

commercial stations,<sup>16/</sup> as well as certain noncommercial<sup>17/</sup> and low power television stations<sup>18/</sup> located within its market.<sup>19/</sup> As enacted, the legislation contains no requirement that broadcast stations actually offer any locally-originated programming to qualify for carriage.<sup>20/</sup>

While the rules invalidated in Century limited the number of retransmitted stations required to be carried to one-quarter of a cable system's capacity, the Act forces cable systems to allocate up to one-third of their channel capacity to the mandatory carriage of commercial broadcast stations. 1992 Cable Act § 4(b)(1)(B). Further, unlike the rules struck down in Century, the Act contains no minimum viewership standard that broadcast stations must meet to qualify for mandatory carriage. In addition, the geographic area in which stations can demand carriage is broader than was the case under the rules invalidated in Quincy and Century.<sup>21/</sup>

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<sup>16/</sup> See 1992 Cable Act § 4(b)(1)(A), 4(b)(5) & 4(h)(1).

<sup>17/</sup> See id. § 5(a)-(c) & (l).

<sup>18/</sup> Under Section 4(c)(1), a cable system that has 35 or fewer channels must carry the signal of one qualified low power television station. Cable systems that have more than 35 channels must carry the signals of up to two qualified low power television stations. Such stations were not eligible for mandatory carriage under the regulations invalidated in Quincy and those invalidated in Century.

<sup>19/</sup> Although a cable system that has 12 or fewer channels and 300 or fewer subscribers need not commence carrying any new broadcast stations, it may not cease to carry any stations it is already carrying. 1992 Cable Act § 4(b)(1)(A).

<sup>20/</sup> The Conference Committee deleted a provision from the legislation that would have required low power stations to carry a substantial amount of locally originated and produced programming to qualify for carriage. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 74 (1992) [hereinafter "H.R. Conf. Rep. No. 862"].

<sup>21/</sup> Section 4(h) of the Act requires cable systems to carry local commercial stations assigned to the same market as the cable system. 1992 Cable Act § 4(h)(1)(A). That market coincides with the geographic area encompassed by the station's Area of Dominant Influence ("ADI") established by the Arbitron ADI Market Index. Id. § 4(h)(1)(C). By contrast, the must carry

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The Act also requires cable systems to carry noncommercial educational stations. Section 5(b) requires each cable system with 35 or fewer channels to carry the signal of one qualified noncommercial educational station. Each cable system with more than 35 channels must carry the signals of up to three qualified noncommercial educational stations. In addition, Section 5(c) requires a cable system to continue carrying all qualified local noncommercial educational stations that were carried on March 29, 1990 under every circumstance. By comparison, the must carry rules invalidated in Century only required carriage of one noncommercial educational station if a system had 54 or fewer channels, and two noncommercial educational stations if the system had 55 or more channels.<sup>22/</sup>

Under the statute, cable networks are not only forced to compete for diminished -- and increasingly scarce -- cable system capacity, but for carriage on less desirable cable system channels. Indeed, the Act's channel positioning provisions perhaps best exemplify the aim of the statute to bolster broadcasters' economic fortunes at the expense of the First Amendment rights of cable program networks, cable operators and the public. Sections 4(b)(6) and 5(g)(5) guarantee the most favorable cable system channels to broadcasters, authorizing broadcast stations to dictate -- without regard to the editorial judgments of cable operators or viewer preferences -- the

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<sup>21/</sup>(...continued)

rules invalidated in Century limited the geographic area of mandatory carriage to an area within 50 miles of the cable system headend. The rules invalidated in Quincy limited the geographic area of mandatory carriage to an area within 35 miles of the community served by the system. Most ADI's encompass a broader geographic area than that provided for in the must carry rules invalidated in Century and those invalidated in Quincy. Furthermore, a station may ask the FCC to expand its ADI.

<sup>22/</sup> Century, 835 F.2d at 297; 47 C.F.R. § 76.56 (1986).

specific cable system channels on which they must be placed.<sup>23/</sup> Thus, by government fiat, broadcasters reap the benefits that flow from placement on lower channel numbers adjacent to popular programming.

