# 11-4138(L)

11-5152(CON)

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

TIME WARNER CABLE INC.
AND
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA,
*Respondents*.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

**PAGE PROOF**
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## SUMMARY OF THE ARGUMENT

Even though the competitive concerns of two decades ago that prompted Congress to enact the program carriage statute have long since vanished, the Federal Communications Commission ("FCC") argues that it remains empowered to limit the speech of multichannel video programming distributors ("MVPDs") and to compel the carriage of unaffiliated programming. The FCC's justifications for not only maintaining but *expanding* its program carriage mandates cannot pass muster under the First Amendment.

As a threshold matter, despite the FCC's protestations, these rules plainly are content-based restrictions subject to strict scrutiny—which no one claims they can survive—because they entail a preference for the speech of unaffiliated programmers and their application turns on intensive governmental examination of programming content. The FCC also fails to justify the program carriage rules under the intermediate scrutiny standard it champions. The "governmental interest" on which the FCC chiefly relies is combating "the potential for affiliation-based discrimination created by vertical integration" *regardless of whether any modern-day bottleneck exists*. FCC Br. 34.[1] But absent any structural impediment

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[1] References to "FCC Br." are to the Brief for Respondents, filed July 2, 2012, while references to "TWC Br." and "NCTA Br." are to the Briefs of Petitioners Time Warner Cable Inc. ("TWC") and National Cable and Telecommunications

to competition, the only rationale for targeting vertical integration in this manner is the notion that forced carriage of unaffiliated programming will result in "better" programing than if an MVPD is permitted to make its own decisions about what content to present to subscribers. That rationale cannot justify the restrictions at issue under intermediate (or any) scrutiny, for regulation with the avowed purpose of suppressing free speech is precisely what the First Amendment forbids. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*") (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The FCC also claims that its program carriage rules—including the recently adopted *prima facie* standard and standstill rule—are necessary to address unidentified pockets of local bottleneck power and to promote diversity in the already-diverse programming marketplace. But those conclusory assertions find no support in the record, and the rules are in any event far more burdensome than necessary to advance those interests. These fundamental constitutional deficiencies are not alleviated by the case-by-case nature of the FCC's adjudicatory regime, because the complaint process, grounded in constitutionally deficient interests, entails substantial burdens that severely chill MVPDs' speech even absent a finding of liability.

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Association ("NCTA"), both filed on March 27, 2012. References to the *amicus* briefs follow the same convention.

Finally, the FCC cannot justify its adoption of the standstill rule without the notice required by the Administrative Procedure Act ("APA"). Its attempts to circumvent the notice requirement—by labeling the rule "purely procedural" or a "logical outgrowth" of an unrelated proposal—are unavailing.

## ARGUMENT

### I. THE GOVERNMENT CANNOT JUSTIFY THE FIRST AMENDMENT BURDENS IMPOSED BY THE PROGRAM CARRIAGE RULES

#### A. The Program Carriage Rules Are Subject to Strict Scrutiny

There is a telling omission in the FCC's brief. While the FCC argues that strict scrutiny is not the correct standard for reviewing the constitutionality of the Order, it does not even assert, let alone seek to demonstrate, that the Order could survive review under that standard. This is significant because, as a matter of law, strict scrutiny is the applicable test.[2]

Notwithstanding the FCC's efforts to evade the principle that laws that "restrict the expression of specific speakers contradict basic First Amendment principles," *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000),

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[2] The Court should reject *amici curiae's* argument that the Court should not consider TWC's First Amendment challenge. *See, e.g.*, Public Knowledge Br. 2, 5. The July 29, 2011 Order squarely addressed the constitutional arguments raised by TWC and NCTA, making those issues ripe for review. Order ¶ 32 (JA___-___). This objection, in any event, cannot be raised by a non-party. *See Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 163 n.8 (2d Cir. 2004) (refusing to consider arguments raised only by *amicus*).

the law could hardly be more "well established that, '[i]n the realm of private speech or expression, government regulation may not favor one speaker over another.'" *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 105 n.12 (2d Cir.) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)), *cert. denied*, 131 S. Ct. 414 (2010).

