No. 09-____ 09-901 JAN 27 2010

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 614 of the Communications Act, 47 U.S.C. § 534, compels cable systems to carry the programming of broadcast television stations — even if doing so is contrary to their editorial judgment and displaces programming that their customers prefer. This Court nonetheless upheld that statute (often called the "must carry" statute) against a facial First Amendment challenge 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"*). The Court held that, for purposes of a facial challenge, the statute was sufficiently tailored to the congressional objective of ensuring the continued availability of over-the-air broadcast signals for viewing by households not subscribing to cable. That conclusion crucially relied on several important findings about the industry, including that cable operators possessed market power. The questions presented in this case are:

1. Whether the imposition of must-carry obligations is consistent with the Constitution now that the facts undergirding the *Turner* decisions have evaporated with the emergence of vibrant competition and other dramatic market and technological changes.

2. Whether a cable operator may constitutionally be compelled to carry the programming of a broadcast station when, in addition to the industry changes noted above, the station lacks an over-the-air audience in the area in which the station is seeking carriage, the broadcast station's traditional over-the-air market is well outside of that area, the sta-

tion does not need cable carriage to remain viable, the cable operator has declined carriage for legitimate editorial reasons, the cable operator is subject to unusually robust competition, and the carriage mandate is based in part on the content of the station's programming.

3. Whether the order of the Federal Communications Commission in this case can be sustained where it ruled (without meaningful explanation) that compelled carriage is consistent with the statutory requirement that carriage be ordered only where it "better effectuate[s] the [statute's] purposes" and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In the court of appeals, Cablevision Systems Corporation was the only petitioner. The respondents were the Federal Communications Commission and the United States of America. WRNN License Co., LLC, was an intervenor in support of respondents. The National Association of Broadcasters was an *amicus curiae* in support of respondents.

Cablevision Systems Corporation is a publicly traded company. It has no parent corporation. T. Rowe Price Group, Inc., owns 10% or more of Cablevision Systems Corporation's Class A common stock.

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INTRODUCTION

Enacted in 1992, the "must carry" statute, 47 U.S.C. § 534, requires operators of cable television systems to carry and transmit the programming of local television broadcast stations. The statute requires them to do so even when such carriage overrides cable operators' editorial judgment and displaces programming their customers prefer. This Court nonetheless upheld the must-carry statute against a facial First Amendment attack (albeit by the slimmest of margins) 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*").

Since then, however, the factual underpinnings of those decisions have evaporated. Most importantly, the monopolistic nature of the cable industry that was key to this Court's *Turner* decisions has been replaced by vibrant competition. In *Turner I*, the Court ruled that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661. But, as the D.C. Circuit recently determined, cable operators today "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).

Despite that change and a host of other important market and technological developments that gut *Turner*'s rationale, the FCC (with the Second Circuit's approval) not only enforced the must-carry statute here, but expanded its application to a new context that cannot be reconciled with *Turner*'s ana-

lysis. In particular, the FCC forced Cablevision to carry the signal of WRNN, a distant home-shopping station with no over-the-air viewership, on its Long Island cable systems. The FCC did so despite Cablevision's determination, in the exercise of its editorial discretion, that the programming of WRNN was not of interest to Cablevision's audience and that carrying the station would require Cablevision to displace programming that Cablevision's customers prefer over WRNN's programming.

Neither the must-carry statute nor its application to these circumstances can be sustained. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *see also Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges"). The factual foundations for the governmental override of editorial judgment contemplated by the must-carry regime have disappeared. And those foundations never could have supported the application here in any event.

The time has therefore come for this Court to revisit this area to determine whether the must-carry regime continues to be consistent with the Constitution. The continuing validity of that intrusion on constitutionally protected interests and the permissibility of expanding its application to new contexts present precisely the kind of important constitutional issues that should constitute the core of this Court's docket. For these and additional reasons stated below, review should be granted.

OPINION AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 83. The FCC's order (Pet. App. 47a-68a) is reported at 22 FCC Rcd 21054. The order of the FCC's Media Bureau (Pet. App. 27a-46a) is reported at 21 FCC Rcd 5952.

JURISDICTION

The court of appeals entered its judgment on June 22, 2009. Pet. App. 1a. The court of appeals denied a petition for rehearing and rehearing en banc on October 29, 2009. Pet. App. 70a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." Portions of relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 534, 535, are reprinted at Pet. App. 72a-96a.

STATEMENT

I. Statutory and Regulatory Background.

A. The Must-Carry Statute.

Enacted in 1992, the must-carry statute, 47 U.S.C. § 534, requires cable systems to retransmit the signals of all "local" commercial television broadcast stations. *Id.* § 534(a), (h)(1)(A); *see also*

47 U.S.C. § 535(a), (l) (creating an analogous carriage regime with respect to noncommercial educational stations). It requires a cable operator to do so even when, in its editorial discretion, it would choose not to carry the station, and even when carrying the broadcast station means that the cable operator must drop or reposition a non-broadcast service that it believes is of more interest to its subscribers.

Congress enacted the must-carry statute out of concern that cable posed a threat to broadcast television, and thus to the availability of video signals for households that do not subscribe to cable. "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming," Congress declared. Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*), Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(10). In "the absence of a requirement that [cable] systems carry local broadcast signals," it concluded, the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* § 2(a)(16).

