violates equal
25 protection and due process by irrationally treating similarly situated service providers
26 differently, and violates state law by creating a new category of license not authorized
27 by law. Through this action, Cox seeks declaratory and injunctive relief to remedy
28 these violations of law.

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PARTIES, JURISDICTION, AND VENUE

6. Cox is a Delaware limited liability company authorized to do business in Maricopa County, Arizona.

7. Defendant City of Tempe is an Arizona municipal corporation in Maricopa County, Arizona.

8. Defendant Mayor Mark W. Mitchell of the City of Tempe is named in his official capacity only.

9. This Court has jurisdiction to hear and adjudicate this Complaint and to grant the requested relief by virtue of 28 U.S.C. §§ 1331, 1367, and Title VI (“Cable Communications”) of the federal Communications Act, as amended, 47 U.S.C. §§ 521 et seq. This is an action for declaratory and equitable relief under 28 U.S.C. §§ 2201 - 2202.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), as the Defendants reside in Maricopa County, Arizona, and the claims arose here.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

11. For a full understanding of how Tempe’s actions have created an unlawful regulatory regime, it is important to understand (a) the manner in which cable operators have been licensed historically, (b) Cox’s history in Tempe, (c) Tempe’s creation of two different regulatory regimes for entities that are providing cable service, and (d) the harm caused Cox by Tempe’s actions.

Cable Licensing Under the Federal Communications Act and State Law

12. Cable operators use cable systems to provide video programming. They transmit various kinds of signals, including local broadcast stations, national non-broadcast programming services (e.g., Discovery, CNN, and ESPN), premium entertainment channels (e.g., HBO and Showtime), and on-demand and pay-per-view offerings. Because of the programming provided, cable operators engage in constitutionally protected speech.

1 13. Cable operators cannot provide service without using public rights-of-way
2 to deploy their underground and aerial cable plant. Almost fifty years ago, when Cox
3 and a series of predecessors first began providing cable services to Tempe, they did so
4 pursuant to permission from the city in the form of a cable television license.
5 Municipalities often used their ability to withhold such permission to extract cable
6 operators' agreement to various regulatory obligations relating to, among other things,
7 public-access channels ("PEG channels") and license fees.

8 14. In 1984, the United States Congress added Title VI (the "Cable Act") to
9 the Federal Communications Act to regulate the cable-franchising process. 47 U.S.C.
10 § 521 et seq. Congress's goal was to "establish a national policy concerning cable
11 communications" under which local governments would operate within uniform federal
12 standards. 47 U.S.C. §§ 521(1), (3). These statutes ensure that cable services are
13 available to the public, encourage diverse services, promote competition, and minimize
14 unnecessary regulatory burdens. *Id.* at (4), (6). The federal Cable Act establishes a
15 uniform regulatory framework for cable service and requires State and local adherence
16 to that framework.

17 15. The Cable Act affirmed local authorities' right to grant franchises. It
18 provided that a "cable operator may not provide cable service without a franchise." 47
19 U.S.C. § 541(b). Local authorities, however, were allowed to exercise their powers
20 only in accordance with the federal framework.

21 16. Under the Cable Act, 47 U.S.C. § 541, any entity providing *cable service*
22 over a *cable system* is a *cable operator* and must obtain a cable franchise and comply
23 with applicable legal requirements imposed upon all cable operators.

24 17. Cable service is defined as "(A) the one-way transmission to subscribers
25 of (i) video programming, or (ii) other programming service, and (B) subscriber
26 interaction, if any, which is required for the selection or use of such video programming
27 or other programming service." 47 U.S.C. § 522(6). Nothing in the statutory definition
28 of "cable service" excludes linear internet protocol ("IP") video service. An entity that

1 engages in the one-way transmission of linear video programming channels to
2 subscribers is engaged in the provision of cable service, regardless of whether such
3 channels are transmitted in IP format, as radio frequency signals, or in some other
4 fashion. Further, the fact that subscriber interaction may be involved in the selection of
5 such channels is irrelevant to whether the service being offered is a cable service
6 because the Cable Act specifically includes such interaction in the definition of “cable
7 service.”