Just two years ago, the Supreme Court reaffirmed that "restrictions distinguishing among different speakers" are generally "[p]rohibited." *Citizens United v. FEC,* 130 S. Ct. 876, 898 (2010). Applying strict scrutiny, the Court stressed that "[q]uite apart from the purpose or effect of regulating content ..., the Government may commit a constitutional wrong when by law it identifies certain preferred speakers," because under the First Amendment, the public has "the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 899.[3]

The program carriage regime favors a class of speakers: certain unaffiliated programmers. That is both its purpose and its intended effect. The rules enable

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[3] The FCC maintains that the Supreme Court's concern with government regulation preferring certain speakers over others is limited to electoral speech. FCC Br. 31 n.6. To the contrary, the Court concluded that the law's exemption for certain favored categories of speakers (media companies) constituted a "differential treatment [that] cannot be squared with the First Amendment" and provided a "further, separate reason for finding this law invalid." *Citizens United*, 130 S. Ct. at 906.

unaffiliated programmers to obtain Government-mandated carriage and terms from MVPDs merely by showing that an MVPD has "discriminated" by offering its own programming rather than "similarly situated" unaffiliated programming. Order ¶¶ 1, 14 (JA___, ___-___). Programmers that offer content that is not "similarly situated" to the MVPD's must secure carriage without governmental assistance.

Unable to rebut the reality that the rules favor one class of speaker, the FCC maintains that speaker-based preferences are constitutionally acceptable *unless* they also reflect a content preference. FCC Br. 31. But that is not what any of the cases cited above—or in the FCC's brief—say or hold. Indeed, the Court has held unconstitutional speech burdens that fell far short of the compelled speech at issue here, including speaker-based preferences that burdened a class of speaker by subsidizing other speech in response. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011). Here, the burden is more severe: the price that an MVPD must pay for choosing to speak as a programmer is forced carriage of another party's speech.

For similar reasons, the FCC errs in asserting that only *viewpoint*-based restrictions qualify as "content-based" under the First Amendment. *See* FCC Br. 15-16, 23-24. This Court has repeatedly held otherwise. *See, e.g., Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011) (explaining that "[v]iewpoint discrimination" is but "a subset of content discrimination"), *cert. denied*, No. 11-

1153, 2012 U.S. LEXIS 4749 (June 15, 2012); *Longo v. U.S. Postal Serv.*, 953 F.2d 790, 796 (2d Cir.) ("A viewpoint-based restriction on expressive activity ... is not the only form of impermissible content control."), *vacated on other grounds*, 506 U.S. 802 (1992).

The applicability of strict scrutiny here is particularly clear because the program carriage rules are rooted in and triggered by governmental determinations about content. As with earlier FCC proceedings involving WealthTV and MASN, *see* TWC Br. 26-27, the FCC's recent order finding that Comcast violated the program carriage rules underscores the content-based nature of the regime. *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, Memorandum Opinion and Order, FCC 12-78 (rel. July 24, 2012) ("*Tennis Channel Order*"). In finding that Comcast unlawfully favored the Golf Channel and Versus over the unaffiliated Tennis Channel, the FCC undertook a "careful examination" of the "content" of each programming service, including a detailed comparison of the "image" conveyed by each network. *Id.* ¶¶ 51-67. But for the FCC's disagreement with Comcast's assertion that the Tennis Channel's "international" image differs from the Golf Channel's "country club" image (and similar content-based determinations), the Tennis Channel might have been unable to state a claim. *Id.* ¶ 66. As with FCC's efforts to regulate indecency, this second-guessing of Comcast's editorial judgments necessarily involved

"subjective, content-based decision-making" and thus "raises grave concerns under the First Amendment." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 333 (2d Cir. 2010), *vacated on other grounds*, 132 S. Ct. 2307 (2012).

The FCC seeks to minimize its focus on content, insisting that its analyses also take into account factors such as "'genre, ratings, license fee, target audience, target advertisers [and] target programming.'" FCC Br. 28 (alteration in original) (citation omitted). But the "genre" of a program, its "target audience," and its "target programming" are deeply intertwined with content, and the FCC fails to suggest how or why they are not. Nor are the rules about patrolling anticompetitive practices, as the FCC asserts. *Id.* at 24. The rules *begin* with a preference for unaffiliated programmers and grant benefits—*i.e.,* compelled carriage—to that particular class of speaker, in exchange for burdens on another class of speaker.

The regime's focus on content therefore belies the FCC's assertion that the rules concern merely the "'economics of ownership.'" *Id.* at 22 (citation omitted). The whole point of program carriage proceedings is to implement the governmental goal of promoting unaffiliated programmers' speech when an MVPD has undertaken the risk and expense of creating new programming that is similar in content. In this sense, the program carriage rules are similar to the "right of reply" statute that was invalidated under strict scrutiny in *Miami Herald*

*Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); in each case the Government made compelled speech the price of exercising one's own First Amendment rights. The program carriage rules likewise echo the "fairness doctrine," which the FCC invalidated as a content-based restriction on speech, finding that "minute and subjective scrutiny of program content resulting from the enforcement of the fairness doctrine is at odds with First Amendment principles." *Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, Report, 102 FCC 2d 145, 191-92 ¶ 73 (1985), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

The FCC also cannot camouflage the content-based nature of these base restrictions on MVPDs' speech by likening them to police powers that advance public safety objectives "'unrelated to the content of expression.'" FCC Br. 24 (quoting *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 150 (2d Cir. 2005)). In *Hobbs*, this Court upheld a law barring the issuance of street performance permits to sex offenders that used content enticing to children. The law passed constitutional muster because the "specific content of the speech" was "irrelevant to the government goal" of protecting minors. *Hobbs*, 397 F.3d at 152. Neither the justification ("the safety of children") nor the outcome (reducing sex offenders' physical proximity to children) was focused on content. *Id.* By contrast, both the

justification and the outcome under the program carriage rules relate to the content of the affected speech.