Congress's concern rested on an intricate chain of reasoning. Congress believed that cable operators had an economic incentive to exclude broadcast stations from their channel line-up, lest they compete for local advertising. *See id.* § 2(a)(15). Ordinarily, competitive forces should prevent cable operators from acting on that incentive: a cable operator that drops a local television station with popular programming would lose customers to other providers. But Congress concluded that cable operators generally faced no multichannel competition and were

therefore free to act on the incentive without having to fear losing subscribers. *See id.* § 2(a)(2). Congress further determined that television viewers generally stop watching off-air television after subscribing to cable. *See id.* § 2(a)(17). Dropped stations, Congress believed, would therefore lose part of their audience, possibly bankrupting them. *See id.* § 2(a)(16). The end result, Congress feared, would be that consumers unable to afford cable would be left with fewer over-the-air stations to watch. *See id.* § 2(a)(12).

To address this concern, Congress enacted a statute to entitle stations to guaranteed cable carriage in their entire "market." 47 U.S.C. § 534(a), (h)(1)(A). Under FCC rules implementing that statute, markets comprise metropolitan areas and their surroundings. *See* Pet. App. 3a. For example, the New York City market at issue in this case stretches from the Catskills to near Atlantic City, and from the Poconos to Montauk. *See id.*

Local broadcast stations are entitled not merely to carriage in the entire geographic market, but to carriage on their over-the-air channel and on the cable system's service tier that reaches each of the system's subscribers. *See* 47 U.S.C. § 534(b)(6)-(7). Thus, broadcasters are automatically entitled to carriage on the most desirable part of the cable channel line-up — the part on which programmers prefer to be carried.[1]

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[1] *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

B. The *Turner* Challenge.

In the immediate wake of the statute's enactment, cable operators and programmers brought a facial First Amendment challenge. The district court, however, granted summary judgment against them: it held that the must-carry statute did not trigger strict scrutiny, and that the statute could survive intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) (three-judge court).[2]

On review, a five-Justice majority of this Court agreed that Congress's rationale did not trigger strict scrutiny. According to the majority opinion, the must-carry statute "impose[d] burdens and confer[red] benefits without reference to the content of speech." *Turner I*, 512 U.S. at 643. "Congress' overriding objective in enacting must-carry," the Court stated, was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Id.* at 646.

In rejecting calls for strict scrutiny, the Court deemed it crucial that, at that point in time, cable operators lacked competition from other providers of

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[2] The *Turner* plaintiffs brought their facial challenge in a three-judge district court pursuant to a provision making that forum available in a "civil action challenging the constitutionality of [the must-carry statute]." 47 U.S.C. § 555(c)(1). By contrast, Cablevision has invoked the Constitution as a defense in an FCC enforcement proceeding and has appealed pursuant to the Hobbs Act, which provides the exclusive mechanism for obtaining review of an FCC order. *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

multichannel video service. For example, the Court held that cable operators could not benefit from the principle that laws singling out particular speakers trigger strict scrutiny. According to the Court, must carry was "justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Similarly, the Court held that, although laws compelling speech typically receive strict scrutiny, that principle did not trigger strict scrutiny of the must-carry statute. That was so, the Court stated, because "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." *Id.* at 656.

The Court did, however, subject the must-carry statute to intermediate scrutiny. *See id.* at 662. Thus, the Court held, must carry's defenders were required to show that the statute "furthers an important or substantial governmental interest," and that must carry's burden on speech is "no greater than is essential to the furtherance of that interest." *Id.* (internal quotation marks omitted).

Applying that standard, the Court held that it was not enough for must carry's defenders to show that must carry promotes abstract goals, such as "the widespread dissemination of information from a multiplicity of sources." *Id.* Rather, the Court required a concrete showing that "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664. That meant that must carry's defenders had to prove that, without must carry, "significant numbers of broadcast stations

will be refused carriage on cable systems," and "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 666. Finding that the record evidence did not support such a finding, the five-Justice majority held that the district court had erred by entering summary judgment. *See id.* at 668.

Four Justices (Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg) dissented. They would have invalidated the statute outright. In her dissenting opinion (joined by the three other dissenters), Justice O'Connor stated that must carry's preferential treatment of broadcasters was content-based: it reflected a strict-scrutiny-triggering preference for the kind of speech engaged in by broadcast stations over that engaged in by non-broadcast video services. *See id.* at 675-82. Moreover, the dissenting Justices concluded, must carry was so overbroad that it would fail even intermediate scrutiny; it required carriage even in the many instances in which a carriage refusal was not "motivated by anticompetitive impulses" and would not "lead to the broadcaster going out of business." *Id.* at 682. Justice Ginsburg likewise filed a dissenting opinion stating that must carry triggered strict scrutiny and could not survive intermediate scrutiny. *See id.* at 685-86.

Following a remand in which the record was amplified, the Court again reviewed the statute. This time, it upheld the statute by a 5-4 vote, with no opinion garnering the full approval of a majority of Justices. A four-Justice plurality concluded that the record now supported the conclusions that "cable operators had considerable and growing market power," *Turner II*, 520 U.S. at 197; that they had an

incentive to use that power to favor cable-programming services that they owned or on which they could sell advertising, *id.* at 198, 200; and that stations denied carriage would "deteriorate to a substantial degree or fail altogether," *id.* at 208 (internal quotation marks omitted).

