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* NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry.

NCTA fully supports Cablevision's petition for a writ of certiorari and submits this amicus brief to endorse Cablevision's arguments that changes in the video programming marketplace since this Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), significantly undermine the continued viability and constitutionality of "must carry" requirements.

As this Court recognized in the *Turner* decisions, the must carry provisions at issue in this case directly and significantly restrict the protected speech of NCTA's members — both its cable operator members, who are compelled to set aside capacity on their systems for broadcast signals that they would

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[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

not otherwise choose to carry, and its cable-program-network members, who must compete for carriage on cable systems and for desirable channel placement without any such guaranteed carriage rights.

Fundamental changes in the marketplace since Congress adopted the must-carry statute in 1992 have substantially eroded the bases on which this Court upheld the constitutionality of such forced carriage. In particular, the development of "ever increasing competition among video providers," *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009), and technological changes have eliminated the "bottleneck control" on which the Court relied in declining to apply strict scrutiny — the standard normally warranted in cases involving forced speech — and in finding that the must carry provisions survived intermediate scrutiny. In addition, far fewer households now rely on over-the-air reception, which also decreases any governmental interest served by the must carry rules.

Finally, NCTA also supports Cablevision's petition for a writ of certiorari because this case provides a much-needed opportunity for the Court to consider an as-applied challenge to the must-carry rules.

INTRODUCTION AND SUMMARY

Although this Court rejected the facial challenge to the must-carry provisions of the 1992 Cable Act in its *Turner* decisions, all the Justices recognized that the statute infringes free-speech values. The plurality acknowledged that the must-carry provisions both "restrain cable operators' editorial discretion in creating programming packages by

'reducing the number of channels over which [they] exercise unfettered control'" and "'render it more difficult for cable programmers to compete for carriage on the limited channels remaining.'" *Turner II*, 520 U.S. at 214, *quoting Turner I*, 512 U.S. at 637. In casting the deciding vote, Justice Breyer similarly recognized that the must-carry provision "extracts a serious First Amendment price." *Turner II*, 520 U.S. at 226. And the dissenters concluded that it was unconstitutional on its face for Congress to "commandeer[] up to one third of each cable system's channel capacity for the benefit of local broadcasters." *Id.* at 251.

Today, the must-carry rules continue to impose a substantial burden on the free-speech rights of cable programmers and cable operators. But much has changed in the market for television programming since the must-carry statute was adopted in 1992. Significantly, these changes in the marketplace call into question many of the considerations underlying this Court's rulings in the *Turner* cases.

In particular, regulations that require a medium of communications to transmit speech that it does not choose to carry are presumptively unconstitutional and generally subject to strict scrutiny. In *Turner I*, however, the Court held that the must-carry provisions were subject only to intermediate scrutiny. 512 U.S. at 661. The Court explained that "special characteristics of the cable medium" — in particular, cable operators' "bottleneck control" over the programming available to cable customers — not only justified this departure from "application of the most exacting level of First Amendment scrutiny," *id.*, but also gave

rise to a real threat of anticompetitive harm that justified the must carry rules under intermediate scrutiny.

In adopting the 1992 Act, Congress feared that cable operators' "bottleneck" control would allow them to decline to carry small broadcasters in order to capture the broadcasters' advertising revenue. Today, however, any potential concern about a cable "bottleneck" has been eviscerated. Satellite operators DirecTV and the EchoStar are now the second and third largest providers of multichannel video programming and the FiOS and U-verse offerings of telephone companies Verizon and AT&T are growing fast. As a result, as the D.C. Circuit recently held in *Comcast Corp. v. FCC*, "[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992." 579 F.3d at 8.

Both Congress and the *Turner I* Court also noted another facet of the "bottleneck" that it found to have existed in 1992: Once viewers connected their sets to cable, they were essentially foreclosed from obtaining video programming not carried by the cable system. Again, however, these concerns are greatly attenuated today. Because virtually all television sets now include multiple video inputs, attachment of a particular source of programming no longer inherently closes off access to other sources.

The fact that cable can no longer credibly be found to possess bottleneck control over video programming suggests that forced carriage of programming by cable systems may deserve the same strict scrutiny that applies to forced carriage of material by newspapers. But even under intermediate scrutiny, the absence of bottleneck

control means that the burden of must-carry requirements can no longer be justified as necessary to promote a real, non-conjectural threat.

In addition, the fact that the number of over-the-air viewers is now much smaller supports the conclusion that forced carriage is no longer warranted.

REASONS FOR GRANTING THE PETITION

In its *Turner* decisions, this Court upheld the must-carry regime after applying intermediate scrutiny even though it is typically appropriate to apply strict scrutiny to statutes in which the government compels speech, as here. The Court based that decision largely on its finding that cable operators have bottleneck control over what viewers can watch. But changes in the competitive marketplace as well as changes in technology have undermined this finding. And the interest served by the must-carry requirement has decreased in force as the number of over-the-air viewers has decreased. The Court should therefore grant certiorari to re-examine whether compelling carriage of broadcast stations that a cable operator would otherwise choose not to carry can still survive First Amendment scrutiny.[2]

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[2] This case also squarely presents an important issue reserved by the Court in *Turner I*. Specifically, the Court there declined to address the question whether FCC consideration of programming content during market-modification proceedings would require application of the strict scrutiny standard. *Id.* at 643 n.6. In this case, the FCC granted the market modification sought by WRNN based in part on consideration of its programming content, so the question whether strict scrutiny applies cannot be avoided.