Trying another analogy, the FCC asserts that program carriage "closely resembles the leased access statute" and urges this Court to adopt the D.C. Circuit's approach in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner*"). FCC Br. 25. That ruling was rooted in the D.C. Circuit's finding that a bottleneck existed, a finding that the FCC does not argue is true today. *Time Warner*, 93 F.3d at 978. That court also relied on its determination that whether an operator was required to set aside channels for public leasing "depend[ed] *entirely* on the operator's channel capacity," and thus the programming "on the operator's other channels" and the content carried via leased access "matter[ed] not in the least." *Id.* at 969 (emphasis added). Obviously, the opposite is true in this case.

The FCC's reliance on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), is similarly misplaced. FCC Br. 26. In *Turner I*, the Court determined that "the extent of the interference [by the must-carry provisions] *does not depend upon the content* of the cable operators' programming. The rules impose obligations upon [almost] all operators ... regardless of the programs or stations *they now offer or have offered in the past.*" 512 U.S. at 643-44 (emphasis added). The content requirements and burdens imposed on cable operators by the

must-carry regulation were grounded in a stated desire to assure the continued viability of broadcast television and were "not activated by any particular message spoken by cable operators and thus exact no content-based penalty." *Id.* at 655. By contrast, under the program carriage rules, program content is determinative of *when* the Government compels program carriage and *what* must be carried. It is the "content of the speech that determines whether it is within or without" the statute's purview. *Carey v. Brown*, 447 U.S. 455, 462 (1980). That being so, strict scrutiny is required, and the FCC's inability even to argue that the Order could survive this review demonstrates its unconstitutionality.

### B. The Program Carriage Rules Fail Even Under Intermediate Scrutiny

The FCC in any event fails to satisfy the standard it espouses, as it has not remotely demonstrated that the program carriage regime "advances important governmental interests unrelated to the suppression of free speech" and "does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377). The Government claims that the program carriage rules are necessary to "promote competition and diversity of programming sources in the video programming market." FCC Br. 32. But absent a bottleneck, these interests are little more than a euphemism for a wholly impermissible preference for the speech of unaffiliated programmers. And to the

extent the Government relies on claims of local bottlenecks, those claims simply lack evidentiary support.

### 1. The Rules Fail to Advance the Asserted Governmental Interests

#### a. An Interest in Preventing MVPDs from Preferring Affiliated Programming, Without More, Cannot Justify the Restrictions at Issue

The FCC seeks to avoid the constitutional implications of the dramatic marketplace changes that have occurred since 1992 by asserting that "[t]he principal factor motivating Congress to regulate program carriage was not the cable 'bottleneck,' but the potential for affiliation-based discrimination created by vertical integration." FCC Br. 34. But the legislative history reveals that Congress was concerned *primarily* with cable operators' "market power derived from their *de facto* exclusive franchises," and believed that this market power was "exacerbated by the increased vertical integration in the cable industry" at the time—not the other way around. S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1156-57. Regardless, divorced from such a "bottleneck" rationale, the FCC's asserted interest in preventing MVPDs from favoring

affiliated programming is simply not a legitimate governmental interest, let alone an "important" or "compelling" one.[4]

The FCC claims an interest in doing precisely what the First Amendment prohibits: preferring the speech of unaffiliated programmers, and preventing an MVPD from acting on its "incentive and ability" to carry its own speech. FCC Br. 15. The FCC's efforts to justify the speaker-based preferences entailed by the program carriage regime closely resemble the failed defense of the "right of reply" statute struck down in *Tornillo*. After the *Miami Herald* printed editorials that criticized a political candidate, he sought to require the newspaper to print his reply under a Florida statute requiring compulsory access. Tornillo argued that this government intervention in editorial decision-making was necessary because "[n]ewspapers [had] become big business" and consolidation of ownership had made the press "noncompetitive and enormously powerful and influential in its