8 18. A cable system is a “a facility, consisting of a set of closed transmission
9 paths and associated signal generation, reception, and control equipment that is
10 designed to provide cable service which includes video programming and which is
11 provided to multiple subscribers within a community. . . .” 47 U.S.C. § 522(7). To the
12 extent a cable operator uses “a set of closed transmission paths” to provide cable
13 service, such as providing IP video programming over fiber optic cable, its facility
14 meets this definition of cable system.

15 19. “Cable operator” means “any person or group of persons (A) who
16 provides cable service over a cable system and directly or through one or more affiliates
17 owns a significant interest in such cable system, or (B) who otherwise controls or is
18 responsible for, through any arrangement, the management and operation of such a
19 cable system.” 47 U.S.C. § 522(5). Any entity that delivers cable services via IP is a
20 cable operator to the extent it delivers those services as managed video services over its
21 own facilities.

22 20. The Cable Act and its implementing regulations are designed to advance
23 pro-competitive, consumer-focused policy goals. To this end, cable operators must
24 comply with numerous requirements under the Cable Act and its rules, including a
25 number of customer service standards and local television carriage requirements
26 promulgated by the Federal Communications Commission (“FCC”). The customer
27 service standards address, among other things, telephone response times, installation
28 time frames, and requirements that cable operators communicate with their customers,

1 and local franchising authorities, about the services provided, when changes in the
2 services or rates occur, and what is contained on a subscriber's bill. *E.g.*, 47 C.F.R.
3 §§ 76.309, 76.1602, 76.1603, § 76.1619. Local television carriage rules establish the
4 right for all local full-power television stations to demand carriage on the local cable
5 system, and cable operators' obligations to adhere to certain network and syndicated
6 programming blackout rules protect the localism of such stations.

7 21. Cable operators must also comply with the Cable Act's privacy
8 requirements that govern the collection and use of personally identifiable information
9 by subscribers. 47 U.S.C. § 551. The Cable Act sets forth privacy safeguards for cable
10 operators and remedies that an aggrieved subscriber may pursue to address potential
11 violations of those requirements.

12 22. Federal regulations require cable operators to participate in the Emergency
13 Alert System ("EAS") by providing communications capabilities that enable the
14 President to address the public in the event of a national emergency. EAS participants
15 also must transmit state and local EAS alerts—that may warn subscribers of dangerous
16 weather conditions, missing children and seniors, and other potential life-threatening
17 events—originated by governors or their designees using the Common Alerting
18 Protocol standard. The regulations include extensive requirements to test the EAS
19 equipment and maintain logs of the test events, and a cable operator can be sanctioned
20 for failing to comply with these regulations. 47 C.F.R. § 11.1, et seq.

21 23. Federal law also requires cable operators to dedicate a portion of their
22 channel space to allow persons unaffiliated with the cable operator to lease channel
23 capacity on a cable system, according to a prescribed rate calculation, in order to air
24 their own programming. 47 U.S.C. § 532. These leased access requirements are
25 designed to ensure networks are open to diverse voices .

26 24. The federal Cable Act allows cable operators to install their cable system
27 transmission facilities and other equipment in public rights-of-way and "easements ...
28 which have been dedicated to compatible uses..." 47 U.S.C. § 541(a)(1). This

1 provision allows cable operators to use public utility easements located on private
2 property not under the government's jurisdiction. Federal law requires cable operators
3 using such property to ensure the safety of the installation, to absorb the cost of the
4 construction, and to reimburse the owner for any damage. 47 U.S.C. § 541(a)(2).

5 25. A variety of other statutory and regulatory requirements apply to cable
6 operators, including rules governing the exchange of inside wiring, signal leakage rules
7 to ensure aeronautical frequencies are not compromised, various subscriber notification
8 provisions and restrictions on negative option billing, record-keeping and public file
9 requirements, technical standards and performance requirements, and tiering and buy-
10 through rules.

11 26. As noted above, a local government must exercise its regulatory activities
12 within the parameters authorized by the Cable Act. The Cable Act anticipated and
13 preserved state regulation of cable systems, so long as such state regulation is consistent
14 with the provisions of the Cable Act.

15 27. Consistent with the directives in federal law, the State of Arizona enacted
16 statutes regarding local governments' authority to regulate cable operators in the state.
17 A.R.S. § 9-505, *et seq.* Arizona's state act adopts definitions of "cable operator," "cable
18 service," and "cable television system" modeled after and substantively similar to the
19 federal definitions under the Cable Act.

