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 WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* TIME WARNER CABLE INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE TIME WARNER CABLE INC.[1]

Amicus Time Warner Cable Inc. ("TWC") is the second largest cable operator in the country, with over 14 million customers in 28 states. TWC offers its customers various products and services, including cable television, high speed Internet, and telephone. TWC is recognized as a leader in cable and fiber optic technology, and in 1994, became the first cable company to receive an Emmy Award by winning the Engineering Award for Outstanding Achievement in Technological Development for its pioneering work in using fiber optics to transmit broadband signals.

As a cable operator, TWC, like Petitioner Cablevision, is subject to the must-carry regime set forth in the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"). 47 U.S.C. § 534(a), (c), (h)(1)(A). Under that regime, cable operators are obligated to set aside a portion of their channel capacity to carry the signals of local broadcasters who elect "must-carry" status. In the absence of must-carry, TWC would exercise its editorial discretion and business judgment in determining what programs to carry on its system based upon many factors, including customer demand.

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief and their written consents are on file with the Clerk of this Court.

TWC, like Petitioner Cablevision, has also had dealings with intervenor-broadcaster WRNN that exemplify the negative real world impact of the must-carry regime as applied in today's marketplace. TWC believed at the time of the passage of the 1992 Cable Act that the must-carry provisions were not consistent with the First Amendment to the United States Constitution. The Company was involved in the cable industry's facial challenge to the must-carry requirements which led to this Court's *Turner* decisions, which ultimately upheld the must-carry regime in a pair of 5-4 decisions. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) ("Turner I"); *Turner Broadcasting System, Inc* v. *FCC*, 520 U.S. 180 (1997) ("Turner II").

To say that the market for video programming has changed in the 18 years since Congress enacted must-carry legislation and the subsequent *Turner* decisions would be a dramatic understatement. TWC faces intense competition today for increasingly technologically sophisticated consumers who have a vast array of options from which to get their video programming content, such as satellite companies, telephone companies, and the Internet. Because of these dramatic changes in the ever-more-competitive marketplace, the rationale underlying the *Turner* decisions has been eviscerated. TWC believes that Cablevision's petition for certiorari raises important questions about the continued vitality of the must-carry regime that are well worthy of consideration by this Court.

SUMMARY OF ARGUMENT

Time Warner Cable's own experience with WRNN demonstrates the mischief caused by the must-carry regulations. WRNN, a station licensed in Kingston, NY, had historically never been carried on TWC's New York City cable system. Kingston is far away from New York City—both geographically (over 80 miles) and culturally. The program line-up of WRNN is primarily home shopping and infomercials, one that is of limited interest to TWC's urban subscriber base in New York City. WRNN offers, at best, a tiny amount of token programming directed toward New York City viewers, and in fact, offers very little programming that is local even to Kingston, its community of license. Threatened with a potential must-carry order from the Federal Communications Commission ("FCC"), however, TWC decided it would rather strike a deal with WRNN. Under the must-carry regime, TWC would be obligated to carry WRNN in an analog format. This is significant because analog carriage uses much more bandwidth than digital—up to ten times more to carry only one channel. Rather than risk losing this valuable bandwidth on its cable system, TWC decided to provide WRNN (i) two digital channels in exchange for the one must-carry analog channel; and (ii) carriage on TWC's Albany system, an area not normally within WRNN's local market. The end result was the forced carriage of two channels that are of little to no interest to TWC's subscribers.

As the WRNN example illustrates, given the competitive marketplace in which TWC operates today, must-carry acts as far too blunt an instrument. The competitive and technological market place for the delivery of video programming has changed dramatically since the must-carry regime was narrowly approved by this Court in its *Turner* decisions. TWC faces intense competition from other companies providing video content services to consumers: traditional broadcasters, satellite companies such as DIRECTV and Echostar, large and well-capitalized telephone companies including Verizon and AT&T, and multiple portals on the Internet, such as YouTube, Hulu and other streaming video websites all of which were unheard of in 1992. At the same time, broadcasters have demonstrated through their actions their own increased market power in the changed competitive landscape, most often choosing not to opt-in to the must-carry regime at all. Must-carry remains as a relic of a by-gone era that is not needed to protect the broadcast industry, and at worse, leads to twisted incentives that run against the value of "localism," one of the goals must-carry was supposed to protect.