In a separate concurrence that supplied the fifth vote, Justice Breyer similarly concluded 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). Justice Breyer concluded that, "without the statute, cable systems would likely carry significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer." *Id.* at 228 (citations omitted).

Again, four Justices dissented. Justice O'Connor, in a dissenting opinion joined by Justices Scalia, Thomas, and Ginsburg, explained that the remand record showed that only marginal stations were at risk. *See id.* at 233. Arguments that these stations' programming content deserved protection, the dissenters explained, fortified the conclusion that the must-carry scheme was content-based. *See id.* at 233-35. In addition, Justice O'Connor urged, the majority's intermediate-scrutiny analysis reached the wrong result. *See id.* at 235-57.

II. Proceedings in This Case.

A. The FCC's Decisions.

WRNN is a television station licensed to King-

ston, New York, which lies at the very northern tip of the giant New York City television market. WRNN broadcasts mostly home-shopping programming. *See* Pet. App. 17a.[3] Traditionally, WRNN's broadcast signal reached only Kingston and its surroundings. After must carry's enactment, WRNN nonetheless sought carriage far beyond that area. As part of that effort, WRNN sought cable carriage on Cablevision's systems on Long Island — even though television viewers could not receive WRNN's over-the-air signal there, and even though cable systems had never carried it there.

Exercising its editorial discretion, Cablevision determined that carrying WRNN — a station that is licensed to a community as much as 195 miles away from the systems on which the station demanded carriage, *see* Pet. App. 66a n.11, and that broadcasts mostly home-shopping programming — would not improve the mix of speech on its cable systems serving Long Island. In the wake of must carry's enactment, therefore, Cablevision asked the FCC to "remove" Long Island from WRNN's market, invoking a provision empowering the FCC to "exclude communities from" a station's market "to better effectuate the purposes of" the must-carry statute. 47 U.S.C. § 534(h)(1)(C)(i).

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[3] The must-carry statute instructed the FCC to consider whether must-carry rights should be accorded to home-shopping stations — indeed, it instructed the FCC to consider whether home-shopping stations should be allowed to hold broadcast licenses in the first place. *See* 47 U.S.C. § 534(g). The FCC answered both questions in the affirmative. *See Implementation of Section 4(g) of the Cable Television Consumer Prot. and Competition Act of 1992: Home Shopping Station Issues*, Report and Order, 8 FCC Rcd 5321, ¶¶ 22-23, 39 (1993).

Relying in part on WRNN's inability to cast an over-the-air signal over Long Island, the FCC granted Cablevision's request. *See Petition of Cablevision Sys. Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 6453 (CSB 1996), *aff'd*, *Market Modifications and the New York Area of Dominant Influence*, Memorandum Opinion and Order, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

In an apparent attempt to gain must-carry rights after all, however, a few years later WRNN moved its antenna some 50 miles to the south, extending the reach of its over-the-air signal. *See* Pet. App. 9a, 38a ¶ 11. It also added a small amount of programming that it said was of interest to Long Islanders. *See id.* at 38a ¶ 11; *see also id.* at 41a-43a ¶ 14. It then returned to the FCC, asking the agency to reconsider its prior order.

The FCC granted the request, returning Long Island to WRNN's market. In support of this conclusion, the FCC's Media Bureau relied heavily on a single fact: that WRNN now cast a signal over Long Island. *See id.* at 43a-44a ¶ 16. On review, however, the full FCC added reliance on an additional fact: that "WRNN submitted a substantial record that details programming that focuses on Long Island," which, according to the FCC, "serve[d] to add more support to" WRNN's case. *Id.* at 52a ¶ 4.

Although the full Commission at least acknowledged Cablevision's constitutional arguments (the Bureau had not), it rejected them summarily. For example, the Commission stated briefly its belief that carriage of WRNN would "help to ensure that the . . . station . . . remains a viable option for view-

ers who rely on free, over-the-air television service in Nassau and Suffolk counties." *Id.* at 55a. The Commission did not point to specific facts supporting its conclusion despite its burden of proving facts that would sustain its order against Cablevision's constitutional challenge.

Two of the FCC's five members dissented. The dissenters expressed concern that, instead of helping localism, compelling Cablevision to carry WRNN would hurt it. Cable carriage of WRNN on Long Island, they explained, would give WRNN an incentive to serve Long Island instead of Kingston, its community of license. As the dissenters put it: "There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve. For the sake of the people of Kingston, we hope we have not reached that point here." *Id.* 68a. Unwilling to accept that risk, the dissenters would have denied WRNN's market-modification request.

B. The Decision of the Court of Appeals.

Cablevision filed a petition for review of the FCC's order in the United States Court of Appeals for the Second Circuit, invoking 28 U.S.C. § 2341, *et seq.* The court of appeals denied the petition for review. *See* Pet. App. 1a-26a.

The panel rejected Cablevision's contention that the FCC's reliance on WRNN's Long Island-targeted content triggered strict First Amendment scrutiny. *See id.* at 21a-23a. The court cited three reasons: (1) there was no proof "that the restoration of the Long Island communities to WRNN's market . . . was based on some illicit content-based motive";

(2) "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision"; and (3) under the must-carry statute, WRNN had been presumptively entitled to carriage on Long Island. *Id.* at 23a. The FCC "considered the amount of local programming provided by WRNN," the court stated, "only . . . in assessing the continued need to restrict a presumptive market defined solely by geography." *Id.*

The court then held that the FCC's order could withstand intermediate scrutiny. *See id.* at 23a-24a. The court of appeals stated that the FCC's order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests." *Id.* at 23a (internal quotation marks omitted). The court of appeals added that "[t]he burden imposed by the order — the loss of control over one channel — is no greater than necessary to further the government's interest in preserving a single broadcast channel it found serves the local community." *Id.* at 23a-24a.

