No. 09-901

In the Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DISCOVERY COMMUNICATIONS, LLC IN SUPPORT OF PETITIONER

MATTHEW A. BRILL
Counsel of Record
J. SCOTT BALLENGER
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Matthew.Brill@lw.com

Counsel for Discovery Communications, LLC

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INTEREST OF *AMICUS CURIAE*[1]

Discovery Communications, LLC ("Discovery") is a leading global media and entertainment company that provides original and purchased cable and satellite television programming across multiple platforms in the United States and over 170 other countries. Discovery's worldwide networks include the Discovery Channel, TLC, Animal Planet, Science Channel, Planet Green, Discovery Health, and HD Theater. Discovery also develops and sells consumer and educational products and services in the United States and around the world, and operates a diversified portfolio of website properties and other digital services.

Discovery's U.S. cable networks have a well-earned reputation for unparalleled production values, spectacular cinematography, and compelling stories. These networks invite viewers to explore their world by providing engaging programming that spans a number of nonfiction genres, including science, exploration, natural history, environmental sustainability, technology, anthropology, engineering, health and wellness, and current events. The Discovery Channel, Discovery's flagship network, is home to the critically acclaimed miniseries *Planet Earth* and *When We Left Earth: The NASA Missions*, as well as several popular ongoing series, including *Deadliest Catch*, *MythBusters*, and *Man vs. Wild*.

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[1] Pursuant to this Court's Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the clerk.

Discovery's award-winning programming competes with broadcast and cable networks for limited shelf space on cable systems. Like all programming providers, Discovery seeks carriage arrangements that enable it to reach the widest possible audience. Discovery benefits most when it secures placement on an analog cable tier (often known as "basic" or "expanded basic") that all subscribers can access, including those who rely on an analog television and directly connect the cable wire without using a set-top box. Most Discovery networks are carried on digital tiers with lower penetration, however, in large part because broadcast stations not only enjoy a government-guaranteed right of carriage, but are entitled to carriage on the basic programming tier, *see* 47 U.S.C. § 543(b)(7), and therefore crowd out all but a handful of cable networks. In short, because cable carriage is a zero-sum game, broadcast stations like WRNN-TV that invoke their must-carry rights under 47 U.S.C. § 534 necessarily disadvantage cable programmers, such as Discovery, which must negotiate for carriage without any government backing. That naked preference violates the First Amendment rights of cable programmers and, by displacing more popular cable programming that viewers would prefer to see, the rights of the viewing public as well. Discovery therefore has a strong interest in removing the substantial burden on its speech imposed by the government's preference for broadcasters under the must-carry regime.

SUMMARY OF ARGUMENT

A core tenet in First Amendment jurisprudence is that the Government cannot take the right to speak from some speakers and give it to others. Yet that is precisely the effect of the government's must-carry regime, which forces capacity-constrained cable systems to carry even marginal and unpopular stations that happen to have a broadcast license, replacing important and highly regarded cable programming that viewers actually would prefer to see. Rather than competing on the merits of their content, broadcasters enjoy the benefits of a statutory preference for their speech over the speech of cable programmers—the kind of preference this Court has repeatedly condemned. *See Citizens United v. FEC*, No. 08-205, slip op. at 24 (U.S. Jan. 21, 2010) (holding that a governmental preference for one speaker over another "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

In the 1990s, under a fundamentally different set of market conditions, this Court narrowly upheld the must-carry statute against a First Amendment challenge by pointing to a content-neutral governmental interest in preserving the "viability of broadcast television." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) ("*Turner I*"). The Court accepted the premise that cable operators had unchecked and growing "monopoly power" in local markets around the country, and would have a strong incentive not to carry local broadcast stations—even popular ones that customers would otherwise demand—because cable operators compete with the broadcast stations for local advertising dollars. *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997) ("*Turner II*") (noting that "cable operators had considerable and growing market power over local video programming markets"). The Court deferred to Congress's prediction in 1992 that, absent must-carry, cable operators' incentive to freeze out broadcasters would cause many local stations to go dark. *Turner II*, 520 U.S. at 191. The Court also predicted that the "burden of must-carry" would be "modest" for cable programmers that compete with broadcasters for carriage and tier-placement, because of what seemed at the time to be a boundless potential for expansion in cable channel capacity. *Id.* at 214.

In the almost twenty years of dramatic change since 1992, new developments in technology and in the media content and delivery markets have made the must-carry regime an outmoded relic. Today's vastly different technological and market conditions change the constitutional analysis in at least two fundamental ways.