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[4] While the FCC seeks to frame its interest in combatting "affiliation-based discrimination" by MVPDs as one grounded in fostering "competition," FCC Br. 33-34, its inability to demonstrate an actual competitive *problem* prevents it from relying on the types of cases (such as the *Turner* cases and *Time Warner*) that upheld speech restrictions as necessary to address monopoly or "bottleneck" conditions. *See infra* Section I.B.1.c. The absence of a demonstrated bottleneck also puts the FCC's continued enforcement of program carriage mandates at odds with Congress's preference for the agency to "rely on the marketplace, to the maximum extent feasible, to achieve" its competition- and diversity-related goals. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460, 1463 (1992).

capacity to manipulate popular opinion and change the course of events." *Tornillo*, 418 U.S. at 249. The Court disagreed, holding that "[h]owever much validity may be found in these arguments," the "governmental coercion" entailed by an "enforceable right of access" could not be squared with the guarantees of the First Amendment. *Id.* at 254.

Just as the FCC suggests here that the program carriage regime does not prevent MVPDs from choosing to carry affiliated programming, FCC Br. 42-43, 46-47, Tornillo claimed that the Florida right-of-reply statute did not prevent the *Miami Herald* "from saying anything it wished." *Tornillo*, 418 U.S. at 256. But the Court found that compelling publication of a third party's speech "operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish a specified matter" and also "exacts a penalty on the basis of the content of a newspaper." *Id.*

The same is true here, as MVPDs' editorial decisions are pressured and distorted by the penalties of the program carriage regime. For example, in the recent *Tennis Channel Order*, the FCC found that Comcast's decision to carry the Golf Channel and Versus broadly compelled it to offer the same terms to the Tennis Channel, despite Comcast's view that the Tennis Channel's content merited a different tier placement—and even though every major MVPD in the United States (including DIRECTV and Dish Network, each of which owns an equity

stake in the Tennis Channel) "carr[ies] Golf Channel and Versus more broadly than Tennis Channel." *Tennis Channel Order* ¶ 73. The FCC imposed this requirement not because it believed that less favorable carriage terms from Comcast would lead to Tennis Channel's exclusion from the marketplace, but rather because broader distribution on Comcast's systems would increase Tennis Channel's revenues. *Id.* ¶ 84. Such governmental interference with an MVPD's editorial judgment penalizes speech in the same manner as the discredited fairness doctrine and "right of reply" statutes and plainly undermines the validity of the supposedly "pro-competitive" interest at stake.

The FCC's asserted justification here also contrasts sharply with the governmental interests that narrowly were found sufficient to justify the broadcast must-carry rules in *Turner II*. There, the assertion of a cable bottleneck was pivotal to the Court's willingness to override cable operators' editorial judgments. *See* TWC Br. 33-34. And the Supreme Court found that preserving the institution of over-the-air broadcasting was unrelated to the suppression of speech. *Turner I*, 512 U.S. at 643-44. But here, the FCC disavows the significance of any purported bottleneck, FCC Br. 34, and as shown above, the program carriage rules overtly prefer the speech of unaffiliated programmers that produce content "similar" to the MVPD's over that of other programmers.

### b. The FCC's Asserted "Diversity" Rationale Fails for the Same Reasons

The FCC asserts that "the continuing presence of vertical integration in the MVPD market" means that "the program carriage rules remain necessary" to promote "diversity" in the video marketplace. FCC Br. 39-40. Because the FCC is forced to concede that recent years have seen "'major gains in the amount and diversity of programming,'" *id.* at 39 (quoting *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011)), it assumes that *any* vertical integration, no matter its competitive significance, justifies governmental intrusion into MVPDs' editorial discretion. This interest in "diversity" cannot justify the speaker-based preference at issue.

Again, *Tornillo* is instructive. There, defenders of governmental interference with editorial decision-making decried "a homogeneity of editorial opinion, commentary, and interpretive analysis" resulting from what they viewed as excessive concentration in media ownership. *Tornillo*, 418 U.S. at 250. The Court held that such a perceived lack of diversity could not justify commandeering newspaper editorial space, *id.* at 254-55, and the same interest is no more substantial in this context, where cable programming slots are at issue. As the D.C. Circuit has recognized, "at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest." *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001)

("*Time Warner Entm't*"). The Order does not even attempt to document an absence of "diversity" that could justify the intrusive mandates under consideration. Notably, the FCC itself recognized that vague assertions about content diversity could not justify interfering with broadcasters' editorial discretion when it invalidated the analogous "fairness doctrine" years ago, finding that "explosive growth in both the number and types of such outlets in every market" eliminated concerns about the public's access to a diversity of viewpoints. *Syracuse Peace Council v. Television Station WTVH Syracuse*, 2 FCC Rcd. 5043 ¶¶ 1 n.2, 55, 57 (1987), *recons. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). Now that video programmers can easily and inexpensively reach the public through various MVPD platforms and the Internet, TWC Br. 11-14, micromanaging editorial judgments to promote an improved mix of speech is even more obviously inappropriate.