All of these changes lead to one conclusion: this Court's *Turner* decisions are based upon economic and technological suppositions that are simply inconsistent with the realities of the marketplace. This conclusion is supported by the recent decision of the D.C. Circuit Court of Appeals, which recognized that cable operators no longer possess the bottleneck power that in large part drove the *Turner* decisions. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992"). And even more recently, this Court, citing to *Turner I* itself, warned of the dangers of making differentiations between preferred and disfavored forms of speech which may become "irrelevant or outdated by technologies that are in rapid flux." *Citizens United* v. *FEC*, No. 08-205, Slip. Op. at 9 (Jan. 21, 2010) (citing *Turner I)*. Cablevision's petition for certiorari raises important questions about the viability of must-carry in today's market, questions worthy of this Court's review.

ARGUMENT

I. TIME WARNER CABLE'S EXPERIENCE WITH WRNN DEMONSTRATES THE MISADVENTURE OF MUST-CARRY

A. The Must-Carry Regime and the Turner Decisions

Under the must-carry provisions of the 1992 Cable Act, cable operators such as TWC are required to carry the signals of a number of local broadcasters. 47 U.S.C. § 534(a), § 535(a). The statute generally requires cable operators to set aside up to one-third of their channels for mandatory carriage of commercial television stations. *Id.* § 534(b)(1)(B). Cable operators are not obligated to carry signals of distant broadcasters; rather, the must-carry regime applies to the signals of broadcasters deemed to be "local" as to each community served by the cable system. *Id.* § 534 (h)(1)(A). Thus an important question under the must-carry regime is determining a broadcast station's local status.

Currently, the FCC determines the local status of a commercial television station by using information generated by Nielsen Media Research that divides the nation into a series of geographic Designated Market Areas based on viewership patterns. 47 C.F.R. § 76.55(e)(2). The 1992 Cable Act also contains a market modification provision which serves as the crux of the present litigation. Under the market modification provision, the FCC may, on written request, add certain communities to, or exclude certain communities from, a given broadcast station's local market "to better effectuate the purposes of the statute." 47 U.S.C. § 534(h)(1)(C)(i). In reviewing market modification requests, the FCC is supposed to examine four statutory factors intended to "afford particular attention to the value of localism," including "whether the television station provides coverage or other local service to [the] community." *Id.* § 534(h)(1)(C)(ii).

In this Court's *Turner* decisions, the Court narrowly upheld the must-carry regime against a facial attack brought by TWC and other cable operators and programmers. In *Turner I*, Justice Kennedy wrote for the 5 member majority, holding that the Cable Act's requirements were generally content neutral and thus subject to intermediate scrutiny.[2] The Court identified three "important"

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[2] The Court's opinion, however, explicitly carved out the market modification provision at issue in the instant litigation, noting that it appeared to be content-based due to its focus on the "value of localism", and noted that the district court did not address this issue below but could do so on remand. 512 U.S. at 643 n.6 (quotation mark omitted). In its decision below, the Second Circuit recognized that the constitutionality of the market modification provision was a question left open by *Turner I. Cablevision Systems Corp.* v. *FCC*, 570 F.2d 83, 97 (2d Cir. 2009).

goals served by must-carry in the abstract: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." 512 U.S. 622, 662 (1994). The Court, however, found that the record was not adequate for determining whether the statute was sufficiently tailored to address those interests without burdening too much speech and remanded the case for further fact finding. *Id.* at 667-68.

Three years later, with a developed record, this Court held that the must-carry provisions satisfied intermediate scrutiny. *Turner II,* 520 U.S. 180 (1997). Justice Breyer, who gave the majority its fifth vote, wrote separately to state that he did not agree that promoting fair competition in the marketplace for television programming qualified as an important governmental interest of the 1992 Cable Act. *Id.* at 226. Instead, Justice Breyer grounded his opinion in the governmental importance of insuring over-the-air "access to a multiplicity of information sources." *Id.* (quotation marks omitted). Foreshadowing the future, Justice Breyer observed that the evidence showed that "a cable system . . . at present *(perhaps less in the future)* typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice . . . ." *Id.* at 227-28 (emphasis added).

With this background in mind, TWC turns to its experiences with the must-carry rules, and in particular, its dealings with WRNN, the broadcaster-intervenor in this case.