First, must-carry now burdens substantially more speech than this Court believed it would, particularly the speech of cable programmers like Discovery. The growth in channel capacity that this Court predicted has not solved the problem—but instead has been outstripped by an unanticipated and remarkable explosion of programming content. Slots on cable systems have in fact become more scarce than ever. Despite this scarcity, the must-carry statute mandates that cable systems make room on their most widely penetrated tiers for broadcasters insisting on mandatory carriage. The FCC's must-carry rules also guarantee broadcasters placement on the lowest-numbered channels, which are easier for subscribers to find and remember. 47 C.F.R. § 76.57. Cable operators have no choice but to bump Discovery and other cable programmers onto less popular tiers with less desirable channel placement. And sometimes a cable operator's must-carry obligations preclude it from carrying a cable network altogether, even if viewers would choose it over one or more must-carry stations. By locking in this preference for broadcasters' speech, must-carry makes Discovery and other cable programmers second-class speakers, undercuts the government's interest in promoting a diversity of voices, and displaces the actual viewing preferences of cable subscribers to an extent that this Court could not have predicted.

Second, technological and marketplace developments have both undermined the importance of protecting broadcast television and ameliorated the threat that Congress saw. Modern consumers can access information and media content through a wide variety of channels, some of which barely existed in 1992—such as the Internet and television signals delivered by satellite and over the phone lines. The factual premises underlying must-carry—that cable operators enjoy local monopoly power in the distribution of content and have strong anticompetitive incentives to refuse carriage of broadcast signals in order to maximize advertising revenue—describe a marketplace that no longer exists. Cable operators now face vigorous competition from satellite companies, telephone companies, the Internet, and a host of other emerging technologies for the distribution of video programming in local markets. As the D.C. Circuit recently concluded, "[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

Discovery therefore urges this Court to grant certiorari to determine whether the statute's clear preference for broadcasters' speech over cable programmers' speech can withstand First Amendment scrutiny under current marketplace conditions.

ARGUMENT

As Cablevision's Petition demonstrates, the must-carry statute is unconstitutional as applied to the facts of this case, particularly in light of the major developments in the video programming marketplace since 1992. The statute's application not only fails under strict scrutiny, Pet. 29-32, but also can no longer withstand the intermediate scrutiny applied in *Turner I* and *II*. Under intermediate scrutiny, must-carry's application in this case can be sustained only "'if it 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 (citation omitted); *see also Turner I*, 512 U.S. at 662. In today's marketplace, the burden on cable programmers competing for limited shelf space on cable systems is substantial. And the asserted governmental interests in protecting broadcast television can no longer justify that burden.

I. MUST-CARRY NOW BURDENS SUBSTANTIALLY MORE SPEECH THAN NECESSARY.

This Court has long recognized that the must-carry regime burdens the speech of cable programmers. In *Turner I*, the Court acknowledged that "the must-carry provisions impose . . . special burdens upon cable programmers," triggering "some measure of heightened First Amendment scrutiny." 512 U.S. at 641. Those burdens include "reducing the number of channels for which [cable programmers] can compete." *Id.* at 645. The Court in *Turner II* agreed, observing that "[t]he must-carry provisions have the potential to interfere with protected speech" by "'render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining.'" 520 U.S. at 214 (quoting *Turner I*, 512 U.S. at 637).

The record developed on remand after *Turner I* suggested to this Court in 1997 that cable operators could generally "satisfy their must-carry obligations" by "using previously unused channel capacity" and that "the actual effects" of must-carry therefore would be "modest." *Turner II*, 520 U.S. at 214. This Court predicted that must-carry would "not displace cable programmers," *id.* at 205, and that any burdens on cable programmers "will soon diminish as cable channel capacity increases," *id.* at 214.

The Court in *Turner II* could not have foreseen the vibrant and diverse programming marketplace that has since developed. Over the past decade, the surge in the number of cable networks in the marketplace has far outpaced the growth in cable channel capacity. The Federal Communications Commission ("FCC") has estimated that roughly 565 national cable programming networks and 101 regional non-broadcast cable networks now compete with broadcasters for an average of 226 channel slots. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 20-21, 44 (2009) (hereinafter "Thirteenth Annual FCC Report"). Cable operators typically carry fewer than a third of those channels on their highest-penetration "analog" tiers, to which every cable subscriber has access. *Id.* ¶ 44. The remaining two-thirds of the slots are available only on digital tiers, which cable subscribers must actively request and purchase in addition to their basic service. *Id.* Viewers also must lease or purchase a set-top box to access digital tiers. Competition among programmers thus is especially intense for placement on the low-capacity, high-penetration analog tiers. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd 2134 ¶ 58 (2008) (noting that new cable networks are typically placed on digital tiers and recognizing the "significantly lower penetration rate" of such tiers), *vacated on other grounds sub nom. Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