The court of appeals also rejected Cablevision's arguments under the Takings Clause of the Fifth Amendment. As noted above, the must-carry statute requires cable operators to carry local stations on a tier that reaches all subscribers. That means that cable companies may not carry local stations on channels that reach, for example, only a subset of digital subscribers. Cablevision therefore argued that compelled carriage of WRNN involves the appropriation of the electronic equivalent of a beachfront lot: a 6 MHz channel on the most widely distributed cable tier. And, Cablevision argued that there is no reason to treat valuable electronic prop-

erty differently than any other form of property. But the court of appeals disagreed, seeing no *per se* taking. *See id.* 24a-26a.

Finally, the court of appeals rejected Cablevision's argument that the FCC had misinterpreted the must-carry statute and failed to justify its decision under it. Under the must-carry statute, the FCC may modify a station's market only if doing so "better effectuate[s] the purposes of" the must-carry statute and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C). Cablevision argued that the FCC had failed to explain how compelling its Long Island systems to carry WRNN was consistent with either the value of localism (when carriage outside WRNN's traditional service area would only undermine the station's incentive to serve its community of license) or the statutory purpose (when Congress's intent had been to protect broadcast stations from unfair treatment in their traditional markets — not to expand their geographic reach). But the court of appeals ruled that the FCC had permissibly found that WRNN could serve both Kingston and Long Island, and that the must-carry statute was not offended by carriage outside a station's traditional service area. *See* Pet. App. 17a-19a.

Cablevision asked the court of appeals to stay its mandate pending the filing and disposition of a petition for a writ of certiorari, thereby extending a stay pending appeal that the court of appeals had granted earlier. Cablevision showed that compelled carriage of WRNN on the most widely distributed tier would mean dropping or moving C-SPAN (a popular government-affairs service) in some systems and Syfy (a popular entertainment service) in others. Apparently concluding that there was a rea-

sonable probability that this Court would grant Cablevision's petition, the court of appeals granted the motion. *Id.* at 69a; *see id.* at 26a; *see also Conkright v. Frommert*, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, J., in chambers) (stay of mandate appropriate only where there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. This Court's decisions in *Turner* nonetheless sanctioned a significant medium-specific deviation from that principle. Relying (among other things) on cable companies' putative position as monopolists, the Court upheld a statute that compelled those companies to carry programming they did not want to carry (thereby displacing programming they do want to carry). Since *Turner*, however, the cable industry has experienced transformative market and technological changes, including the emergence of vibrant competition. Cable companies simply no longer have the "bottleneck" control that was critical to this Court's rationale in *Turner*. In the wake of these changes, compelled carriage pursuant to the must-carry statute is no longer compatible with the Constitution. Moreover, compelled carriage of WRNN by Cablevision's Long Island systems cannot be justified under *Turner*'s rationale quite apart from these changes. And such carriage violates not only the Constitution but also the must-carry statute itself. For all these reasons, and because of the

fundamental nature of the First Amendment freedoms at stake, this Court should grant the petition.

I. THIS COURT SHOULD DECIDE WHETHER THE CONSTITUTION PERMITS MUST-CARRY OBLIGATIONS TO BE IMPOSED UNDER CURRENT CONDITIONS.

This case offers the Court an opportunity to decide whether must-carry obligations may still be imposed consistent with the Constitution despite sweeping industry changes since the 1990s. That issue has broad significance for virtually every cable system and broadcast station in the country — and, thus, for each of the Nation's more than 100 million television households. The question has a deep impact on perhaps the most fundamental of constitutional rights, the right to speak, as well as the equally fundamental right not to speak. And it profoundly affects the rights of viewers and listeners to receive their programming of choice. This case also crisply and squarely presents the question in the preferred context of an "as applied" challenge.[4]

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[4] *See, e.g., Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("Facial challenges are disfavored . . . ."); *Sabri v. United States*, 541 U.S. 600, 608-09 (2004) ("[F]acial challenges are best when infrequent. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.") (citations omitted). At the same time, the as-applied nature of Cablevision's challenge would not prevent the Court from addressing the constitutionality of the must-carry statute as applied even to cable operators other than Cablevision. *See, e.g., Citizens United v. FEC*, No. 08-205, slip op. at 12-20 (U.S. Jan. 21, 2010).

A. *Turner*'s Factual Underpinnings Have Evaporated.

As explained above, this Court in *Turner* rejected a facial First Amendment challenge to must carry by the narrowest of margins. In a pair of 5-4 decisions, the Court held that must-carry did not trigger strict scrutiny and could survive intermediate scrutiny. It so held on the basis of a specific and narrow rationale: (1) that cable operators had an incentive not to carry broadcasters; (2) that cable operators faced no competition and were therefore free to act on the incentive; (3) that stations not carried would lose audience and go dark; and (4) that noncable households would therefore be left with fewer over-the-air viewing options. The Court recognized that it was the Government's burden to prove that the rationale was factually supported.[5] And the Court ultimately (albeit narrowly) held that the Government had carried its burden of proof to sustain the statute against a facial challenge. *See Turner II*, 520 U.S. at 196-224.