B. Time Warner Cable's Experience With WRNN and the Must-Carry Rules

TWC provides cable television service to much of New York City, including Manhattan, Brooklyn, Queens, and Staten Island. WRNN is a television station licensed in Kingston, NY. It primarily broadcasts home shopping, infomercials, and other paid programming. Kingston is far away from New York City in every sense of the word—geographically (*e.g.,* approximately 89 miles from Brooklyn), politically, and culturally. Thus, it is no surprise that historically, TWC did not carry WRNN on its New York City systems.

In the late 1990's, TWC prevailed in an action that, under the very market modification provision at issue in this case, excluded the portions of New York City served by TWC from WRNN's "television market", *i.e.,* the area in which it is entitled to demand must-carry status. Pet. of Time Warner New York City Cable Group for Modification of ADI for Station WRNN, Kingston, NY, 11 FCC Rcd 6528 (CSB 1996), *recon. denied*, Market Modifications and the New York Area of Dominant Influence, 12 FCC Rcd 12262 (1997), *aff'd, WLNY-TV, Inc.* v. *FCC,* 163 F.3d 137 (2d Cir. 1998). The primary basis for the market modification ruling was that WRNN's Grade B contour coverage—the area in which viewers could receive an adequate broadcast signal over-the-air—did not reach the New York City area.

WRNN thereafter moved its broadcasting tower 50 miles closer to New York City and—while maintaining its city of license as Kingston—opened a studio in Manhattan that it designated as its "head studio." Later that year, WRNN filed a Petition for Special Relief before the FCC for market modification to add the New York City specific communities back into its television market in order to be eligible for must-carry status as to TWC.

TWC opposed WRNN's petition on numerous grounds, many of which track those cited by Cablevision here. For example, TWC pointed out that WRNN failed to provide local programming of interest to the NYC communities, but rather primarily provided programming of a very generic sort such as home shopping and infomercials. TWC noted that only one program, "NYC Metro Live," appeared to cover any issues of local importance, and it was only broadcast for 4.5 hours a week, or less than 2.7% of WRNN's weekly broadcast schedule. In contrast, TWC set forth the plethora of local programming carried on its system by other providers. TWC also pointed out that, ironically, given broadcasters' supposed responsiveness and benefit to local communities, WRNN's line up had very little programming that was directed toward its local community of license —Kingston. Instead, WRNN, a predominantly home shopping network, appeared to be ignoring its own local community while presenting a token amount of programming directed to New York City that would permit a facially plausible must-carry argument for expanded carriage into New York City's larger commercial market.

The Second Circuit's decision below in this action makes reference to TWC's dispute with WRNN, noting that the FCC's Media Bureau granted WRNN's petition and that TWC did not appeal the decision to the full Commission. *Cablevision*, 570 F.3d at 91. While that much is true, it does not tell the full story of TWC's experience with WRNN. Due to the coercive and distorting effect of the must-carry rules, TWC made the business decision that it was better to settle with WRNN than to continue with litigation.

The deal TWC struck is instructive of the mischief caused by the must-carry rules. Under the must-carry regulations, a broadcaster entitled to must-carry status must be carried in analog format by a cable company such as TWC which has both analog and digital capabilities. *See* Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120, FCC 07-170 (rel. Nov. 30, 2007) (Third Report and Order). This is significant because analog carriage takes up far greater bandwidth than digital carriage. Every analog channel takes approximately 6 MHZ of bandwidth. That same bandwidth could be used to offer TWC's customers 10 digital channels. In other words, TWC could offer its customers 10 different channels of varying subject matters, including those with local interest, but because of must-carry, it must instead offer only WRNN, a predominately home shopping station with, at best, a token amount of local programming that one suspects was included solely to game the must-carry regulations in general and the market modification provision in particular. Putting aside the harm to TWC's First Amendment rights to determine what it should carry on its own cable system, it is difficult to see how this result advances the consumer's interests, or the interest supposedly served by the must-carry rules themselves: preserving free, over-the-air local broadcasting and promoting a widespread dissemination of information from a multiplicity of sources.