Must-carry entitles broadcasters but not cable programmers to guaranteed placement on cable's highest-penetration tiers, regardless of "what speech and speakers" the public believes "worthy of consideration." *Citizens United*, slip op. at 24. This statutory guarantee has a direct, adverse impact on the speech of cable programmers seeking carriage on today's capacity-constrained cable systems. Cable systems cannot "fulfill their must-carry obligations using spare channels," as the Court assumed they could in 1997. *Turner II,* 520 U.S. at 205. Instead, they must now make room for must-carry broadcasters by displacing other programmers that have no such right. Thirteenth Annual FCC Report ¶¶ 20-21, 44. Must-carry forces cable systems to bump cable networks to less popular tiers and sometimes precludes a cable programmer from carriage altogether.[2] The statute thus ensures that, on the whole, cable programmers are far less likely to achieve the high level of distribution via cable that broadcasters automatically enjoy. This artificial limit on a cable programmer's reach imposes a substantial burden on its speech. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985) (recognizing "substantial First Amendment costs" in "guarantee[ing] a channel even if carriage effectively bumps a cable programmer"), *cert. denied,* 476 U.S. 1169 (1986).

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[2] *See, e.g., Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules,* Opposition of Discovery Communications, Inc. to Petitions for Reconsideration, CS Docket No. 98-120, at 9-10 (filed May 26, 2005) (describing Discovery's inability to gain carriage of Animal Planet in the Manhattan market on the expanded basic level of service, despite its proven value, due to the large number of broadcasters on the system occupying extensive channel capacity).

II. CURRENT MARKETPLACE REALITIES SHOW THAT MUST-CARRY DOES NOT DIRECTLY AND MATERIALLY ADVANCE IMPORTANT GOVERNMENT INTERESTS.

Even apart from the magnitude of the burden on cable programmers' speech, the profound changes in the marketplace since 1992 make *any* such burden unwarranted. There is no longer any sound basis for governmental preferences for broadcast stations' speech, and no legitimate danger that a cable bottleneck threatens the "the viability of broadcast television." *Turner I*, 512 U.S. at 661.

First, the *Turner I* Court found that there was an important governmental interest in promoting broadcast television over other media, which is not surprising given the central role broadcast television once occupied in the lives of Americans. But "the widespread dissemination of information from a multiplicity of sources" no longer genuinely depends on preserving several independent broadcast television stations in every local market nationwide. *Turner I*, 512 U.S. at 662. Consumers now have access to more information from more outlets than ever before, including a wide array of subscription video providers and myriad sources of news, information, and entertainment over those platforms and on the Internet.

The Internet in particular has largely supplanted (and greatly surpassed) broadcast television's traditional role in stimulating public participation in "the national discourse." *Turner II*, 520 U.S. at 194. *See, e.g.*, Thirteenth Annual FCC Report ¶ 156 & n.535

(reporting that "[m]ajor internet portals . . . offer pre-existing and original video content from traditional video providers," and that "Google Video, for example, allows viewers to search, view, and purchase video content, and allows users to share opinions about video clips"). And broadband Internet access has become available nationwide over the last decade and is now enjoyed by a substantial majority of Americans, *see Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 48 (2009) (estimating that 63 percent of Americans have adopted broadband Internet services), while the percentage of broadcast-only households has plummeted from 40 percent at the time of *Turner II* to less than 13 percent today. *See Turner II*, 520 U.S. at 216 (noting that, in 1997, "40 percent of American households [were] without cable"); Thirteenth Annual FCC Report, Appendix B, Table B-1 (reporting that, as of 2007, 87 percent of households subscribed to multichannel video programming distribution services).

The FCC has also acknowledged the emergence of local cable news stations and recently observed that "local news and local community or educational programming is readily replicable by competitive MVPDs." *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, FCC 10-17, MB Docket No. 07-198 ¶ 51 n.200 (rel. Jan. 20, 2010). Moreover, subscription news services like CNN, FOX News, and MSNBC reach millions of viewers without broadcasting over the air and, for many viewers, have replaced broadcast networks as a primary source of news. *See* Lymari Morales, *Cable, Internet News Sources Growing in Popularity*, Gallup, Dec. 15, 2008, http://www.gallup.com/poll/113314/cable-internet-news-sources-growing-popularity.aspx (noting that "significantly more Americans say they turn to cable news networks daily than say they turn to nightly network news programs"). In light of varied alternatives for disseminating information and promoting the national discourse, the government's "special protections" for broadcasters are an unjustified anachronism.