20 28. Arizona's comprehensive statutes establish requirements regarding the
21 licensing fees that can be charged and the additional obligations, such as public,
22 education or government access channels, that can be required of cable operators.

23 29. Under state law, a provider must have a cable license issued by a city,
24 town or county (for unincorporated areas) before constructing a new cable television
25 system in the relevant jurisdiction.

26 30. These state and federal requirements apply uniformly to all cable
27 operators. Nothing in the federal Cable Act or state law authorizes a local government
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1 to by-pass these laws by assigning a different label or regulatory scheme to a service
2 provider that provides cable service over a cable system.

3 *Cox Service in Tempe*

4 31. Since 1975, Cox and a series of predecessors, including Cox
5 Communications Phoenix, Inc., have provided cable services to Tempe.

6 32. As a cable operator, Cox is subject to all of the requirements of the Cable
7 Act discussed above and, throughout the years, Tempe has treated Cox as a cable
8 operator.

9 33. Chapter 10 of Tempe's City Code provides the framework for Tempe's
10 regulation of cable operators within the City, consistent with state and federal legal
11 requirements.

12 34. Currently, Cox provides cable services in Tempe pursuant to a cable
13 license effective June 30, 2007. Contract No. C97-92(D) is attached hereto as **Exhibit**
14 **A.**

15 35. Cox provides cable service and broadband service to Tempe residents
16 over its cable system. Under its existing license, Cox has the right to be in the public
17 rights-of-way to provide cable service and, pursuant to federal law, Cox is authorized to
18 build and provide broadband service on top of its cable services.

19 36. Cox has recently been expanding gigabit-speed broadband services, which
20 are not cable services, to communities in Arizona. As part of this effort, Cox has been
21 seeking to provide gigabit-speed broadband service to Tempe residents.

22 37. In order to efficiently provide gigabit-speed broadband service in Tempe,
23 Cox needs Tempe's permission to conduct limited aerial construction, i.e., to install
24 cables and equipment on poles rather than lay cables underground.

25 38. Tempe's ordinance and the cable license include restrictions on aerial
26 construction. The preference for underground construction in Tempe increases the cost
27 of providing service but has traditionally been an important policy priority for Tempe.
28

1 39. For ten months, Tempe refused to grant necessary permissions to Cox for
2 that aerial construction.

3 40. Consequently, Cox's plans to provide for gigabit-speed broadband service
4 in Tempe have been significantly delayed.

5 ***Tempe City Ordinance No. 02014.74 and Resolution No. R2015.75***

6 41. While Cox was attempting to work with the City of Tempe to provide
7 gigabit-speed broadband service to Tempe, the City was creating new regulations that
8 would enable Google and presumably others to bypass the state and federal laws that
9 apply to Cox and other cable operators.

10 42. In December 2014, by Ordinance No. 02014.74, the City of Tempe made
11 substantial amendments to Chapter 10 of its City Code. While the amendments created
12 a new category of communications service called "video services," they also retained
13 the existing "cable operator" classification. In several places, the amendments to
14 Chapter 10 imposed separate, specific obligations on "cable operators" or "cable
15 operator licensees."

16 43. Neither federal nor state law authorizes the City to establish two different
17 regulatory regimes for entities that are providing cable service over a cable system.
18 Under the uniform national framework established by Congress, any such entity should
19 be treated as a cable operator subject to a cable franchise.

20 44. Tempe's 2014 amendments to Chapter 10 define "video services" as "the
21 provision of video programming without regard to delivery technology, including
22 internet protocol technology, whether provided as part of a tier, on demand, or a per
23 channel basis." Tempe City Code § 10-1(42). "Video programming" is programming
24 "that is provided by, or generally comparable to programming provided by a broadcast
25 television station or programming network." *Id.* § 10-1(41). These services are
26 available to subscribers. *Id.* § 10-1(37). A "video services provider" is "any entity that
27 distributes video services through a video services system pursuant to a video services
28 system license." *Id.* § 10-1(43).

1 45. All cable operators are also video service operators under the ordinance,
2 but not all video service licensees appear to be cable operators subject to the specific
3 obligations on cable operators.