But even beyond those expansions, the most enormous change in the system was the addition of the "retransmission consent" option. The retransmission consent provisions of Section 6 enable the most financially successful broadcast stations to "negotiate" payments from cable systems in return for consent to retransmission of the station's programming. Those payments represent nothing more than a government-directed cash subsidy, inasmuch as a large percentage of the broadcast programming is created, not by the broadcasters, but by Hollywood, independent producers, and others.<sup>24/</sup> Under the unified scheme created by Sections 4, 5 and 6 of the Act, the most popular broadcast stations will be able to demand payment from cable operators for carriage, while, at the same time, cable operators will be required to carry less-popular stations -- without compensation -- under the must carry provisions. On a system-by-system basis, broadcast stations will be able to leverage this bundle of rights to negotiate the most favorable deal possible.

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<sup>23/</sup> Section 4(b)(6) of the Act requires each cable system to retransmit the signals of local commercial television stations and qualified low power stations on the cable system channel number on which the station is broadcast over the air, on which it was carried on July 19, 1985, or on which it was carried on January 1, 1992. Similarly, Section 5(g)(5) requires each cable system to retransmit the signals of qualified noncommercial educational television stations on the cable system channel number on which the station is broadcast over the air or on which it was carried on July 19, 1985.

The July 19, 1985 date is particularly significant, apart from being the date of the Quincy decision. Because cable systems at that time generally had more limited channel capacity, stations that now demand carriage on the channel on which they were then carried are virtually guaranteed carriage on the lowest and most viewed channel numbers.

<sup>24/</sup> Under the Copyright Act, copyright holders already receive payments from cable systems for their retransmission of broadcast signals. See 17 U.S.C. § 111.

Although packaged with claims of preserving local broadcasting, promoting diversity, and enhancing competition<sup>25/</sup> -- interests which, as shown below, the courts have found insufficient to justify the intrusions on First Amendment rights the rules necessarily entail -- the Act's blatant protectionism and constitutional flaws led the President, with the recommendation of the Attorney General and Secretary of Commerce, to veto the legislation. President Bush specifically condemned mandatory carriage, "which is unconstitutional, requir[ing] cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations."<sup>26/</sup> Moreover, he recognized retransmission consent as a "special interest provision[] . . . requir[ing] cable companies for the first time to pay broadcasting companies, who have free access to the airwaves, to carry the broadcasters' programs."

The Act becomes effective on December 4, 1992. Its effect on cable program networks will be immediate. From that day on, every broadcaster, by government mandate, will have preferred carriage and channel positioning rights at the expense of cable program networks, even though such carriage represents merely a duplicative path for broadcasters to reach cable households and cable program network lack other means to reach these audiences. As the affidavits submitted in support of plaintiffs' motion for a preliminary injunction establish, new cable program networks will have great difficulty finding outlets through which to speak. In some systems, broadcast stations not currently carried by systems can invoke must carry to

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<sup>25/</sup> See 1992 Cable Act § 2(a)(6)-(9). As explained in the legislative history, "[t]he interests which support the local signal carriage regulations can be summed up as: (1) preserving the benefits of local television service, particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. 58 (1991) (hereinafter "S. Rep. No. 92"). See also H.R. Rep. No. 628 at 63.

<sup>26/</sup> See Veto message of President Bush (Oct. 3, 1992) (Exhibit A hereto); Letter from William P. Barr and Barbara Hackman Franklin to Hon. Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance (Apr. 1, 1992) (Exhibit B hereto).

displace cable program networks now reaching viewers through those systems -- whether or not subscribers desire the change. The inevitable effect of the must carry statute will be a net reduction in diversity available to the public and a net reduction in speech.

### ARGUMENT

The standards governing the issuance of a preliminary injunction in this Circuit are well-established: (1) the likelihood that the moving party will succeed on the merits; (2) the threat that the moving party will suffer irreparable harm in the absence of preliminary relief; (3) the prospect that other parties interested in the proceedings will be harmed if the requested relief is granted; and (4) the public interest in granting the requested relief.<sup>21/</sup> The test is a flexible one, and relief may be granted "with either a high probability of success and some injury, or vice versa."<sup>22/</sup> As explained below, all of these factors weigh heavily in favor of granting preliminary relief in the present case.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE CONSTITUTIONALITY OF THE "MUST CARRY" AND CHANNEL POSITIONING PROVISIONS OF THE 1992 CABLE ACT

A. The Challenged Provisions Directly Infringe Upon Fundamental First Amendment Rights and May Be Upheld -- If at All -- Only If the Government Proves They Are a Precisely Drawn Means of Serving a Compelling Government Interest

In both Quincy and Century, the D.C. Circuit found it unnecessary to resolve "definitively" the precise standard of review under the First Amendment applicable to government mandates requiring cable operators to transmit the programming of local broadcast

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<sup>21/</sup> See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Nat'l Fed'n of Fed. Employees v. Greenberg, 789 F. Supp. 430, 433 (D.D.C. 1992).