Second, the development of robust competition among video distributors has eliminated the threat that cable operators will prevent audiences from viewing broadcasters' programming. Even assuming the continuing importance of a governmental interest in protecting broadcasters' speech, therefore, the must-carry statute no longer directly and materially advances that interest. Far from requiring governmental assistance, more and more broadcast stations are now demanding and receiving substantial cash payments in return for their consent to retransmit their signals on cable systems. *See, e.g.*, Lynn Hicks, *Mediacom, Sinclair Reach Agreement; Subscribers Will Pay More*, Des Moines Register, Jan. 8, 2010, at B7 (noting that Sinclair, a broadcast station group, was reported to be seeking "a 50 percent increase in fees" for carriage); Brian Stelter, *Next Up on Cable TV, Higher Bill for Consumers*, N.Y. Times, Jan. 4, 2010, at A1 ("On New Year's Day, the News Corporation, the media empire controlled by Rupert Murdoch, wrangled new payments from Time Warner Cable, including subscriber fees for the Fox Broadcasting network, which is free for viewers with over-the-air antennas."). The "marginal" broadcasters that most concerned the Court in *Turner II* also have far better distribution options than they did in the 1990s. The FCC recently found that satellite and wireline services now provide significant alternatives to cable, and that "[t]he MVPD marketplace ... continue[s] to grow." Thirteenth Annual FCC Report ¶ 5.

As a result of these new platforms, the purported monopoly power and anticompetitive incentives in the cable market that concerned this Court in *Turner II* have largely evaporated. The Court in *Turner I* found that "the bottleneck monopoly power exercised by cable operators" required special protection for broadcast stations because cable providers had an incentive to freeze out local broadcast stations in order to maximize local advertising revenue. *Turner I*, 512 U.S. at 661. *Turner II* echoed this finding and observed that, in 1992, "cable operators had considerable and growing market power over local video programming markets." *Turner II*, 520 U.S. at 197. This Court believed that expanding monopoly power "would give cable operators increasing ability and incentive to drop local broadcast stations" that "compete with them for audience and advertisers." *Id.* at 197, 200.

More than a decade later, both the FCC and the D.C. Circuit have recognized that cable's monopoly has disappeared, along with any "incentive" or "ability" cable may once have had to harm broadcast television by denying carriage. In its January 2009 report on the market for video programming distribution, the FCC recognized that cable operators face competition in nearly every local market from satellite video providers, wireline providers, and Internet-based providers, among others. Thirteenth Annual FCC Report ¶¶ 5, 17. According to the FCC, satellite providers DIRECTV and DISH Network have surpassed all cable operators but Comcast to become the second and third largest multichannel video programming distributors. *Id.* ¶ 76. Wireline providers such as Verizon FiOS and AT&T U-verse more than doubled their subscribership in 2008 and are "continu[ing] to expand their service areas." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Supplemental Notice of Inquiry, 24 FCC Rcd 4401 ¶ 33 (2009). The Department of Justice observed in 2008 that "[t]he most significant development in regard to [multichannel video programming distribution] in the past three years is entry by the principal local telephone companies." U.S. Dep't of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers,* at 6 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf. And the precipitous rise of Internet video distribution, particularly on iTunes, Hulu, and YouTube, led the FCC to determine in 2009 that "established models for the distribution of video programming are being challenged by these technological advancements and consumers' ability to receive video programming via alternative means, not just from traditional linear networks." Thirteenth Annual FCC Report ¶ 153. Such developments led the D.C. Circuit to conclude that the "bottleneck" power that once justified analogous restrictions on cable operators has now disappeared. *Comcast Corp. v. FCC,* 579 F.3d at 8.

Robust competition among programming distributors has rid cable operators of "the power and the incentive to harm broadcast competitors" by withholding carriage. *Turner I*, 512 U.S. at 633. While a strategy of refusing to carry even popular broadcast stations might have made sense in a monopoly environment, it would be self-defeating for any cable operator today. Cable operators simply face too much competition now, in every market, to risk denying subscribers access to programming that might drive them to a competitor. FCC studies have demonstrated that, in today's marketplace, a cable operator will rapidly lose market share to competing video distributors if it stops carrying one or more local broadcasters. In assessing a carriage dispute in 2000 between Time Warner Cable and a local ABC affiliate in Houston, the FCC found that "[a] number of Time Warner customers . . . switched to DirecTV" during "the temporary withdrawal of the ABC broadcast station from Time Warner subscribers in the Houston [market]." *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶¶ 207-08 (2004). Competition has therefore tempered "the risk of anticompetitive carriage denials" that concerned this Court in 1997. *Turner II*, 520 U.S. at 207.