To make matters worse, the must-carry regime further obligates TWC to carry must-carry signals on the same channel position assigned to the broadcaster in the broadcasting frequency. 47 U.S.C. § 534(b)(6). This means that TWC would have to carry a broadcaster on a specific channel on its line-up, even if that numerical channel was already assigned to a different content provider. In the case of WRNN, all these rules would have obliged TWC (in the event WRNN prevailed on its petition) to carry WRNN in analog format and on channel 48, which would have necessitated TWC's removal of an already existing channel, most likely C-SPAN 2, from its analog line up in order to have enough capacity to carry WRNN. It is ironic indeed that the must-carry provisions would lead to such a result—the replacement of C-SPAN 2, a commercial-free service offering exclusively government and public affairs programming, with a home shopping/infomercial station on a valuable analog channel.

To avoid these must-carry costs, TWC agreed to withdraw its opposition to WRNN's petition before the FCC and to give WRNN *two* channel slots in a digital format, and to offer carriage on TWC's Albany system, an area not otherwise in WRNN's market. In exchange, WRNN agreed to relinquish its must-carry rights, including its right to one analog channel.

TWC's experience with WRNN is not an anomaly. Since the FCC adopted its current must-carry rules in 1993, TWC has been involved in over 40 disputes in which it has defended against must-carry complaints or has sought modification of local station markets to avoid carriage of stations not deemed of sufficient interest to TWC subscribers in particular communities. And, as explained more fully below, given the changing competitive and technological landscape, must-carry's distorting and negative effect has grown only more disproportionate. Whatever "fit" may have existed at the time of *Turner* between the goals served by the must-carry regulations and the speech price paid by cable operators and programmers is no more.

II. DRAMATIC CHANGES IN THE MARKETPLACE AND TECHNOLOGY SINCE THE 1992 CABLE ACT AND THE *TURNER* DECISIONS MANDATE REVIEW OF THE MUST-CARRY REGIME

As the petition for certiorari demonstrates, fifteen years after *Turner I*, the constitutionality of the must-carry provision of the 1992 Cable Act is ripe for review. *Turner*'s analysis is keyed to industry conditions long outdated. The state of the industry is rapidly changing—indeed, has changed substantially even over the course of this litigation—and is radically different from the *Turner* era. The must-carry provision, bolstered by the *Turner* decisions, is a study in the law of unintended consequences, and a look at the present state of the industry illustrates the perversions to which a regulatory regime can lead once its factual underpinnings vanish.

Turner I's rationale was grounded in a particular time, at a particular moment in the development of video technology, when the power of cable companies was on the rise and consumers had relatively few alternatives and correspondingly little control. *See, e.g.*, *Turner I*, 512 U.S. at 632-33 ("increasing concentration of economic power in the cable industry" and exclusivity based on infrastructure); *id.* at 633 (industry characterized by power of cable companies relative to broadcasters); *id.* at 634 (increasing vertical and horizontal integration).[3] This Court found that the regulations were "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Even at the time, however, the Court recognized the "pace of technological advance-

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[3] The same is true in *Turner II*, where the Court relied heavily on the notion that cable maintained a monopoly, and that both horizontal and vertical integration were trending upward. *E.g.*, *Turner II*, 520 U.S. at 197-98, 206-07. Tellingly, *Turner II* arrived at the Supreme Court after a remand to consider additional factual material on a summary judgment motion, and much of the opinion was devoted to the consideration of various studies that are woefully out of date. *See, e.g.*, *id.* at 200 (specific evidence of cable providers' favoritism toward vertically-integrated content providers); *id.* at 206 (information that "[o]n average, even the lowest rated station added pursuant to must-carry had ratings better than or equal to at least nine basic cable program services carried on the system"); *id.* at 214 (studies finding that cable operators were required to make few substantial changes as a result of the must-carry regime).

ment," and noted that there was an "ongoing telecommunications revolution with still undefined potential to affect the way [people] communicate and develop [ ] intellectual resources". *Id.* at 627. *See also Citizens United*, Slip Op. at 9 (citing *Turner I* for the proposition that courts should be wary of making distinctions between favored and disfavored forms of speech which may become "irrelevant or outdated by technologies that are in rapid flux").