In the years since the must-carry statute's 1992 enactment, however, the facts on the ground have changed beyond recognition. Under current circumstances, the FCC can no longer make the required showing — which explains why the FCC did not even attempt to make such a showing in this case.

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[5] *See Turner I*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks and citations omitted).

In particular, the FCC can no longer show that cable operators possess bottleneck power: Cablevision demonstrated before the FCC that cable operators now face vibrant competition. *See* C.A. App. 325.[6]

As the D.C. Circuit recently noted, "satellite television companies, which were bit players in the early '90s, now serve one-third of all subscribers." *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009); *see also* Pet. App. 39a. In light of the new industry paradigm, the D.C. Circuit (while addressing another set of cable regulations) determined that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast*, 579 F.3d at 8. The D.C. Circuit concluded that, "[c]onsidering the marketplace as it is today and the many significant changes that have occurred since 1992, the FCC has not identified a sufficient basis for imposing upon cable operators the 'special obligations,' *Turner I*, 512 U.S. at 641, represented by the [rules at issue there]." *Comcast*, 579 F.3d at 8.

Those statements stand in sharp contrast to this Court's statement in *Turner I* that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators . . . ." 512 U.S. at 661. Similarly, they stand in sharp contrast to Justice Breyer's fifth-vote-supplying concurrence, which found dispositive that "a cable system . . . at present (*perhaps less in the future*) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck." *Turner II*, 520 U.S. at 227-28 (emphasis added).

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[6] "C.A. App. ___" citations are to the court of appeals appendix.

The future of which Justice Breyer spoke then is now here. Today, cable systems face extensive competition and no longer constitute any kind of bottleneck. Accordingly, *Turner*'s rationale can no longer justify an intrusion on constitutional rights, under intermediate scrutiny or any other standard. Because no alternate rationale has ever been suggested, must carry cannot be sustained.[7]

In addition to the advent of competition, three other important industry changes have fatally undermined *Turner*'s rationale. *First*, *Turner* rested on the predicate that, once consumers subscribe to cable, they lose access to over-the-air signals because, at the time, available "A/B switches" used for toggling between cable and antenna inputs did not work well. *See Turner I*, 512 U.S. at 633; *Turner II*, 520 U.S. at 219-21. By contrast, today's A/B switches are "built into television receivers and can be easily controlled from a TV remote control device." *Carriage of the Transmissions of Digital Television Broad. Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, ¶ 16 (1998) (footnote omitted). Because viewers today can easily access over-the-air programming even though they subscribe to cable, the FCC cannot establish that broadcast stations need to be carried on cable to reach cable subscribers.

Second, the percentage of Americans who rely on

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[7] *See* R. Matthew Warner, *Reassessing* Turner *and Litigating the Must-Carry Law Beyond a Facial Challenge*, 60 Fed. Comm. L.J. 359, 378 (2008) ("For those communities in which cable operators experience healthy competition, must-carry rules would not achieve Congress's objectives and, thus, as applied in those particular areas, the must-carry law should be considered unconstitutional.").

over-the-air television has plummeted. *Turner* held that compelled cable carriage was needed "to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646. But, by the time WRNN filed its petition, the subset of U.S. households relying on over-the-air television had plummeted to 14 percent. *See* C.A. App. 329. Since then, the number has dwindled even further: the June 2009 transition to digital broadcasting caused large numbers of Americans to give up on over-the-air reception.[8] As the number of Americans relying on over-the-air television has decreased, so too has the weight of the governmental interest in preserving the viewing options of those Americans at the expense of free speech.

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[8] *See* Nielsen Wire, *The Switch from Analog to Digital TV* (Nov. 2, 2009), *available at* http://blog.nielsen.com/nielsenwire/media_entertainment/the-switch-from-analog-to-digital-tv/ (in the wake of the transition, about a quarter of previously "broadcast only" homes signed up for cable or DBS). Indeed, the over-the-air audience is now so small that some have argued that the FCC should terminate over-the-air broadcasting and recapture its valuable spectrum. *See* John Eggerton, *Broadcasters Defend Spectrum From Reclamation Proposals*, Multichannel News (Oct. 26, 2009), *available at* http://www.multichannel.com/article/366507-Broad casters _Defend_Spectrum_From_Reclamation_Proposals.php?rssid=20076&q=broadcast+television+FCC; *see also* Stuart Minor Benjamin, *Roasting the Pig To Burn Down the House: A Modest Proposal*, 7 J. on Telecomms. & High Tech. L. 95, 98 (2009) ("Simply stated, the costs of subsidizing cable or satellite service for the 14% of households that do not subscribe to cable or satellite but want television service would be a small fraction of the value of broadcast frequencies, as reflected in the value of those frequencies at auction once they could be used for any service.").

Finally, cable operators in the 1990s offered only one or two tiers of so-called "analog" service. But cable operators today provide additional "digital" tiers. Because the analog tiers were filled up long ago, new non-broadcast services are nowadays added to the digital tiers, which have fewer subscribers. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). Yet, under the must-carry statute, broadcast stations like WRNN can commandeer a channel on the most widely distributed — and thus most desirable — tier. *See* 47 U.S.C. § 534(b)(7). Thus, in today's video marketplace, the must-carry statute goes well beyond placing broadcast stations on equal footing with non-broadcast services — it grants broadcast stations special privileges.

