

No. 11-4138

11-5152 (CON)

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

TIME WARNER CABLE, INC.

AND

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;

UNITED STATES OF AMERICA

Respondents.

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

**BRIEF AMICUS CURIAE OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel respectfully submits this corporate disclosure statement for the National Association of Broadcasters (“NAB”).

NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. NAB has not issued any shares or debt securities to the public, and NAB has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).¹

INTEREST OF AMICUS

Pursuant to Federal Rule of Appellate Procedure 29, the National Association of Broadcasters (“NAB”) submits this amicus brief in support of Respondent Federal Communications Commission (“FCC” or “Commission”). The NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. NAB is an established advocate of broadcaster mandatory carriage rights and the public interest goals underlying the mandatory carriage regime. The Federal Communications Commission (“FCC”) order in this case effectuates similar public interest goals to those underlying the broadcaster mandatory carriage statute, namely diversity and structural means of countering cable operators’ incentives to discriminate in favor of their own affiliated programming. NAB therefore has a strong interest in assisting the court in the instant case to understand why these governmental interests are and remain important government interests.

¹ No party or counsel thereof authored this brief; no person other than *amicus* contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

In 1992, Congress adopted the program carriage framework applicable to unaffiliated cable networks, as well as broadcaster mandatory carriage rights. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1450 (“1992 Cable Act”). Congress made clear that it was concerned about important public interest goals, including fair competition, diversity, localism, and countering cable operators’ incentives to discriminate in favor of their own affiliated programming. When the cable industry asserted a First Amendment challenge to the broadcaster mandatory carriage rights adopted by Congress, the Supreme Court concluded that the regime was a content neutral law subject to intermediate scrutiny and that each of the above interests was an important governmental interest sufficient to withstand intermediate scrutiny under the First Amendment. In a second case, the Supreme Court found that the evidence relied upon by Congress justified any incursion on cable operators’ speech: the broadcaster mandatory carriage regime promoted important government interests without unnecessarily burdening speech. The Supreme Court’s holdings in these cases remain valid today.

ARGUMENT

I. THE SUPREME COURT HAS ALREADY UPHeld THE GOVERNMENT INTERESTS THAT MOTIVATED CONGRESS IN 1992.

To the extent that Appellants simply repeat arguments that were rejected by the Supreme Court more than a decade ago, their challenge is clearly foreclosed by the Supreme Court's *Turner* decisions. In *Turner I*, the Supreme Court held that broadcaster mandatory carriage was a content neutral restriction on speech subject to intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (*Turner I*). The Court identified three important governmental interests furthered by the regime: (1) preserving the benefits of free over-the-air broadcast television; (2) promoting the widespread dissemination of information; and (3) promoting fair competition. *Id.* at 662. However, the Court remanded the case for further findings regarding these objectives. In *Turner II*, the Supreme Court upheld the mandatory carriage regime against constitutional attack, holding that the provisions directly served Congress' interests and did not burden substantially more speech than necessary. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*).

While Appellants have focused on changes in technology and the competitive landscape, the record that was available to Congress in 1992 remains the most relevant point of reference for purposes of evaluating the constitutionality of the provisions of the 1992 Cable Act. *See Minority Television Project, Inc. v.*

FCC, 676 F.3d 869, 887 & n.10 (9th Cir. 2012) (evaluating whether there was “some evidence before Congress *when it enacted* the ban”) (emphasis added); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty., Fla.*, 337 F.3d 1251, 1266 (11th Cir. 2003) (looking to evidence relied upon at the “*time of enactment*”) (emphasis in original). Further, the Supreme Court has already considered and upheld each of the public interests goals underlying broadcaster mandatory carriage, which overlap with those underlying the program carriage regime. *See Turner I*, 512 U.S. at 663 (“[W]e have no difficulty concluding that *each* of [these interests] is an important government interest.”) (emphasis added); *Turner II*, 520 U.S. at 189-90 (“We decided [in *Turner I*], and now reaffirm, that *each* of [the three interests] is an important governmental interest.”) (emphasis added).

Indeed, the *Turner I* Court stated that diversity of information sources is “a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *See* 512 U.S. at 663; *see also id.* at 663-64 (“[I]t has long been a basic tenet of national communications policy that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’”) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972)).² And, in *Turner II*, the Court expressly found

² Of course, the Court also made clear that protecting over-the-air, local broadcast television is an independently important government interest that is itself sufficient to withstand intermediate scrutiny. *See Turner II*, 520 U.S. at 189.

adequate for purposes of withstanding intermediate scrutiny the “clear concern” by Congress in 1992 that “increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the incentive and ability to delete, reposition, or decline carriage to local broadcasters in an attempt to favor affiliated cable programmers.” *Turner I*, 520 U.S. at 190.