<sup>22/</sup> Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (emphasis in original). See also Holiday Tours, 559 F.2d at 843-44.

stations. As a general rule, where government action restricts First Amendment rights, such action "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980). In Quincy and Century, however, the government asserted that the must carry rules at issue only "incidentally" burdened free speech rights, and that therefore the somewhat less demanding test set forth by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968), was controlling.<sup>29/</sup> In Quincy, the court expressed "serious doubts" that the Commission's must carry rules could properly be understood as merely having "incidental" effects on First Amendment rights, but held that even if the regulations could be so characterized, they failed to pass muster under the O'Brien standard. 768 F.2d at 1454.<sup>30/</sup> Two years later, in Century, the D.C. Circuit concluded, in striking down the Commission's "new, scaled-back" carriage regulations, that it again was unnecessary to decide whether a more exacting First Amendment standard of review than O'Brien applied. 835 F.2d at 298 & n.3.

As explained below, the mandatory carriage and channel positioning requirements of the

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<sup>29/</sup> See Quincy, 768 F.2d at 1450-54; Century, 835 F.2d at 298. Under O'Brien, rules designed to serve government interests "unrelated" to the suppression of free expression which impose "incidental" burdens on First Amendment rights may be upheld if the government demonstrates that the challenged rules further a "substantial government interest" and that the restriction "is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

<sup>30/</sup> That the court had such "serious doubts" is not surprising. In O'Brien, defendant claimed that the First Amendment prohibited his prosecution for burning his draft card because this conduct constituted "symbolic speech" against the Vietnam war. 391 U.S. at 376. The test announced in that case was designed for situations "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." Id. This case, of course, involves no "speech/nonspeech" distinctions -- the Act purposefully and directly regulates the programming that cable operators may offer to their subscribers. Even the congressional committee reports supporting the legislation concede that the new cable law "is quite different from the regulations which have generally been analyzed under O'Brien." See H.R. Rep. No. 628 at 61 n.90. See also Quincy, 768 F.2d at 1451 (the FCC's objective in promulgating must carry rules "is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech.").

1992 Cable Act, by design, seek to promote the speech -- and fortunes -- of broadcasters by imposing restrictions on fundamental First Amendment rights of cable program networks, cable operators and subscribers. Since the very purpose of the legislation is to enhance the relative voice of broadcasters by limiting the audience available to cable program networks and directly restricting the editorial discretion of cable operators, the challenged provisions do not merely impose "incidental" burdens on First Amendment rights. Accordingly, the challenged provisions are subject to the strictest scrutiny under the First Amendment.

1. The Challenged Provisions Impose More Than Mere "Incidental" Burdens on First Amendment Rights

The Quincy court identified a number of reasons why rules mandating that cable operators carry specified broadcast programming cannot properly be treated as embodying governmental interests "unrelated to speech" imposing mere "incidental" burdens on First Amendment rights. First, the court noted that "the rules are explicitly designed to 'favor[ ] certain classes of speakers over others.'"<sup>31/</sup> Indeed, the "very purpose" of the rules, the court explained, was "to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers." 768 F.2d at 1451.

Under the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels.<sup>32/</sup>

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<sup>31/</sup> 768 F.2d at 1451 (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 48 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977)).