4 46. Some regulatory requirements of the ordinance apply to all licensees, and
5 some apply only to cable operators. The provisions that apply only to cable operators
6 are generally those drawn from federal requirements. *See, e.g., id.* §§10-57 (service
7 standards); 10-60(b) (consumer information requirements); 10-61 (billing practices); 16-
8 62 (disconnection and termination of cable services).

9 47. Within eight months of inventing this discriminatory regulatory scheme,
10 the Tempe City Council considered and approved its first license application for a
11 “video services provider.”

12 48. On information and belief, the first applicant for a video services provider
13 license in Tempe was Google Fiber Arizona, LLC. In its application, Google Fiber
14 described its services as “build[ing] and/or operat[ing] a fiber optic network and
15 associated equipment to provide broadband and video services.” Google Fiber
16 Application § 2, attached hereto as **Exhibit B**. Google Fiber proposed to use
17 underground or aerial fiber optic cables to provide these services. *Id.* § 3(A)(ii).

18 49. At its July 30, 2015 meeting, the Tempe City Council adopted Resolution
19 No. R2015.75 that authorized the Mayor to execute a “License for a Video Services
20 System and Right-of-Way Use Agreement” with Google Fiber Arizona, LLC (the
21 “Google Fiber License”), attached hereto as **Exhibit C**.

22 50. Tempe agreed to waive certain standard City requirements, including the
23 requirement for underground construction to accommodate Google Fiber. The
24 resolutions approving the Google Fiber License and waiving certain undergrounding
25 and other requirements for Google Fiber are attached as **Exhibit D**.

26 51. The Google Fiber License granted by the City purports to specifically
27 exempt Google Fiber from compliance with the federal Cable Act by declaring that
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1 Google Fiber “is not a ‘cable operator’ and does not operate a ‘cable system’ under the
2 federal Cable Act.”

3 52. The video service that Google Fiber is proposing to provide in Tempe is,
4 however, a “cable service” under federal law. The City articulated no legally
5 cognizable rationale for reaching the conclusion that Google Fiber would not be
6 offering cable service. The FCC has specifically stated that “merely using IP to deliver
7 cable service does not alter the classification of a facility as a cable system or of an
8 entity as a cable operator.. . [T]o the extent an operator may provide video programming
9 services over its own facilities using IP delivery within its footprint it remains subject to
10 regulation as a cable operator.” Notice of Proposed Rulemaking, *Promoting Innovation
11 and Competition in the Provision of Multichannel Video Programming Distribution
12 Services*, 80 Fed. Reg. 2078 (Jan. 15, 2015).

13 53. On information and belief, Google Fiber intends to engage in the
14 transmission of a variety of prescheduled, linear video programming channels via a
15 closed transmission path. These channels flow only “one way,” from the Google Fiber
16 network facilities to subscribers. Google Fiber will therefore be offering cable service
17 over a cable system in Tempe, and it must be classified as a cable operator subject to
18 cable franchising and other applicable federal and state obligations.

19 54. Google Fiber’s proposed video offering will include the same types of
20 programming channels furnished by cable operators, such as local broadcast stations,
21 satellite-delivered cable programming channels, premium entertainment and movie
22 channels and on-demand offerings. The vast bulk of channels provided by Google Fiber
23 in other markets where it already offers video service—and which are expected to be
24 available in Tempe—are also furnished by “traditional” cable operators such as Cox to
25 their subscribers in a fashion that is materially indistinguishable from the manner in
26 which they will be furnished to customers by Google Fiber.

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1 55. Under the terms of the Google Fiber License, Google Fiber is not subject
2 to the same regulatory regime as Cox and other cable operators despite the fact that
3 Google Fiber will also offer a cable service over a cable system under the Cable Act.

4 56. For example, under the terms of the Google Fiber License, a number of
5 consumer protections, such as service standards, consumer information, and billing
6 requirements would not apply to Google Fiber, although they apply to all cable
7 operators. Indeed, the Google Fiber License imposes no obligation on Google Fiber to
8 comply with the FCC standards regarding customer service, including response times,
9 installation timeframes, and requirements regarding communication with customers and
10 local authorities about the services provided, and when changes in services or rates
11 occur.