Indeed, WRNN's business model seems to be built on that fact. In the absence of must carry, the home-shopping station might still be able to secure substantial cable carriage in the New York City market, but it would likely be carried on a digital channel higher on the cable dial and on a less penetrated tier. By claiming must-carry rights, WRNN can occupy a favored spot on the dial alongside the most widely watched cable services. *See* 47 U.S.C. § 534(b)(6)-(7). The Constitution simply cannot justify that result. Must carry was enacted and upheld on the theory that it would protect access to over-the-air broadcast signals — not that it would give broadcasters preferential treatment so that they can capture channel surfers and earn rich home-shopping profits.

B. Whether Imposition of Must-Carry Obligations Remains Consistent with the Constitution Should Be Decided Now.

"Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner I*, 512 U.S. at 636. And "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 641. To this principle, the *Turner* holdings recognized a broad and unusual exception — one that compels unwanted speech in a large and important sector of the communications media.

But that exception was never cast in stone — it was predicated on the special market circumstances that existed at the time. As this Court noted just last week, media-specific First Amendment rules "might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United v. FEC*, No. 08-205, slip op. at 9 (U.S. Jan. 21, 2010) (citing *Turner I*, 512 U.S. at 639). That is precisely what happened here: the circumstances underpinning *Turner*'s rationale have now ceased to exist. Thus, the time has come for the restraint on speech to be removed as well.

Despite the transforming market and technological changes that have occurred since the 1990s, and despite the D.C. Circuit's *Comcast* decision, the court of appeals in this case held that this Court's *Turner* decisions required it to affirm the FCC's carriage order. *See* Pet. App. 19a-24a. But *Turner* rejected a *facial* attack on the statute. *See Turner I*,

512 U.S. at 671 (Stevens, J., concurring in part and concurring in the judgment). A precedent upholding a statute against a *facial* attack never bars an as-applied challenge, particularly when facts essential to that precedent's holding have changed. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist."); *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges").

The court of appeals' reluctance, however, is not surprising. Both the FCC and WRNN argued before the court of appeals that any other conclusion would in effect overrule *Turner*, and that only this Court has authority to do so.[9] Because other courts of appeals will likely display similar reluctance, a conflict of authority is unlikely to develop.

Granting review in this case has an additional advantage: it will allow the Court to decide whether must carry is consistent not only with the First Amendment, but also with the Takings Clause of the Fifth Amendment. The must-carry statute does not merely appropriate cable operators' valuable

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[9] *See* FCC C.A. Br. 46 ("Much as Cablevision would like to wish the *Turner* decisions away, . . . this Court has no power to overrule or depart from controlling Supreme Court precedent."); WRNN C.A. Br. 55 ("the *Long Island Order* is within the heartland of *Turner*, and this Court is not at liberty to depart from binding Supreme Court precedent unless and until the Court reinterprets that precedent") (internal quotation marks and brackets omitted).

channels;[10] it appropriates channels on the most widely distributed cable tier — the electronic equivalent of a beach-front lot. There is no reason to treat valuable electronic property differently than any other property.[11] Yet this Court has to date not had an opportunity to address whether the full and complete appropriation of the basic property unit in cable television, the individual television channel, effects a *per se* taking: the issue was not presented to this Court in *Turner*. By contrast, Cablevision has carefully preserved the issue throughout the instant litigation. *See* Pet. App. 24a-26a, 55a-58a ¶¶ 8-9. Thus, the Court can address the issue here. For this reason, too, review should be granted.

II. THIS COURT SHOULD DECIDE WHETHER, CONSISTENT WITH THE CONSTITUTION, CABLEVISION'S LONG ISLAND CABLE SYSTEMS MAY BE COMPELLED TO CARRY WRNN.

The Court should also decide whether Cablevision's Long Island systems can be compelled to carry WRNN. Even apart from the industry-wide changes

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[10] The statute itself recognizes that cable channels constitute valuable property. *See* 47 U.S.C. § 532 (providing that a non-broadcast service that a cable system does not wish to carry voluntarily may still secure access to a cable channel if it pays for the privilege).

[11] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("a requirement that facilities be . . . dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"), *aff'd*, 440 U.S. 689 (1979); *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . .").

described above, *Turner*'s rationale cannot justify compelled carriage of WRNN here. Indeed, because of the decision below, First Amendment values have suffered across the board. Cablevision is not merely being forced to carry programming against its judgment. It must replace valuable cable programming (including the public-affairs programming provided by C-SPAN) with home-shopping programming that consumers desire to watch to a much lesser extent. This issue, moreover, helps place all facts of the case before the Court, providing concrete factual context, illustrating the breadth of must carry's application, and avoiding possible questions about the scope of the other questions presented.

A. Compelled Carriage of WRNN Here Cannot Be Predicated on *Turner*'s Rationale.

In addition to changes in the industry generally, there are five reasons why *Turner*'s rationale cannot be invoked to require Cablevision's Long Island systems to carry WRNN.