<sup>32/</sup> Id. In view of the harm to plaintiffs resulting from the Act's carriage provisions, there can be no question -- as Quincy squarely held -- that cable program networks have standing to challenge these provisions even though, by their terms, they impose direct obligations only on cable operators. Quincy, 768 F.2d at 1445 n.24 ("TBS clearly has standing to raise this claim."); id. at 1447-48 n.29; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) (publishers of books had standing to challenge under the First Amendment actions of state

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Because "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment," Buckley v. Valeo, 424 U.S. 1, 48-49 (1976), the court found it difficult to conclude that rules designed for this "very purpose" -- to restrict the only means available to cable program networks to reach their audience in order to enhance the relative voice of local broadcasters -- could be characterized as merely imposing "incidental" burdens on First Amendment rights. See Quincy, 768 F.2d at 1451-52.<sup>32/</sup>

Second, the court in Quincy found that the regulations at issue, like the provisions of the 1992 Cable Act challenged here, directly intruded upon the editorial discretion of cable operators. Quincy, 768 F.2d at 1452 (citing Miami Herald v. Tornillo, 418 U.S. 241, 447-56 (1974))

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<sup>32/</sup>(...continued)

directed to book distributors); Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir.) ("It is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons."), cert. denied, 478 U.S. 1021 (1986). See also Buckley v. Valeo, 424 U.S. 1, 19 (1976) (restriction affecting "the size of the audience reached" violates First Amendment rights of speaker).

<sup>33/</sup> In Buckley v. Valeo, the Court of Appeals had relied on O'Brien to uphold statutory limitations on expenditures that could be made in support of political candidates. See 519 F.2d at 840-41. The Supreme Court reversed, finding O'Brien inapplicable. 424 U.S. at 15-16. It stated that the congressional enactment plainly restricted protected First Amendment speech, and found that the dependence of a communication on expenditure of money does not introduce "a nonspeech element" such as to "reduce the exacting scrutiny required by the First Amendment." Id. at 16. See note 30, supra. Strict scrutiny applied even though the restrictions were "neutral as to the ideas expressed." Id. at 39.

Since Buckley, the Supreme Court and other federal courts have repeatedly struck down content-neutral legislation which has the effect of limiting the speech of some to enhance the voice of others or to promote diversity. See Meyer v. Grant, 486 U.S. 414, 426 & n.7 (1988); Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 14 (1986) (plurality opinion); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981); First National Bank of Boston v. Bellotti, 436 U.S. 765, 790-91 (1978); Baldwin v. Redwood City, 540 F.2d 1360, 1369-70 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977); Service Employees Int'l Union, AFL-CIO, v. Fair Political Practices Comm'n, 721 F. Supp. 1172, 1176-77 (E.D. Cal. 1989), aff'd, 955 F.2d 1312 (9th Cir.), cert. denied, 112 S. Ct. 3056 (1992).

(powerfully affirming First Amendment protection for editorial discretion)). As Quincy explained, "[t]he rules coerce speech" by forcing cable operators to carry programming they otherwise might choose not to carry, and impose "substantial limitations . . . on the operator's otherwise broad discretion to select the programming it offers its subscribers." Quincy, 768 F.2d at 1452.<sup>34/</sup> That cable operators, in selecting the programming they choose to provide to subscribers, are engaged in activity protected by the First Amendment is well-established.<sup>35/</sup>

Finally, the court in Quincy noted that the Commission's must carry rules also "profoundly affect[ed] values near the heart of the First Amendment" to the extent that they prevented cable program networks from reaching their intended audience "even if that result directly contravenes the preference of cable subscribers." 768 F.2d at 1453. The Supreme Court has recognized that television viewers enjoy distinct rights under the First Amendment, and that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Red Lion, 395 U.S. at 390. See also Quincy, 768 F.2d at 1453. Rules specifically

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<sup>34/</sup> Outside the special constitutional realm reserved for broadcasting which, by virtue of the scarcity of frequencies available within the electromagnetic spectrum, the courts have held allows for limited regulation in the public interest (see, e.g., Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)), the First Amendment jealously guards against governmental intrusions into editorial functions. See *infra* at 20-24 (discussing Miami Herald). "[S]pecial characteristics of broadcasting have led the Supreme Court to give Congress greater latitude in broadcast regulation than it or any state legislature would enjoy in the regulation of printed (or other non-broadcast) speech." News America Publishing, Inc. v. FCC, 844 F.2d 800, 805 (D.C. Cir. 1988). See also *id.* at 811 (noting that "new technology may render the [scarcity] doctrine obsolete -- indeed, may have already done so."). For a thorough discussion of the reasons why the principles governing regulation of the broadcast media have no application to cable television, see Quincy, 768 F.2d at 1447-50. See also Home Box Office, Inc. v. FCC, 567 F.2d at 44-46 (finding no "constitutional distinction between cable television and newspapers" with respect to the permissibility of government intrusions into editorial functions).