As early as 1995, commentators began to recognize that the *Turner I* decision's reasoning—based as it was on the status of an obviously dynamic technological industry—invited obsolescence.[4] Recent scholarly articles, with the

[4] *See, e.g.*, Ronald W. Adelman, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 SMU L. Rev. 1549, 1550 (July-August 1996) ("The de facto monopoly that most cable operators have historically enjoyed in their service areas—a prerequisite to the Court's bottleneck analysis—may soon be a thing of the past."); James A. Bello, Comment, Turner Broadcasting System, Inc. v. FCC: *The Supreme Court Positions Cable Television on the First Amendment Spectrum*, 30 New Eng. L. Rev. 695, 744 (1995-1996) ("[T]he advent of new technology[] [has] brought about increased competition in the cable television market. Thus, the economic justification for imposing must-carry on cable operators is quickly becoming moot."); Henry Geller, *Turner Broadcasting, the First Amendment, and the New Electronic Delivery Systems*, 1 Mich. Telecomm. & Tech. L. Rev. 1, 26-27 (1994-1995) ("With the inevitable digital revolution and its convergence of media [ ], there will be no way to distinguish between the media. . . . [T]he bottleneck aspect of cable television, which understandably drove the decisional process in *Turner*, will disappear.").

benefit of hindsight, have also suggested that it is time for the *Turner* regime to come to an end.[5]

A. The Bottleneck Analogy No Longer Applies In A Vibrant and Technologically Advanced Market.

Vibrant competition in the marketplace for provision of video services has swept far beyond what anyone could have dreamed in 1992. It continues to change even as this petition is briefed. The most recent Annual Report from the FCC, which itself lags several years behind,[6] suggests that the proliferation of alternative forms of delivery of video content has already transformed the industry in a manner far from that portrayed to the Court when it decided *Turner*. *See* Federal Communications Commission, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

[5] *See, e.g.*, Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 Charleston L. Rev. 373, 393 (Winter 2009) ("[W]hatever Turner Broadcasting's merits when it was decided, ... [t]oday, with many more media outlets available, along with the Internet, the justification, if ever there were any, for providing special protection to local broadcasters at the expense of cable operators' First Amendment rights is even more problematic. . . .).

[6] The Report, adopted in 2007 and published in 2009, only reflects data from 2006. The 1992 Cable Act provides that the FCC shall provide annual reports to Congress on the status of the cable market. 1992 Cable Act, Pub. L. No. 102-385 (codified as amended at 47 U.S.C. § 548(g)). Those reports are evidence in themselves of the dramatic changes that have occurred in the industry. *See* Report; *see also id.*, at p. 2 n.1 (citing the Commission's previous reports, beginning in 1994).

Programming, Thirteenth Annual Report ("Report") (adopted Nov. 27, 2007, released Jan. 16, 2009).

By 2006, cable's competitive advantage had decreased substantially. In the area of traditional provision of video services, cable penetration rates had decreased, while satellite companies' share of the multichannel marketplace increased by 7.1% and Local Exchange Carriers (LECs), like Verizon's FiOS, expanded their service areas. Report, at pp. 6-7, 39-40. In Comments submitted to the FCC in May 2009, the National Cable & Telecommunications Association ("NCTA") noted that cable's share of the video marketplace had dropped from 68.17% in June 2006 to 63.5% in 2009; that satellite companies' revenues were up 8.3% from 2007; and that the number of homes with FiOS and AT&T's U-Verse availability had "more than quadrupled since 2008." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the NCTA (May 20, 2009) ("NCTA Comments"), at pp. 8-12. The trajectory of the industry suggests that cable television will continue to lose subscribership while alternative technologies increase in popularity; given these realities, any monopoly that cable may have had is inalterably broken.

Traditional over-the-air broadcasters still compete with cable operators. However, the percentage of Americans who receive their television programming solely from over-the-air broadcasts has declined significantly since *Turner*. The *Turner I* Court noted that "nearly 40 percent of American households still rel[ied] on broadcast stations as their exclusive source of television programming." 512 U.S. at 663. Today, that landscape has shifted dramatically. As of the 2006 FCC Report, almost 87% of households subscribed to an MVPD service; only 14% of the total U.S. television households relied solely on over-the-air service. Report, at pp. 5, 8. Even this small number was expected to drop after broadcasters' transition from analog to digital in June 2009. NCTA Comments, at p. 16.