Finally, seeking to ensure carriage of programming that is substantially similar to the programming already carried by an MVPD does not meaningfully enhance diversity but, in fact, can reduce it by commandeering capacity that an MVPD likely would use to carry programming of a different genre. TWC Br. 41-42. And the FCC's effort to recast its interest as one in "source" diversity is unavailing. *See* FCC Br. 40-41. Absent "bottleneck" conditions, any interest in "source" diversity is nothing more than an interest in advancing the speech of

unaffiliated programmers, which cannot serve as a valid First Amendment justification. *See Citizens United*, 130 S. Ct. at 898-99 (barring speech restrictions based on the identity of the speaker); *Rosenberger*, 515 U.S. at 828 (barring regulations that "favor one speaker over another").

### c. The FCC Has Not Shown That the Program Carriage Rules Directly Advance the Asserted Interests in Competition and Diversity

Although the FCC attempts to argue that demonstrating a bottleneck is unnecessary to its defense of the program carriage regime, it alternatively claims that bottlenecks remain in some geographic areas and that "cable continues to dominate some MVPD markets." FCC Br. 36-37. This fallback contention fails for several reasons.

Most significantly, it lacks any record support. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81 (2d Cir. 2006) ("[A]fter-the-fact rationalization for agency action is disfavored."). The Order makes no findings as to the existence of local bottlenecks, and it does not purport to justify the continued operation of the program carriage regime by relying on notions of local monopoly power. An agency seeking to justify First Amendment burdens must rely on concrete, contemporaneous findings. *See Edenfield v. Fane*, 507 U.S. 761, 770

(1993) (noting that the Government's burden in justifying restrictions on commercial speech "is not satisfied by mere speculation or conjecture"). The FCC thus cannot meet its burden with newly minted assertions of localized "bottleneck" power that the Order fails even to assert, let alone document.[5]

Notably, in a related proceeding where First Amendment interests were at stake, the FCC recently recognized that it may not continue to enforce rules that compel cable operators' speech without justifying those restrictions with substantial "record ... evidence" regarding "current marketplace conditions." *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, ¶ 11 (rel. June 12, 2012) ("*Viewability Sunset Order*"). That proceeding involved the FCC's "viewability" mandate, which required the carriage of certain broadcasters' signals in digital and analog formats. *Id.* ¶ 1. In considering whether to sunset this compelled-carriage rule, the FCC was "persuaded by cable commenters' argument that the dramatic changes in technology and the

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[5] *Amici* point to various surveys purporting to show that cable operators maintain high shares in certain local areas. *See, e.g.,* NAB Br. 7; Public Knowledge Br. 14-15; Bloomberg Br. 22. The FCC did not rely on those surveys, however, nor did it provide record evidence demonstrating that achieving certain local viewership numbers is a factor for programmers. In any event, much of the data cited by *amici* are considerably outdated. *See* Public Knowledge Br. 14-15 (relying on figures from 2006).

marketplace over the past five years render less certain the constitutional foundation for an inflexible rule compelling carriage" under these circumstances. *Id.* ¶ 11. In particular, the FCC concluded that "the burden placed on cable operators by the viewability rule is not justified on the current record," which "lack[ed] evidence that infringing on cable operators' discretion by requiring both digital and analog carriage of the same broadcast stations is necessary" to advance any governmental interests. *Id.* Here, in stark contrast, the FCC relies solely on conclusory assertions about purported market power in seeking to justify retention—indeed, expansion—of the program carriage rules. Such assertions are plainly not the kind of "substantial evidence" that, even in the FCC's view, would be necessary to justify a compelled-carriage mandate under the First Amendment. *Turner I*, 512 U.S. at 666.

The Government also misses the point in arguing that Internet video services are not viewed as a total "substitute" for MVPD services by most consumers. FCC Br. 40. There is no reason that Internet video would need to completely *replace* other video technology in order to offer competition, diversity, and additional distribution options. The emergence of Internet-based video distribution is significant precisely because it presents another way for programmers to reach

consumers—even those that have maintained MVPD subscriptions.[6] It is irrelevant how many consumers perceive Internet-based services and MVPD services as "'substitute[s]'" versus complements. *Id.* (citation omitted). Either way, programmers may rely on Internet distribution to reach consumers—irrespective of a particular MVPD's carriage decisions—which deprives the Government of a substantial interest in interfering with the MVPD's carriage choices.[7]

The FCC and *amici* fare no better in pointing to the Comcast/NBC Universal merger. *See id.* at 37-38; Bloomberg Br. 9; Public Knowledge Br. 15; Tennis Channel Br. 13. They fail to mention that the FCC's order approving the merger (which has not been subjected to judicial review) already "mitigate[d] any potential public interest harms" that might arise by imposing carriage-related merger conditions on Comcast—including "a non-discrimination requirement."