<sup>35/</sup> The Supreme Court has made clear: "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991). See also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986); FCC v. Midwest Video Corp., 440 U.S. 689, 707 & n.17 (1979).

aimed at regulating the programming that cable subscribers receive, the Quincy court indicated, cannot be characterized as affecting First Amendment rights only "incidentally." Id. at 1454.<sup>36/</sup>

The new Cable Act's must carry and channel positioning provisions impose even greater burdens on First Amendment rights than the purportedly "scaled down" carriage regulations struck down in Century. They directly regulate cable programming. This case, unlike O'Brien, has nothing to do with government regulation of a "nonspeech" element of "conduct" which "incidentally" and unintentionally limits expression. The challenged provisions may be upheld -- if at all -- only by a clear demonstration that they constitute a precisely tailored means of furthering a threatened and compelling government interest.<sup>37/</sup>

2. Associated Press v. United States and Its Progeny Provide No Support for the Constitutionality of the Challenged Provisions but Rather Confirm Their Constitutional Invalidity

Perhaps recognizing that must carry could never be sustained under any traditional First Amendment analysis, the congressional reports try to invent a new approach and assert that as "economic" legislation designed to promote "a diversity of voices" in communications services,

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<sup>36/</sup> Although the court in Quincy was willing to assume for purposes of its discussion that the Commission's must carry regulations were content "neutral," the legislative history and statutory "findings" accompanying the carriage requirements of the 1992 Cable Act demonstrate that promoting the content of favored broadcast programming is a fundamental purpose of the legislation. See 1992 Cable Act § 2(a).

<sup>37/</sup> Although the must carry rules are by no means content "neutral", attempts to justify them (see H.R. Rep. No. 628 at 61-62) under the Supreme Court decisions in Ward v. Rock Against Racism, 491 U.S. 781 (1989) and Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), are misplaced even if they could be so-characterized. The challenged must carry provisions are not "time, place and manner" restrictions; rather, they directly regulate cable programming. And, even under Ward and Renton, regulations must be "narrowly tailored" to advance the asserted governmental interests. Ward, 491 U.S. at 798; Renton, 475 U.S. at 52. A regulation is not "narrowly tailored" where, as here, "a substantial portion of the burden on speech does not serve to advance [Congress'] goals." Ward 491 U.S. at 799. See also Simon & Schuster v. New York Crime Victims' Bd., 112 S. Ct. 501, 511 n.\*\*\* (1991). See Point I.B below.

even O'Brien is inapplicable to these provisions.<sup>38/</sup> Instead, the committee reports suggest that Associated Press v. United States, 326 U.S. 1 (1945), which upheld the application of the Sherman Act to a news organization and its members, "provides the most appropriate analysis for signal carriage regulations."<sup>39/</sup> In fact, Associated Press provides no support for the Committees' attempts to avoid First Amendment scrutiny merely by labelling the legislation "economic."

In Associated Press, the Supreme Court affirmed a district court holding that the association's restrictions on membership violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The Supreme Court rejected AP's contention that application of the Sherman Act constituted an abridgement of the freedom of the press, holding that the business practices of publishers -- just like those of other enterprises -- are subject to laws of general applicability.<sup>40/</sup>

In affirming the district court's decree, the Court emphasized that the decree did not interfere with the editorial processes of AP or its members or in any way compel publication of information they might choose not to publish: "It is argued that the decree interferes with freedom 'to print as and how one's reason or one's interest dictates.' The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published." 326 U.S. at 20 n.18 (emphasis supplied). Indeed, in Miami Herald

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<sup>38/</sup> See H.R. Rep. No. 628 at 58-62; S. Rep. No. 92 at 55-57.

<sup>39/</sup> H.R. Rep. No. 628 at 60; S. Rep. No. 92 at 55. Both reports assert that neither Quincy nor Century considered the application of "the Associated Press doctrine."

<sup>40/</sup> The Court stated: "Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." 326 U.S. at 7. It concluded that "[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." Id. at 20.