CHANGES IN THE VIDEO PROGRAMMING MARKETPLACE AND IN TECHNOLOGY HAVE UNDERMINED THE BASES ON WHICH THE MUST-CARRY PROVISIONS OF THE STATUTE WERE UPHELD.

The Court rejected the facial challenge to the must-carry statute in large part on the ground that cable operators controlled a bottleneck. The finding that cable had bottleneck control over access to video programming was a significant basis for the Court's decision to apply intermediate rather than strict scrutiny. And it was a significant basis for its determination that, under intermediate scrutiny, the must-carry rules addressed an important governmental concern that was real and not merely conjectural. But the development of vibrant competition in the video programming marketplace, as well as the ubiquity of multiple video inputs on television sets have eliminated the bottleneck that the Court had found to exist.

In *Turner II*, the Court emphasized that "[o]nly one percent of communities are served by more than one cable system [and] [e]ven in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers." 520 U.S. at 197. This finding of market power was essential to the Court's decision that the must-carry rules were justified. The absence of competition, the Court reasoned, permitted "cable industry favoritism for integrated programmers." *Id.* at 200. Accordingly, the must-carry rules were justified as "regulation[s] designed 'to prevent cable operators from exploiting their economic power to the detriment of

broadcasters.'" *Id.* at 186, *quoting Turner I*, 512 U.S. at 649.

In his short opinion concurring in part, Justice Breyer agreed that "a cable system ... at present (perhaps less in the future) typically faces little competition," and went on in the same sentence to conclude that the resulting control of "the range of viewer choice" justified "*some* degree — at least a limited degree — of governmental intervention." *Turner II*, 520 U.S. at 227. Thus, all five justices voting to uphold the must-carry statute against the facial challenge in the *Turner* cases explicitly recognized that the must-carry rules were premised on the lack of competition. Even then, Justice Breyer emphasized that only a limited degree of governmental intervention was warranted and noted that the future development of competition might eliminate the need for *any* such intervention. *Id.* at 227-28.

Of course, substantial competition *has* developed; indeed there is "ever increasing competition among video providers." *Comcast*, 579 F.3d at 8. The FCC's most recent annual report to Congress on the state of video markets required by 47 U.S.C. § 548(g) documents this increase. That report shows that in 2006 DirecTV was the second-largest provider of multichannel video programming services and EchoStar was the third-largest. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 581 ¶76 (2009) ("*2006 Competition Report*"). DirecTV and EchoStar both provide satellite service and hence compete with cable systems on a nationwide basis, giving most

American households a choice of three providers. Satellite operators initially lacked sufficient spectrum to provide local broadcast channels, but by 2006 at least one of the two satellite providers offered local broadcast channels in "approximately 175 of 210 television markets ..., which represent 97 percent of all U.S. television households." *Id.* at 584 ¶84. The *2006 Competition Report* noted that Verizon had just entered the multichannel video market with "FiOS" and AT&T had just begun to offer "U-verse." *Id.* at 548 ¶14. Only about 14 percent of American households did not subscribe to a multichannel service in 2006. *Id.* at 594-95 ¶108.

NCTA's recent submission providing the FCC updated information on the video-programming market confirms that competition has continued to develop. DirecTV and EchoStar remain the second and third largest multichannel service providers, and DirecTV has grown especially rapidly on account of its aggressive advertising campaign focusing on its high-definition programming. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the National Cable & Telecommunications Association at 9-11, FCC MB Docket No. 07-269 (May 20, 2009). Verizon's FiOS network is now available to 17 million households in 14 states, and Verizon reported that it gained approximately 300,000 new subscribers in the first quarter of 2009. *Id.* at 12. AT&T's U-verse service gained almost as many new subscribers in that quarter, and AT&T plans to extend its service to 93 markets in 19 states. *Id.*

The D.C. Circuit's recent *Comcast* decision provided the exclamation point regarding the

ongoing increase in competition among video programming providers. The *Comcast* court addressed the 30-percent subscriber limit established by the FCC under 47 U.S.C. § 533(f)(2)(A), vacating that provision because the FCC had failed to adequately consider the effects of the development of competition. The subscriber-limit provision was adopted in the same 1992 legislation that required must carry, and the purpose of the subscriber limit, in the words of the statute, is to ensure that cable operators do not "unfairly impede ... the flow of video programming" by refusing to carry disfavored cable channels. Shortly after its adoption, the D.C. Circuit rejected a facial attack on the constitutionality of the subscriber limit provision, but in 2001 held that the FCC had not adequately justified the 30-percent subscriber limit it adopted. *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1315 (D.C. Cir. 2000) (rejecting facial challenge); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (invalidating 30-percent ownership requirement). The recent decision reviewed the FCC's repromulgation of the 30-percent subscriber limit under a modified rationale. The D.C. Circuit stated that the basis for the subscriber limit is that cable operators once possessed "'bottleneck monopoly power.'" *Comcast*, 579 F.3d at 6, *quoting Turner I*, 512 U.S. at 661. Again, however, the court concluded that "[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992," *Comcast*, 579 F.3d at 8, and held that the 30-percent subscriber limit could not stand in light of the development of competition.