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[6] Contrary to *amici's* assertions, TWC's position here is entirely consistent with its position in other proceedings examining the competitive impact of online video distributors ("OVDs"). *Cf.* Public Knowledge Br. 18. In response to an FCC Public Notice asking whether OVDs should be classified as MVPDs, TWC urged the FCC to account for the emergence of OVDs by *reducing* regulatory burdens on all video distributors, not by *expanding* its outdated rules to a new class of video distributors. *See* Comments of Time Warner Cable Inc., MB Docket No. 12-83, at 2 (May 14, 2012).

[7] From the consumer perspective, households that do watch both MVPD and Internet video have access to many more video sources from these technological developments than from any governmental attempt to promote competition and diversity through preferences for favored speakers.

*Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 ¶ 110 (2011). In any event, the fact that *Comcast* controls more programming networks than in the past cannot justify supplanting the editorial discretion of *other MVPDs*, such as TWC.

### 2. The Program Carriage Rules Burden Substantially More Speech Than Necessary

The FCC also fails to demonstrate that its program carriage rules do not "'burden substantially more speech than is necessary'" to further the Government's asserted interests in today's competitive environment, where market forces are more than sufficient to advance the Government's asserted interests in competition and diversity. *Turner I*, 512 U.S. at 662 (citation omitted). Because "the burden placed on cable operators ... is not justified on the current record," *Viewability Sunset Order* ¶ 11, the program carriage rules cannot survive.

Even if the FCC had adduced evidence identifying bottlenecks in particular geographic areas—and it has not—that would at most justify a regime in which complaints could move forward based on adverse carriage decisions *in such areas*. In other contexts, the FCC has recognized that burdens on cable operators' speech cannot be imposed except where effective competition is demonstrably absent. *See id.*; *see also Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd. 3413 ¶ 9 (2012) (acknowledging that

restrictions on vertically integrated cable operators cannot be sustained "where there is sufficient competition"). Here, the Government impermissibly seeks to maintain a regime that subjects *all* MVPDs to burdensome complaints in *all* markets, irrespective of whether bottleneck control even has been alleged. This approach does not qualify as "narrowly tailored."

The FCC insists that the rules compel carriage "only where an anticompetitive impact is shown in a particular case." FCC Br. 42. But that assertion is unpersuasive in light of the FCC's overly expansive conception of "anticompetitive impact." As noted, the FCC asserts that "the potential for affiliation-based discrimination created by vertical integration" is a sufficient justification *on its own* for triggering the program carriage rules. *Id.* at 34. The agency expressly disavows any need to establish that an MVPD facing a program carriage complaint possesses "market power," *id.* at 47—normally a prerequisite for showing that a firm is capable of excluding competition. *See Tops Mkts., Inc. v. Quality Mkts., Inc.* 142 F.3d 90, 97-98 (2d Cir. 1998) (defining market power as "'the power to control prices or *exclude competition*'" (emphasis added) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). And in *every* program carriage adjudication, the FCC's staff has accepted the proposition that *any* adverse carriage action that limits the complaining vendor's audience—which all adverse carriage decisions do by definition—constitutes an

"unreasonable restraint" within the meaning of Section 616 of the Act. *See* TWC Br. 50-51. Thus, under the FCC's conception of the rule, agency staff may find "anticompetitive impact," and thereby compel carriage, in *any* circumstance where an MVPD favors its own speech, even when that MVPD lacks any ability to exclude competition.[8]

As TWC has explained, moreover, the pervasive threat of compelled carriage has a profound chilling effect on speech. *Id.* at 46. An MVPD that might otherwise incur the risk and expense of creating certain programming on topics covered by unaffiliated programmers may be deterred from those entire subject areas based simply on the content trigger such programming would provide, inviting potential compelled carriage claims. MVPDs may also avoid developing programming new genres out of concern that it would spur copycat programmers and concomitant carriage demands. *See Tornillo*, 418 U.S. at 257 (finding that the "right of reply" statute would impermissibly chill free speech as "editors might well conclude that the safe course is to avoid" topics that trigger Government-compelled replies); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[I]n the area of

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[8] The truism asserted by *amici* that adverse carriage decisions leave unaffiliated programmers worse off than compelled carriage can hardly demonstrate that the MVPD's decision was "unreasonable," and is not sufficient to justify rules that interfere with MVPDs' core First Amendment rights. *Cf.* Bloomberg Br. 29-31; Tennis Channel Br. 15.

First Amendment freedoms, ... [t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions").