Publishing Co. v. Tornillo, 418 U.S. 241 (1974), which struck down a Florida statute requiring newspapers to grant a "right to reply" to political candidates criticized in editorials, the Supreme Court specifically relied upon Associated Press in holding that the First Amendment will not tolerate government intrusions into the editorial functions of the press.<sup>41/</sup> An "enforceable right of access," the Court held, "at once brings about a confrontation with the express provisions of the First Amendment . . . ." 418 U.S. at 254.

Further, the Court in Miami Herald -- again citing Associated Press -- specifically rejected the notion that a governmental interest in ensuring dissemination of information from diverse sources justified state intrusion into constitutionally protected editorial functions. The Florida Supreme Court had upheld the challenged statute by finding that it furthered the "broad societal interest in the free flow of information to the public." See 418 U.S. at 245. Proponents of the statute forcefully argued that control of the media had become increasingly concentrated as "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible." Id. at 251. Consequently, with the emergence of one-newspaper towns, chain newspapers and national news and wire services, debate of public issues was becoming "not 'wide-open' but open only to a monopoly in control of the press." Id. at 249, 252. Relying on Associated Press, proponents maintained that, given this reality, the statute furthered First Amendment interests inasmuch as "[t]hat Amendment rests on the assumption that the widest

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<sup>41/</sup> See 418 U.S. at 254. The Court in Miami Herald stated that it "foresaw the problems relating to government-enforced access as early as its decision in Associated Press v. United States. . . . [B]eginning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which "'reason" tells them should not be published' is unconstitutional." Id. at 254, 256 (citations omitted).

possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." See Miami Herald, 418 U.S. at 252 (quoting Associated Press, 326 U.S. at 20). Still, the Court concluded that "[h]owever much validity may be found in these arguments," the statute still "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 254, 258.<sup>42/</sup>

In seeking to defend the constitutionality of the carriage and channel positioning provisions of the 1992 Cable Act, the committee reports simply ignore these aspects of the case law. Instead, the drafters assert simplistically that "economic regulations designed to promote competition and a diversity of voices in communications services have been upheld against First Amendment challenges" (citing Associated Press).<sup>43/</sup> The committees' contentions that under Associated Press some sort of "rational basis" review applies here are, for several reasons, invalid. First, Associated Press stands for the basic proposition that the media are not exempt from laws of general applicability, as to their business practices, merely because they are members of the "press." It provides no support for the notion that laws which infringe on free speech rights are exempt from First Amendment scrutiny if they arguably may be characterized

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<sup>42/</sup> See id. at 260-61 (though "Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues," compulsory access "collides with the First Amendment.") (White, J., concurring). See also Branzburg v. Hayes, 408 U.S. 665, 681 (1972); SEC v. Wall Street Publishing Inst., Inc., 851 F.2d 365, 374 (D.C. Cir. 1988) (interference with editorial control has been decried "as particularly repugnant to core first amendment concerns"), cert. denied, 489 U.S. 1066 (1989); Passaic Daily News v. NLRB, 736 F.2d 1543, 1557-59 (D.C. Cir. 1984). Cf. Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781, 795-98 (1988).

<sup>43/</sup> H.R. Rep. No. 628 at 59. See id. at 60 ("The signal carriage provisions of the bill are economic regulations, similar to the antitrust laws, intended to promote a competitive balance between cable and over-the-air television as distribution systems, and to strengthen the diversity of voices available to both cable and noncable homes."). See also S. Rep. No. 92 at 55 (same).

as "economic."<sup>44/</sup>

Second and more fundamentally, the carriage and channel positioning requirements of the 1992 Cable Act plainly are not laws of "general applicability." They specifically target a particular segment of the media, regulating directly the programming cable operators may offer and, further, limiting cable programmers' access to cable systems and subscribers. Where government regulations -- even purportedly economic ones -- are not generally applicable but target the press, such regulations are subject to heightened First Amendment scrutiny.