II. THE PUBLIC INTEREST GOALS CITED BY THE *TURNER I* AND *II* COURTS REMAIN AS VALID AND IMPORTANT AS EVER.

Even if changes to the competitive landscape were relevant to the analysis, there is no basis for Appellant’s claim that changes in technology and the video distribution marketplace weaken the need for rules that address the incentive and ability of cable operators to discriminate against competitors, including broadcasters as well as independent programmers. Cable continues to dominate the television market as it did in 1992. According to the Commission’s most recent review of competition in the video marketplace, nearly 70 percent of subscribers to a Multichannel Video Programming Distributor (“MVPD”) receive programming from a franchised cable operator. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 546 (2009) (“13th Annual Report”). That means that nearly 60

percent of households with a television subscribe to a cable service³—the very same benchmark that was cited by Congress and the Supreme Court. *See Turner I*, 512 U.S. at 633 (noting over 60 percent of households with television sets subscribe to cable). Cable’s closest competitor in the MVPD marketplace, direct broadcast satellite (“DBS”) service, serves about half as many subscribers as cable serves nationwide. *See* 13th Annual Report, 24 FCC Rcd at 546. Moreover, the Commission has found that the four largest vertically integrated cable multiple system operators have further consolidated their stranglehold on the market in recent years, *increasing* their market share from 34 percent in 2002 to between 54 and 56.75 percent by 2007. *In re Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd 17791, 17829-30 (2007) (Report and Order and Notice of Proposed Rulemaking). Thus, to the extent that cable operators have been affected by new competition, it has been smaller, non-vertically integrated cable operators who have lost market share. The largest vertically integrated cable operators—like Time Warner Cable—continue to have both the market power and the anticompetitive incentives identified by *Turner II* in 1997.

³ The 13th Annual Report indicates that 68.2 percent of the 95.8 million TV households that subscribe to an MVPD service—approximately 65.3 million TV households—are served by cable operators out of a total of 110.2 million TV households in total.

Further, in many local markets—the relevant markets for evaluating competition in video distribution—cable operators have not lost any market share. *Id.* at 17827-28 & n.277; *see also Turner II*, 520 U.S. at 197 (noting that “cable operators possess a *local* monopoly over cable households”) (emphasis added). The cable industry’s market share continues to meet or exceed 78 percent in many of the nation’s largest television markets. *In re Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd at 17827-28 & n.277. Indeed, 85.3 percent of New York households, 80.2 percent of Philadelphia households, and 84.2 percent of Boston households, subscribe to their local cable service. *See TVB, ADS, OTA and Wired-Cable Penetration by DMA*, http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma (last visited June 27, 2012) (2012 data). Because of essentially non-overlapping cable footprints, a single cable operator typically would control most, if not all, of the market share within its footprint. *See 13th Annual Report*, 24 FCC Rcd at 546 (noting that few consumers have a second available cable alternative). Accordingly, to the extent that such operators are vertically integrated, it is clear that they continue to have both the market power and the anticompetitive incentives identified by *Turner II* in 1997.

Further, the Commission has considered and rejected the evidence offered by Appellants relating to alleged marketplace changes. The Commission

concluded that “substantial government interests in promoting diversity and competition remain” and the cable industry’s showings “do not undermine Congress’s finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly.” *See Leased Commercial Access; Dev. of Competition & Diversity in Video Programming Distribution and Carriage*, 26 FCC Rcd. 11494, 11518-19 (2011) (Second Report and Order). Here, where the expert agency has considered and rejected the very same arguments and evidence that Appellants have put forward before the court—at times, citing the Commission’s own reports and analyses—the court should defer to the Commission’s considered judgments. *See Turner II*, 520 U.S. at 196 (making clear that, even in the context of a constitutional challenge, courts should give considerable deference to congressional judgments and the Commission’s unique expertise). It is clear that changes in the technology and the video distribution ecosystem simply have not diminished the importance of addressing the incentive and ability of vertically integrated MVPDs to discriminate against unaffiliated content providers at the expense of “the widespread dissemination of information from a multiplicity of sources.” *Turner I*, 512 U.S. at 662. The public’s interest in a diverse and competitive program marketplace continues to require regulation to counter the

incentive and ability of MVPDs to use their control over video distribution to unfairly compete with broadcasters and independent cable channels for viewers, advertisers, and programming.

CONCLUSION

The National Association of Broadcasters respectfully urges this Court to recognize that the rationales that underlie the carriage requirements in the 1992 Act remain valid.

Respectfully submitted,



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July 3, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7), 29(d) and 32(a)(7)(B)-(C), the attached amicus brief is proportionally spaced, has a typeface of 14-point Times New Roman font and contains 1,838 words. The certificate was prepared in reliance on the word count option in the tools menu of the Microsoft Office Word 2003 word-processing software program that was used to prepare this brief.

A handwritten signature in black ink, appearing to read "Erin L. Dozier". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Erin L. Dozier

11-4138 and 11-5152

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America, Respondents.**

CERTIFICATE OF SERVICE

I, Erin L. Dozier, hereby certify that on July 3, 2012, I electronically filed the foregoing Brief *Amicus Curiae* of the National Association of Broadcasters with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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