Contrary to the FCC's assertion, these chilling effects are far from "hypothetical." FCC Br. 44-45. Over the past several years, TWC has been forced to devote considerable resources to defending against program carriage complaints brought by the Mid-Atlantic Sports Network ("MASN") and WealthTV. *See* TWC Br. 45-46, 50, 54, 56. Even where such claims are ultimately found to be meritless, *see TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269, 273 (4th Cir. 2012), these ordeals represent a powerful deterrent to an MVPD's exercise of editorial discretion under the shadow of the program carriage regime.

### C. The Government Fails to Justify the Impermissible Burdens Entailed by Its *Prima Facie* Standard and Its Codified Standstill Rule

The same defects that undermine the program carriage regime overall also warrant invalidation of the recently adopted *prima face* standard and standstill rule. The FCC attempts to quell concerns over its *prima facie* standard by asserting that it "*benefits* cable operators," FCC Br. 46, but the opposite is true. By failing to require a showing of market power before allowing a programmer to bring a full-blown complaint, *see id.* at 47, the standard encourages complaints even where an

MVPD lacks any ability to exclude competition.[9] The FCC also offers no valid justification for refusing to apply traditional principles for evaluating competitive harm in its *prima facie* standard. It is arbitrary and capricious to assume that such an exclusionary impact will result in today's marketplace, where vibrant competition prevents any MVPD from thwarting a programmer's ability to compete. *See Time Warner Entm't*, 240 F.3d at 1134 (faulting the FCC for ignoring "the true relevance of competition" in assessing cable operators' market power); TWC Br. 36-37. To the extent the FCC is relying on 20-year-old conclusions about competitive harm in a monopoly environment, *see* FCC Br. 34 & n.7, such reliance is unavailing, as the FCC itself recently recognized. *Viewability Sunset Order* ¶ 11; *see also* TWC Br. 34.

The standstill rule exacerbates these constitutional harms by enabling forced carriage without even a finding of violation under the FCC's deficient standard. *See* TWC Br. 53-54. The FCC protests that courts routinely grant preliminary injunctive relief even when it "implicates a party's First Amendment rights." FCC

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[9] Contrary to the FCC's assertion, FCC Br. 45, TWC did present this argument below. *See* Comments of Time Warner Cable Inc., MB Docket No. 07-42, at 30-34 (Sept. 11, 2007) (JA___-___); Ex Parte Letter of Time Warner Cable, MB Docket No. 07-42, at 2-7 (Nov. 20, 2007) (JA___-___).

Br. 43.[10] That is not correct. In *Vance v. Universal Amusement Co.*, the Supreme Court struck down a federal statute that allowed state courts to preliminarily enjoin alleged obscenity "based on a showing of probable success on the merits and without a final determination of obscenity." 445 U.S. 308, 312 (1980) (per curiam). Such a scheme was declared unconstitutional because it allowed preliminary injunctions "of indefinite duration on the exhibition of motion pictures that [had] not been finally adjudicated to be obscene." *Id.* at 316. The Court also noted the scheme lacked certain "'procedural safeguards'"—such as an immediate right of appeal and an assurance of a prompt and final determination on the merits—that would protect speakers where a preliminary injunction that implicated First Amendment rights was improvidently granted. *Id.* at 314 (quoting *Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965)). The FCC's standstill rule suffers from the same defects.[11]

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[10] The FCC's reliance (at 43) on this Court's decision in *Merkos* is misplaced. *See Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002). No party raised—and the Court did not consider—any objection to the preliminary injunction in that case on First Amendment grounds. *Id.*

[11] Relatedly, courts have applied a heightened standard to requests for preliminary injunctions where the relief sought entails a "significant risk" of infringing on a party's constitutional rights. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1208 n.13, 1209 (9th Cir. 2005); *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 958 (9th Cir. 2010) ("[T]hose seeking such injunctive relief must

## II. THE GOVERNMENT CANNOT JUSTIFY ITS FAILURE TO PROVIDE NOTICE OF THE STANDSTILL RULE

Apart from the core First Amendment problems posed by the Order, the FCC is unable to justify the NPRM's failure to provide advance notice of the standstill rule. The FCC's excuses for not meeting this basic requirement—that the rule was "purely procedural" or that it was a "logical outgrowth" of a proposal to address retaliation—are, as Commissioner McDowell concluded in his dissent, unpersuasive. FCC Br. 60, 64; Order at 115-19 (JA___-___).