First, *Turner* rests fundamentally on the notion that must carry is necessary to safeguard the viewing choices of over-the-air viewers; absent carriage on cable, *Turner* suggested, over-the-air stations serving non-cable subscribers might have insufficient viewers to survive. But WRNN itself has trumpeted that it has *no* over-the-air audience: in asking the FCC for permission to make technical changes to its over-the-air signal, WRNN has stated that "the impact on the public will be imperceptible since, according to Nielsen Media Research, there [is] no reportable over-the-air viewing for the station . . . ." *WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004); *see also* Pet. App. 45a ¶ 18 (noting

WRNN's "lack of audience share"). There is no important governmental interest in saving a broadcast signal for an over-the-air audience that does not exist. *See Turner II*, 520 U.S. at 233, 244 (O'Connor, J., dissenting).

Second, and relatedly, *Turner* rested on the notion that broadcasters should be *restored* to the audience that they would have had in a world without cable.[12] *Turner* did not rest on the notion that broadcasters should be made *better off* than they would have been without cable.[13] Here, Cablevision does not provide service to WRNN's traditional broadcast market in upstate New York; it thus does not compete for viewers. Consequently, compelled

[12] *See Turner I*, 512 U.S. at 659 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."); *id.* at 663 ("protecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest") (internal quotation marks omitted); *Turner II*, 520 U.S. at 193 ("In short, Congress enacted must-carry to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.") (internal quotation marks omitted); *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (describing the rationale as being "to prevent . . . a *decline* . . . of programming choice for an ever-shrinking noncable subscribing segment of the public") (emphasis added).

[13] *See Turner II*, 520 U.S. at 222 ("[A] system of subsidies would serve a very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households."); *id.* at 246 (O'Connor, J., dissenting) ("the must-carry provisions have never been justified as a means of *enhancing* broadcast television") (emphasis in original).

carriage here would not give Long Island viewers access to a broadcast station on which they have traditionally relied, or give WRNN access to viewers its traditional over-the-air signals were capable of reaching. It would instead extend WRNN's reach by giving cable subscribers access to an unknown home-shopping station that merely seeks the promise of must-carry riches.

Third, *Turner*'s rationale cannot justify compelled carriage where, as here, there is no evidence that the station seeking carriage will decline absent carriage. *Turner* proposed that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Turner I*, 512 U.S. at 666 (plurality); *see id.* at 667; *Turner II*, 520 U.S. at 195, 208. The record here shows that WRNN (a station whose low-cost home-shopping programming is already carried to millions of cable homes) has been on the air for more than a quarter of a century, *see* Pet. App. 34a, and has prospered without carriage on Long Island — so much so that it was able to fund expensive changes to its transmitter without any guarantee of a must-carry pay-off. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that, without must carry, hardship would befall *some* stations. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, there must be a showing that hardship will befall the particular station at issue.

Fourth, *Turner*'s rationale does not apply where, as here, there is no evidence that the cable operator has declined to carry a station with a view to stifling competition. *Turner* posited that must carry was needed to protect stations from cable operators who

might refuse to carry them for an anticompetitive reason, namely to protect themselves from competition for local advertising. There is no record evidence that Cablevision acted on any such motive here. To the contrary, Cablevision declined to carry the home-shopping station because few subscribers are interested in watching it. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that anticompetitive motives drove *some* carriage decisions. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, the Government must prove that anticompetitive motives drove the specific carriage judgment that the Government seeks to override.

Finally, *Turner*'s rationale simply ceases to function where a cable operator is subject to competition. *See supra*, pp. 17-19. *Turner*'s fundamental premise — the reason it found must carry necessary — was that cable operators had market power that enabled them to drop popular broadcast stations without having to fear losing subscribers. But that reasoning no longer holds: all cable systems in the United States are now subject to competition from two satellite operators that have garnered about one third of all subscribers. *See supra*, p.18. Cablevision's systems on Long Island are subject to particularly vibrant competition: as the order under review itself observes, Cablevision's Long Island systems *also* face robust competition from Verizon's fiber-optic cable television service. *See* Pet. App. 52a ¶ 4 n.15.

Under these circumstances, compelling Cablevision's Long Island systems to carry WRNN cannot be justified on the basis of *Turner*. Even apart from the impossibility of reconciling this application of

must carry with *Turner* itself, *see* Sup. Ct. R. 10(c), this application of must carry proves precisely why this Court's immediate intervention is necessary. Must carry is no longer being used merely as a shield to prevent potentially anticompetitive decisions from shutting out over-the-air stations that might fail as a result. It has now become a sword that stations with no over-the-air viewership can invoke to override legitimate editorial choices and expand their geographic scope at the expense of valuable educational programming that viewers prefer to watch. This is something the First Amendment cannot tolerate.

B. The FCC Order Under Review Should Be Subject to Strict Scrutiny.

In *Turner*, this Court recognized that must-carry orders can avoid strict scrutiny only if they "confer must-carry rights on . . . broadcasters . . . irrespective of the content of their programming." *Turner I*, 512 U.S. at 647. This case squarely implicates an aspect of the must-carry statute that is directly contrary to that admonition.

The must-carry statute's market-modification provision states that, in evaluating market-modification requests, the FCC should "afford particular attention to the value of localism" — *i.e.*, to whether a station provides "news coverage of issues of concern to [a] community or provides carriage or coverage of sporting and other events of interest to the community." 47 U.S.C. § 534(h)(1)(C)(ii). In *Turner I*, this Court recognized that this provision "appears to single out . . . broadcasters for special benefits on the basis of content." 512 U.S. at 644 n.6. The Court, however, had no occasion to rule on

the issue on a facial challenge. *See id.*

In this case, by contrast, the FCC expressly relied on this aspect of the statute and cited the content of WRNN's programming as a factor militating in favor of compelled carriage. *See* Pet. App. 51a-52a ¶ 4.[14] Yet the court of appeals held that such consideration of content did not trigger strict scrutiny. *See* Pet. App. 22a-23a. Each of the three reasons listed by the court of appeals is insupportable.