Moreover, data regarding the more traditional forms of video delivery no longer present a complete portrait of the competition facing cable companies. The 2006 FCC Report addressed several new sources of content when they were still in their relative infancy, finding that both online/mail DVD services like Netflix and streaming Internet video were swiftly becoming part of the ever-growing community of video providers. Netflix was increasingly identified as a competitive alternative to cable "because it offer[ed] services similar to premium and pay-per-view offered by" video content providers, even permitting customers to rent DVDs via streaming video. Report, at pp. 79-80. As to Internet video, in 2006 three out of five Internet users viewed media online in some form, and roughly the same number downloaded video content; as an example, more than 34 million people visited YouTube in August 2006.[7] *Id.*, at pp. 72-73. It is important to

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[7] Time Warner Cable is a provider of Internet services, and that side of the business benefits from increased Internet offerings. This does not, however, negate the powerful effect that the Internet has had—and will continue to have—on the traditional cable television business.

note that over-the-air viewers (not just MVPD subscribers) can and do avail themselves of many of these newer alternatives; thus, such viewers have many additional choices of video content than they had when must-carry was adopted.

Usage of these new technologies has only increased since the 2006 FCC Report. By 2009, the NCTA reported a 70% gain in revenue for Netflix in the first quarter of 2008 and a 25% increase in subscribership. NCTA Comments, at p. 15. Similarly, by 2009, the popularity of Internet streaming video had increased, and more than 6 *billion* videos were viewed on YouTube in January 2009 alone. *Id.*, at pp. 4-5. Hulu, owned by Fox Corp., NBC Universal, and Disney/ABC, is another Internet portal for viewing videos that is gaining in popularity. In January 2010, over 600,000 videos were viewed on Hulu, which ranked second to YouTube that month. *See* Neilsenwire, Total Viewers of Online Video Increased 5% Year-Over-Year, Feb. 11, 2010, available at http://blog.nielsen.com/nielsenwire/online_mobile/total-viewers-of-online-video-increased-5-year-over-year/.

Technological changes have also revolutionized the industry as compared to the time of *Turner*. Cable customers are offered a multitude of services and products, including not only cable television with hundreds of channels, but also high speed Internet access, interactive two-way digital applications, and telephone service delivered through Internet protocol. Cable television customers are offered high definition (HD) channels, video-on-demand, and digital video recording (DVR) permitting subscribers to customize their viewing experience. Further, both cable subscribers and over-the-air viewers are able to hook up new devices to their television sets, such as iPods, Apple TV, Boxee, and DVD players, all of which provide different channels for video content and negate the dated concern that cable, through placement of its cable set top box, would act as a physical bottleneck with respect to information sources. Such technological changes have in turn further fueled intense competition in the industry.

Given these drastic changes, the bottleneck theory under girding the *Turner* decisions is no longer viable.[8] This reality was recently recognized by the D.C. Circuit Court of Appeals in the *Comcast* decision which struck down as arbitrary and capricious the FCC's 30% market share cap on subscribers to be served by any one cable operator: "Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. *Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992.*" *Comcast*, 579 F.3d at 3, 8 (emphasis added).

[8] The vertical integration argument often raised by proponents of must-carry is a red herring. Vertical integration has always been discussed in conjunction with concerns about a horizontal stranglehold on the media industry on the part of cable, *see, e.g.*, *Turner I*, 512 U.S. at 634, which, as discussed *supra*, no longer exists.

B. Broadcasters Have Demonstrated Market Strength and Do Not Need Must-Carry in Today's Competitive Market

The Cable Act provides that every three years, local commercial broadcasters must choose whether they wish to apply for carriage on a cable system through a retransmission agreement, or whether they elect must-carry status. 47 U.S.C. § 325(b)(3)(B). In TWC's experience, the large majority of broadcasters elect retransmission consent over must-carry. For example, in the Hudson Valley system, there are 15 retransmission consent broadcasters as compared to only 3 must-carry broadcast stations. In North Carolina, Raleigh carries 6 broadcasters by retransmission consent and only 3 by must-carry. In Charlotte, all 8 broadcast stations are carried via retransmission agreement; none have chosen must-carry. Not surprisingly, the broadcasters choosing must-carry have much lower viewership than other broadcasters. This trend is generally played out throughout TWC's operations around the country.

The fact the large majority of broadcasters choose to be carried via retransmission agreement rather than must-carry demonstrates, in and of itself, that must-carry is simply not needed to protect the broadcaster industry. Moreover, the vibrant competitive market place in which TWC operates insures that even less popular local broadcast stations, so long as they have content of interest to local subscribers, would be carried by TWC in the absence of must-carry. This is made all the more likely due to the increased channel capacity on TWC's systems as compared to 15 years ago. If TWC fails to be responsive to subscriber demands, TWC will suffer a loss of subscribers to competitors.