### A. The Standstill Rule Is Not Purely Procedural

The FCC attempts to gloss over the substantive impact of the standstill rule on an MVPD's ability to maintain control of its programming lineup, stating dismissively that "'all procedural rules affect substantive rights.'" FCC Br. 63 (quoting *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983)). But the relevant question is "one of degree"—whether the substantive effects are sufficiently serious as to make notice-and-comment procedures necessary to "safeguard the policies underlying the APA." *Lamoille Valley*, 711 F.2d at 328; *see also Perales v. Sullivan*, 948 F.2d 1348, 1354 (2d Cir. 1991) ("There can be no question" that a rule "preclud[ing] what would otherwise have been a valid claim

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establish particularly strong showings of likelihood of success and irreparable harm if there is some risk of offending First Amendment rights in the process.").

for federal reimbursement" of a state's Medicaid expenditures is a "substantive regulation."). Here, the answer is clearly yes.

Compelling an MVPD to carry programming against its will is quintessentially substantive. TWC Br. 57. The FCC's reliance on Section 616's grant of rulemaking authority to justify the standstill rule only underscores the substantive nature of the regulation adopted. *See White v. Shalala*, 7 F.3d 296, 303-04 (2d Cir. 1993) (exercise of an "agency's delegated power to make law through rules[] ... is subject to the public participation and debate that notice and comment procedures provide"). The standstill rule also "'encodes a substantive value judgment'" by enshrining a preference for the speech of unaffiliated programmers, further foreclosing application of the procedural exception to the APA's notice-and-comment requirement. *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

The FCC claims that, because it has issued stays in other situations, the new rule "merely codifies an existing procedure" and thus is exempt from the APA's notice-and-comment procedures. FCC Br. 63. But even the FCC concedes that no such rule has ever been applied in any program carriage case. *Id.* at 62. Orders discussing other procedures that have never been applied to a carriage dispute hardly constitute "existing FCC practice." *Id.* at 11. Accordingly, the contention

that codification of a standstill rule in the program carriage context "'do[es] not change [MVPDs'] existing rights and obligations,'" *id.* at 61 (internal quotation marks and citation omitted), is unavailing and, if accepted, would turn the procedural exception on its head. This Court has made clear that applying rules to new situations, or to new parties, is evidence of legislative rulemaking that is subject to the APA's notice-and-comment requirements. *See Sweet v. Sheahan*, 235 F.3d 80, 92 (2d Cir. 2000) ("Th[e] significant expansion in the persons subject to the legal requirement ... is a strong indication that the agencies engaged in legislative rulemaking.").[12]

### B. The Standstill Rule Is Not a "Logical Outgrowth" of the NPRM

The FCC reiterates the conclusory assertions made in the Order that the standstill rule is a "logical outgrowth" of the NPRM, without addressing any of the defects TWC and NCTA identified. *See* FCC Br. 64-66. It ignores the fact that none of the commenters in the proceeding below addressed the possibility of a standstill requirement in their opening or reply comments; nor does it dispute that,

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[12] The cases on which the FCC relies all involved complaints about some marginal change in a rule's application, not a rule's adoption in the first instance. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994) ("JEM cannot deny ... that the Commission always has required applications to be complete ... by *some* date or suffer dismissal."); *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (rejecting assertion that a new "training aid" modified the standard applied at parole hearing); *Donovan v. Red Star Marine Servs., Inc.*, 739 F.2d 774, 777-78 (2d Cir. 1984) (discussing authority to engage in particular procedure, as opposed to whether notice was required before codifying a new rule).

when the FCC proposed to adopt a similar rule in the program access context, cable operators and other parties filed extensive comments on that proposal, underscoring the significance of their failure to comment here. *See* TWC Br. 58-60.

The suggestion that petitioners are seeking "precise notice of each aspect of the regulations eventually adopted" also misses the point. FCC Br. 65 (quotation marks omitted). The problem is not that the FCC did not sufficiently explain the precise contours of the standstill provision; it is that the FCC never hinted at the possibility of a standstill rule *at all*. The NPRM's vague reference to potential anti-retaliation measures could not have put commenters on notice of the standstill requirement, as "an unexpressed intention cannot convert a final rule into a logical outgrowth that the public should have anticipated." *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (citation and internal quotation marks omitted), *cert. denied*, 131 S. Ct. 1784 (2011). Indeed, crediting that argument would render the "logical outgrowth" doctrine infinitely elastic and would allow agencies to evade the APA's notice requirement at will.

## CONCLUSION

For the reasons herein and in Petitioners' opening briefs, the Order violates the First Amendment and the APA. The Court should vacate the Order.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 31, 2012

s/ Matthew A. Brill
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## CERTIFICATE OF SERVICE

I, Matthew A. Brill, hereby certify that I have this day electronically filed the foregoing Page Proof Reply Brief of Petitioner Time Warner Cable Inc. with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Those not registered on the CM/ECF system (indicated by asterisks below) will receive hard copies of the brief via overnight FedEx delivery.

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