12 57. Under the terms of the Google Fiber License, Google Fiber will not have a
13 legal obligation to comply with federal EAS regulations. Although the Google Fiber
14 License requires Google Fiber to “comply with all applicable federal and state laws and
15 regulations regarding emergency alert messaging,” under the Google Fiber License the
16 EAS regulations may not apply because the Google Fiber License declares that Google
17 Fiber is not a cable operator. In addition, while Cox is categorically required to “all
18 times comply with the Federal Emergency Alert System standards, the Google License
19 only requires adherence to regulations governing “emergency alert messaging.” There
20 are a number of EAS rules and obligations related to equipment, protocols, testing,
21 monitoring, and record-keeping that the City and/or Google Fiber may consider beyond
22 the scope of rules governing “messaging.”

23 58. The City of Tempe is allowing Google Fiber to enter the video market in a
24 manner that jettisons the uniform national framework established by Congress for
25 regulation of providers of cable service. The City has unlawfully departed from this
26 framework by establishing a separate regime for Google Fiber that permits it to come
27 into the market pursuant to regulatory requirements and franchise terms that are far
28 more favorable than those applicable to Cox or other cable operators.

1 59. In addition to impermissibly attempting to exempt Google Fiber from the
2 important statutory and regulatory obligations mentioned above, the Google Fiber
3 License lacks several locally-imposed provisions that provide important protections for,
4 and obligations to, the public including, but not limited to, line extension obligations.
5 The Google Fiber License permits Google Fiber to determine “at its sole discretion” the
6 areas of the City where its video service will and will not be deployed. By contrast, the
7 City requires Cox and other cable providers to comply with provisions governing line
8 extensions and service availability: “An incumbent cable operator licensee shall at its
9 sole expense extend cable service to any single family residence or dwelling unit within
10 the city” if located in an area that meets or exceeds a minimum density threshold.
11 Tempe City Code § 10-37. Before the amendments to Chapter 10, the provisions
12 governing line extensions and service availability applied to all licensees.

13 60. The Google Fiber License also would diminish other key public
14 protections by imposing less stringent obligations than the City has imposed on Cox.
15 These include, but are not limited to, provisions relating to: indemnification, insurance,
16 customer service requirements, the effect of subsequent change in law enacted by City
17 or under State or Federal law, compliance with undergrounding facilities provisions in
18 local ordinance, removal of facilities upon termination of video service, retention of
19 regulatory authority over non-cable services, liability for liquidated damages for certain
20 breaches of the license agreement, city liability for damages caused by its emergency
21 removal or relocation of facilities, and certification of the absence of commercially
22 impracticable terms.

23 61. While State and local authorities may negotiate franchises that vary from
24 cable operator to cable operator, within the bounds of the Federal Cable Act, they are
25 not free to alter the scope or applicability of the franchising scheme—or the cable
26 television regulatory regime as a whole—by exempting from its requirements a provider
27 that meets the definitions of a “cable operator” providing “cable service” under the
28 Federal law.

1 executing or implementing the “License for a Video Services System and Right-of-Way
2 Use Agreement” with Google Fiber that violates federal and state law.

3 **RELIEF REQUESTED**

4 WHEREFORE, Plaintiff seeks:

5 A. A declaration that the City of Tempe’s ordinance and licensing of Google
6 Fiber as a video services provider rather than as a cable provider violates federal and
7 state law;

8 B. A declaration that the City of Tempe’s ordinance and licensing of Google
9 Fiber violate First Amendment, due process and equal protection requirements of the
10 United States Constitution;

11 C. A permanent injunction that prohibits the City of Tempe and the Mayor
12 from executing or implementing a “License for a Video Services System and Right-of-
13 Way Use Agreement” with Google Fiber;

14 D. All costs and fees as allowed by law, including an award of attorneys’ fees
15 under 42 U.S.C. § 1988;

16 E. Such other and additional relief as the Court deems just and equitable.

17
18 DATED this 14th day of September, 2015.

19 OSBORN MALEDON, P.A.

20
21 By s/ Mary R. O’Grady
22 David B. Rosenbaum
23 Mary R. O’Grady
24 Eric M. Fraser
25 Grace E. Rebling
26 2929 North Central Avenue
27 21st Floor
28 Phoenix, Arizona 85012-2793

*Attorneys for Cox Communications Arizona,
LLC*

6294289