This significant increase in competition similarly undermines the principal basis on which the must-

carry requirements survived intermediate scrutiny. Cable operators no longer control a bottleneck and there is little reason to be concerned about abuse of a bottleneck that does not exist, whether the potential victim is a cable programmer, as with the subscriber limits, or a broadcaster, as with the must-carry rules. On account of vigorous competition, cable operators must be especially vigilant to offer programming preferred by viewers lest their subscribers switch to a satellite provider or a telephone company. This effect of the development of competition — explicitly anticipated by Justice Breyer, *Turner II*, 320 U.S. at 227 — erodes the basis for determining that must-carry requirements are necessary to prevent a real, not merely conjectural, threat, just as the D.C. Circuit recognized that it undermined the FCC's subscriber limits.

Cable operators' "bottleneck control" was not only the basis on which must carry survived intermediate scrutiny, but also an important ground for the Court's holding that must-carry rules — unlike forced speech requirements generally — should be subject to intermediate rather than strict scrutiny. The Court noted that the technological characteristics of cable systems gave them a degree of physical "bottleneck control" that differentiated them from newspapers, (which clearly could not be compelled to carry speech not of their choosing). Specifically, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Turner I*, 512 U.S. at 656. But unlike in the early 1990s, when cable was typically connected to the *only* video input

of a subscriber's television set, virtually all television sets today have multiple inputs, and viewers use these inputs to switch seamlessly among a variety of other devices that provide video content from other sources, including gaming consoles and DVD players. Therefore, any physical bottleneck that cable operators once possessed — like any bottleneck created by market power — no longer exists.

Along with the development of significantly greater competition and technological improvements, the number of Americans who depend on over-the-air signals has declined sharply. When the Cable Act was passed in 1992, 40 percent of Americans still depended on over-the-air broadcasts, and the Court reasoned that must carry was necessary "to preserve access to free television programming" for those Americans. *Id.* at 646. But since 1992, that number has dropped sharply. As the FCC's latest report on competition in the video-programming industry explains, only about 14 percent of U.S. households now depend on over-the-air signals. *2006 Competition Report*, 24 FCC Rcd at 549 ¶16. And even that number—which is based on 2006-2007 data—is overstated because it does not account for the large numbers of Americans who switched to cable or satellite during the digital-television transition. *See* Petition at 20 n.8.

This sharp decline changes the constitutional analysis by diminishing the government's interest in "protecting noncable households from loss of regular television broadcasting service." *Turner I*, 512 U.S. at 647. In *Turner II*, this Court found that interest to be sufficiently "important" to justify burdening the First Amendment rights of cable operators because

"[f]orty percent of American households continue to rely on over-the-air signals for television programming" and because "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." 520 U.S. at 190 (internal citation omitted). But with fewer and fewer Americans relying on broadcast signals as their source of news and information, broadcasting is no longer the "principal source" of information and entertainment for "a great part" of the population, and the government's interest is therefore no longer as significant.

Even the FCC has recognized this point. In December, the Commission initiated an inquiry to determine whether spectrum currently allocated to broadcast television should be reclaimed for more productive use. *See Data Sought on Uses of Spectrum*, Public Notice, 24 FCC Rcd 14275, 14277 ¶¶B.5, D (Dec. 21, 2009) (requesting comments on "the costs to replace over-the-air delivery to MVPDs and consumers with other means (fiber, microwave)" and asking "[w]hat market-based or other incentive mechanisms should the Commission consider to enable broadcasters to choose whether or not to make any spectrum (excess or otherwise) available for reallocation to wireless broadband use"). With even the Commission suggesting that broadcast spectrum should be put to better use, it is clear that broadcast television no longer serves an "important" government interest to the extent that it used to.

Thus, changed circumstances have drastically shifted the balance between the government's interest in the must-carry regime and the burden the

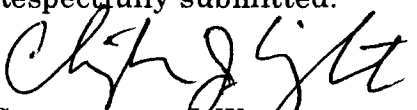
regime imposes on speech, a factor that this Court found crucial in *Turner II*. There, the Court concluded that "the burden imposed by must-carry is congruent to the benefits it affords." *Turner II*, 520 U.S. at 215-16. But given the sharp decline in over-the-air viewership, that conclusion is no longer true.

The Court should grant certiorari in this case to determine how these significant changes to factors that were critical to the Court's decisions in *Turner* affect the constitutionality of the continued application of must-carry requirements.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.



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