In addition to the reality that most broadcasters choose retransmission consent over must-carry, many broadcasters are beginning to demand payment for carriage of their content— content that is broadcast for free over-the-air. This market development, unimaginable at the time the must-carry regime was instituted, renders Congress's efforts to protect the broadcast industry unnecessary. *See, e.g.,* Jessica Reif Cohen *et al.*, Media and Cable: The Tide Has Turned, Bank of America/Merrill Lynch Analyst Report, at p. 1 (Jan. 6, 2010) (recent events "turn[] the tide in favor of broadcasters for negotiating leverage"); Brian Stelter, *Broadcasters Battling for Cable Fees*, N.Y Times, Dec. 29, 2009.

In addition, broadcasters have a much greater likelihood of carriage on cable today due to the increased channel capacity on cable systems. While TWC still has a limited amount of bandwidth and cannot carry all who seek carriage, it is able to provide a far broader array of channel choices to viewers than it could 15 years ago. For example, TWC's Brooklyn cable system currently offers hundreds of channels to subscribers, including multiple offerings that appeal to local and niche markets in particular communities. A local broadcaster with programming of interest to local subscribers would find carriage on TWC's cable system without must-carry; if TWC is not responsive to the demands of its local subscriber base, TWC risks losing customers to competitors.

To the extent that the must-carry provisions, and by extension the *Turner* cases, were predicated on a desire to protect broadcast stations, current market realities illustrate that this protection is no longer necessary or useful to the purposes this Court has identified in upholding it. Power exerted by broadcast stations, combined with a substantial increase in the number of available communicative channels accessible through digital cable, satellite service, telephone companies, DVD players and other consumer devices, as well as the Internet, ensures that the vast majority of Americans can access the multiplicity of sources of information that Congress intended to protect. This is true whether a consumer is an over-the-air viewer or a subscriber to an MVPD service such as cable.

Moreover, at its extreme, the must-carry regime has led to results in tension with at least one of the aims of must-carry: to promote the value of localism. Historically, one of the attributes of local broadcast stations was its focus on local news and issues; indeed, it was at least partially a respect for localism that inspired Congress to initiate must-carry. *See*, *e.g.*, H.R. Rep. No. 628, 102nd Cong., 2d Sess. (1992) ("Congress long has advocated broad access to public television services, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational, and local public interest programming available to the nation's audiences."); *id.* at 69 ("Local public television stations also provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities."); *see also Turner I*, 512 U.S. at 634 ("In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, '[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried,'; the 'marked shift in market share' from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, and that, as a consequence, 'the economic viability of free local broadcast television and its ability to originate *quality local programming* will be seriously jeopardized.'") (internal citations omitted, emphasis added).

By giving broadcasters a free-pass—*i.e.*, automatic carriage—the must-carry regime has distorted broadcasters' decision making process, perversely incentivizing them to forego the interests of their local communities. A broadcaster who can take advantage of must-carry can effectively ignore its local community and broadcast programming of any content, be it generic entertainment, home shopping, or otherwise, and still demand carriage. WRNN offers a case in point. First, WRNN was able to ignore its community of license, Kingston, and build a predominately home shopping/infomercial network and still demand carriage in its legitimate market area. And then, by putting only a token amount of programming geared towards New York City viewers, it was able to demand expanded carriage of its predominantly home shopping network in New York City. This is clearly not the "quality local programming" that the Court had in mind in discussing the must-carry system in *Turner I.* 512 U.S. at 634.

The competitive marketplace and the technological landscape for video programming distribution has undergone major changes since this Court's *Turner* decisions. Cable operators now clearly face vibrant competition and the bottleneck description no longer even plausibly applies. Broadcasters do not need must-carry to survive and most do not take advantage of this outdated mechanism, leaving it to aid only those broadcasters with programming that is not of interest to viewers or, worse, that is not consistent with the "value of localism" that must-carry was designed to protect. The viability of the must-carry regulations, including the market modification provision presented in Cablevision's challenge, is a critically important question affecting communication, competition, and commerce throughout our country. It is a question well worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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