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Internal Revenue, 460 U.S. 575, 585 (1983) (differential taxation of the press is presumptively invalid under the First Amendment regardless of legislative motive); News America Publishing, Inc. v. FCC, 844 F.2d at 810.<sup>45/</sup>

Third, as the discussion above makes clear, nothing in Associated Press suggests that the government's asserted interests in promoting competition or a "diversity of voices" may justify

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<sup>44/</sup> See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."); CBS, Inc. v. FCC, 629 F.2d 1, 16-17 and n.63 (D.C. Cir. 1980) (distinguishing between the editorial process, which is protected by the First Amendment, and the business and commercial aspects of journalism, which are not), aff'd, 453 U.S. 367 (1981); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053 (8th Cir. 1978) ("Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid."), aff'd, 440 U.S. 689 (1979).

<sup>45/</sup> Leathers v. Medlock, 111 S. Ct. 1438 (1991), cited in the legislative reports (see H.R. Rep. No. 628 at 61 n.89), is not to the contrary. There, the Supreme Court upheld an Arkansas state sales tax even though scrambled satellite broadcast services were not covered by the tax while cable television sales were. Upon challenge by a cable operator, the Court held that the law "is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions" (listing numerous items to which the tax applied including electricity, water and telephone services to tickets for entertainment events). Id. at 1444. The Court affirmed that "[a]bsent a compelling justification, the government may not exercise its taxing power to single out the press." Id. at 1443 (emphasis supplied).

legislative intrusions into editorial discretion. See Associated Press, 326 U.S. at 20 n.18. Indeed, in Miami Herald, the Supreme Court left no doubt that an interest in promoting a diversity of views -- even in the compelling context of ensuring free and fair elections -- provides insufficient grounds under the First Amendment to allow government interference with editorial functions, despite economic characteristics of a medium tending to reduce diversity.<sup>46/</sup> Thus, the assertion in the committee reports that "[t]he First Amendment . . . supports governmental regulations intended to promote a diversity of voices, even if some incidental loss of editorial discretion results" is flatly wrong.<sup>47/</sup> Associated Press does not authorize government regulation, in any fashion, of the content of a targeted medium.<sup>48/</sup>

Finally, Associated Press did not involve any effort by the government to promote a diversity of voices by "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others," Buckley v. Valeo, 424 U.S. at 48-49, which the Supreme Court has made clear is fundamentally at odds with the First Amendment. Id. For all of these reasons, the challenged provisions may be upheld only if the government proves they further a compelling government interest other than promoting diversity and are precisely tailored to

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<sup>46/</sup> As the court in Quincy accurately stated, "if Miami Herald supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing the rules against the other O'Brien factors . . . ." 768 F.2d at 1453.

<sup>47/</sup> H.R. Rep. No. 628 at 60-61 (citing Associated Press).

<sup>48/</sup> Again, relying on the "scarcity" rationale, the courts have allowed some governmental regulation of the content of over-the-air broadcast programming. See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 377 (1984); CBS, Inc. v. FCC, 453 U.S. 367, 394-96 (1981). Yet, "[e]ven for broadcasters, regulations that transfer control over programming content to others have met with approval only grudgingly and then only in highly specialized circumstances and without reference to the O'Brien balancing formulation." Quincy, 768 F.2d at 1453. Thus, congressional reliance on Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), a broadcast case, in arguing that its interest in promoting "diversity" is sufficient to sustain the must carry rules despite their intrusions on First Amendment rights of cable programmers and operators is misplaced. See H.R. Rep. No. 628 at 63; S. Rep. No. 92 at 58.

achieve such objective.

3. The Standard of Review is Not Diminished By the Fact that Congressional Legislation is at Issue

From the earliest days of American jurisprudence, it is the federal courts -- not Congress -- which ultimately determine whether a congressional enactment comports with the commands of the Constitution. Marbury v. Madison, 1 Cranch 137, 177 (1803) ("It is emphatically the province of the judicial department to say what the law is.").

To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the legislature has concluded that its product does not violate the First Amendment.<sup>49/</sup>

Particularly in the present case, where (1) the Attorney General of the United States and the Secretary of Commerce, in a joint letter to Congress, urged rejection of the legislation in part because of the "serious First Amendment questions" surrounding the must carry requirements; (2) the President expressly cited the unconstitutionality of the carriage provisions as one of his reasons for his veto of the legislation; (3) the constitutional analysis in the legislative reports, as indicated above, cannot be sustained; and (4) urged on by powerful broadcast interests which benefit directly from the legislation,<sup>50/</sup> Congress uncritically adopted flawed data and factual

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<sup>49/</sup> Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2838 (1989) (emphasis supplied). See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified."); Information Providers' Coalition v. FCC, 928 F.2d 866, 869 (9th Cir. 1991) ("Although a reviewing court should not ignore Congress' conclusion about an issue of constitutional law, it is the ultimate responsibility of the courts to decide whether Congress has violated the Constitution.").