First, the court of appeals erred in suggesting that consideration of content triggers strict scrutiny only when there is an "illicit content-based motive." Pet. App. 23a. This Court has consistently held that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *see also Turner II*, 520 U.S. at 257 (O'Connor, J., dissenting) ("Whether a provision is viewpoint neutral is irrelevant to the question whether it is also *content* neutral."). Thus, the Second Circuit's contrary ruling flies in the face of this Court's unambiguous precedent.

Second, the court of appeals erroneously suggested that strict scrutiny is not triggered if considerations of content are given only "inconsequential" weight. Pet. App. 23a. The court of appeals cited no authority for that proposition, and this Court has re-

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[14] That was hardly unusual – the FCC does so routinely. *See, e.g., Tennessee Broad. Partners*, Memorandum Opinion and Order, 23 FCC Rcd 3928, ¶¶ 61-75 (2008); *Harron Cablevision of Mass. d/b/a Harron Commc'ns Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 16856, ¶ 4 (2003); *Mid-State Television, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 5525, ¶ 15 (2001).

jected the use of *de minimis* exceptions in the First Amendment area. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."); *see also Turner I*, 512 U.S. at 679 (O'Connor, J., dissenting) ("[W]e have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral."); *id.* at 686 (Ginsburg, J., dissenting) ("an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming").

Finally, the Second Circuit erred in suggesting that the FCC may consider content in returning WRNN to its statutory "presumptive" market — apparently on the theory that Congress fixed the default market without regard to content. Pet. App. 22a. It may be that, if the FCC had not limited WRNN's market previously, the FCC would not have had an opportunity to restore WRNN to the statutory default and to rely on WRNN's content in the process. But the FCC did limit WRNN's market, it did restore that market, and, in doing so, it did rely on content. If, in restoring WRNN's default market, the FCC had relied on WRNN's political viewpoint, its order undoubtedly would have been impermissibly content-based. It is hard to see how this is any different: "[r]egulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*,

530 U.S. 703, 723 (2000).

In sum, this Court in *Turner* left open whether strict scrutiny is triggered by the market-modification provision's instruction that the FCC consider a station's programming content. That issue is important. And although *Turner* had no occasion to rule on the issue, the Court strongly suggested that the answer is "yes." The court of appeals nonetheless resolved the issue the other way. None of its three purported distinctions is compatible with this Court's precedent. Review of this aspect of the court of appeals' decision is therefore appropriate as well.

III. THIS COURT SHOULD DECIDE WHETHER COMPELLED CARRIAGE OF WRNN IS CONSISTENT WITH THE MUST-CARRY STATUTE.

The Court should also decide whether compelled carriage in this case is consistent with the must-carry statute. The issue is not merely important. It also is closely related to the fundamental constitutional dispute at the core of this case and places before the Court that dispute's full context.

As noted above, the order under review altered WRNN's must-carry market pursuant to 47 U.S.C. § 534(h)(1)(C). That provision states that the FCC may modify stations' markets "to better effectuate the purposes of this section." *Id.* § 534(h)(1)(C)(i). It further states that the FCC must "afford particular attention to the value of localism." *Id.* § 534(h)(1)(C)(ii).

Compelled carriage of WRNN by Cablevision's systems on Long Island will do nothing to further

the value of localism. Localism calls for the needs of Long Islanders to be served by Long Island stations — not by stations from upstate New York.[15] Conversely, localism is not furthered by giving a Kingston station an incentive to neglect its Kingston audience and to cater to a seemingly more appealing audience on Long Island.[16]

More generally, the purpose of the must-carry statute was to restore broadcasters to the audience that they would have had in a world without cable — not to make broadcasters better off than they would have been without cable. *See supra*, p.26. Thus, requiring carriage of WRNN many of miles away from its traditional over-the-air service area

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[15] *See, e.g.*, *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 5 (2008) ("the Commission has long recognized that every community of appreciable size has a presumptive need for its own transmission service") (internal quotation marks omitted).

[16] *See* Pet. App. 68a (Joint Statement of Commissioners Copps and Adelstein, dissenting) ("There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve."). Indeed, the FCC previously recognized precisely that in defending against WRNN's attack on the agency's prior market-modification order. *See* Brief of Respondents-Appellees at 29-30, *WLNY-TV, Inc. v. FCC*, No. 97-4243 (2d Cir. Jan. 22, 1998) ("[I]f a station licensed to upstate New York were carried on cable systems serving . . . more densely populated Nassau County, it would have an incentive to provide programming targeted at the more profitable Long Island communities at the expense of the community the station has been licensed to serve. That would defeat the very localism that must carry is intended to promote as well as the congressional policy that television stations be licensed to various communities throughout the country and not just in the most populous areas.").

does not "better effectuate the purposes of" the must-carry statute.

Despite these serious statutory concerns, the FCC held that Cablevision must carry WRNN. It did so without even addressing whether compelled carriage "better effectuate[s] the purposes of this section" and promotes "the value of localism." The FCC thereby violated both the must-carry statute, 47 U.S.C. § 534(h)(1)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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