Congress's concerns about future horizontal concentration and vertical integration in the cable industry also have proven either incorrect or irrelevant in today's marketplace. The Court in *Turner II* believed that "as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide," the resulting "structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems." *Id.* at 197. But those predictions were based on assumptions about an industry "structure" that lacked the vigorous competition among cable operators, satellite providers, and telephone company providers that exists today. The FCC recently concluded that cable "clustering" in today's marketplace actually *promotes* competition by "mak[ing] cable operators more effective competitors to [telephone companies] whose local service areas are usually much larger than a single [cable] franchise area." Thirteenth Annual FCC Report ¶ 180.

The predicted harms of vertical integration in the cable industry likewise have failed to materialize. This Court assumed in 1997 that because "many MSO's owned or had affiliation agreements with cable programmers," those "cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers." *Turner II*, 520 U.S. at 198. But vertical integration has diminished markedly since Congress enacted the must-carry statute. In 1992, 57.4 percent of programming networks were vertically integrated with cable providers; by 2006, that figure had shrunk to 14.9 percent. *See* H.R. Rep. No. 102-628, at 41 (1992); Thirteenth Annual FCC Report ¶ 184. While cable networks and cable systems were growing less integrated, broadcast interests have gone in the other direction. The major broadcast networks have all become integrated with major cable networks and use their combined clout to secure favorable carriage deals for station affiliates.[3] Many independent broadcast

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[3] *See* CBS Corp., Form 10-K (filed Feb. 25, 2009), at 2-5 (detailing ownership of CBS assets, the cable network Showtime, and other cable networks); News Corp., Form 10-K (filed Aug. 12,

stations have become part of large "station groups" that pool carriage rights across markets, thus enabling broadcasters to wield considerable economic power in seeking carriage on cable systems.

Even if cable operators were still dominant, today's cable systems would have little incentive to drop a broadcaster in order to "capture broadcasters' advertising revenues," as this Court assumed in 1997. *Turner II*, 520 U.S. at 188. Television advertising revenues, like print advertising revenues, are declining under pressure from emerging technologies. *See* Thirteenth Annual FCC Report ¶ 106. Companies are increasingly shifting their advertising spending away from television and toward popular websites like Google. *See* Eric Pfanner, *Rate of Decline in Global Ad Spending Slows, Report Shows*, N.Y. Times, Sept. 30, 2009, http://www.nytimes.com/2009/10/01/technology/internet/01ads.html (reporting that "online ad spending overtook television in the first half" of 2009). The development of digital video recorders ("DVRs"), which allow consumers to search for and record programming, has also led to "significant reductions in advertising revenues," since users "can more easily avoid watching commercial advertisements." Jonathan Levy, Deputy Chief Economist, FCC, *The Evolving Structure and Changing Boundaries of the U.S. Television Market in the Digital Era*, at 3 (June 1, 2006), *available at*

2009), at 8, 10-13 (detailing ownership of FOX assets, Fox News, and other cable networks); Walt Disney Co., Form 10-K (filed Dec. 2, 2009), at 1-3 (detailing ownership of ABC assets, ESPN, and other cable networks); General Electric Co., Form 10-K (filed Feb. 19, 2010), at 8 (detailing ownership of NBC assets, MSNBC, and other cable networks).

http://www.fcc.gov/ownership/materials/newly-released/evolving060106.pdf. The availability of television content over the Internet and on mobile devices like phones (and, soon, tablet computers) only accelerates that trend.

This Court's decision in *Turner II* rested on the assumption, reasonable in 1997, that "advertising revenue would be of increasing importance to cable operators . . . providing a steady, increasing incentive to deny carriage to local broadcasters." *Turner II*, 520 U.S. at 203. The opposite has proven true. Media providers of all kinds (other than Google) are being forced to move away from advertising-based revenue streams and toward subscription models where success depends entirely on giving the customer the content he wants.

On the record before it, the Court in *Turner II* could not have anticipated this sea change in the video programming marketplace, but market conditions today compel a new and inescapable conclusion. Broadcasters no longer need the extraordinary preference embodied in must-carry, and its overwhelming burdens on cable systems and programmers have become wholly unjustifiable. If cable providers ever had the ability or incentive to block or distort actual customer preferences in the programming marketplace, they no longer do. As a result, the must-carry statute undercuts the very public interest goals it was intended to promote.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

MATTHEW A. BRILL
Counsel of Record
J. SCOTT BALLENGER
MATTHEW T. MURCHISON
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
Matthew.Brill@lw.com

Counsel for Amicus Curiae