<sup>50/</sup> As the President stated in his message to the Senate vetoing the 1992 Cable Act, "[t]his bill illustrates good intentions gone wrong, fallen prey to special interests."

findings proposed by the broadcast industry in support of the legislation -- no deference whatsoever is owed to Congress with respect to the soundness under the First Amendment of the challenged provisions. See Sable Communications, 109 S. Ct. at 2838.

B. The Challenged Provisions Fail to Survive Constitutional Scrutiny Regardless of the Test the Court Applies

1. The Must Carry Rules Abridge First Amendment Rights

Cable program networks are undeniably engaged in speech protected by the First Amendment.<sup>51/</sup> Although the must carry statute does not preclude every cable program network from being carried on all cable systems, it unquestionably curtails and inhibits speech in degradation of the First Amendment. "A rule that substantially impairs the ability of certain groups to convey their message to a desired audience . . . effectively 'abridges speech'. . . ."<sup>52/</sup> "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."<sup>53/</sup> Finally, as the Quincy court recognized, abridgement of cable program networks' First Amendment rights occur from the fact that the rules elevate by government the rights of one category of speakers at the expense of another.<sup>54/</sup>

The must carry requirements abridge the First Amendment rights of cable program networks by sharply reducing the number of cable channels available to them. Not only does the

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<sup>51/</sup> See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981); Quincy, 768 F.2d at 1463.

<sup>52/</sup> Nat'l Black United Fund, Inc. v. Devine, 667 F.2d 173, 179 (D.C. Cir. 1981). See Martin v. Struthers, 319 U.S. 141, 145-46 (1943).

<sup>53/</sup> Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).

<sup>54/</sup> See also Carey v. Brown, 447 U.S. 455, 462-63 (1980); Buckley v. Valeo, 424 U.S. at 49; First Nat'l Bank of Boston v. Bellotti, 453 U.S. 765, 784-85 (1978); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

Act reserve one-third of a cable system's channel capacity to commercial broadcasters, 1992 Cable Act § 4, cable systems are obligated to carry noncommercial educational stations, *id.* § 5, and to provide access for public, educational, and governmental uses. *See* 47 U.S.C. § 531. Moreover, once the governmentally reserved capacity is taken, any remaining capacity is not freely available to cable networks -- they must compete with pay television program providers, pay-per-view programmers, and others for cable system carriage.

Furthermore, as the Affidavits submitted in support of the instant motion make clear, these abridgements of cable program networks' First Amendment rights are not an academic abstraction. In the absence of must carry rules, cable program networks have been able to expand their viewing audiences<sup>55/</sup>; new cable networks like TNT and E! Entertainment were successfully launched;<sup>56/</sup> and a rich diversity of speech has been provided to the public as cable program networks have invested great sums in original entertainment, informational, news and children's programs.<sup>57/</sup>

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<sup>55/</sup> *See* McGuirk Affidavit ¶ 17; Affidavit of Nickolas Davatzes, President and Chief Executive Officer of Arts & Entertainment Network ¶ 4 [hereinafter "Davatzes Affidavit"]; Affidavit of Lee Masters, President and Chief Executive Officer of E! Entertainment Television, Inc. ¶¶ 2-3 [hereinafter "Masters Affidavit"]; Affidavit of Thomas F. Burchill, President and Chief Executive Officer of Hearst/ABC-Viacom Entertainment Services ¶¶ 6-8 [hereinafter "Burchill Affidavit"]; Affidavit of Timothy B. Robertson, President and Chief Executive Officer of International Family Entertainment, Inc. ¶ 4 [hereinafter "Robertson Affidavit"]; Affidavit of Bruce D. Collins, General Counsel of National Cable Satellite Corporation ¶ 16 [hereinafter "Collins Affidavit"].

<sup>56/</sup> *See* McGuirk Affidavit ¶ 31; Masters Affidavit ¶ 3; Affidavit of Joseph M. Segel, Chairman and Chief Executive Officer of QVC Network, Inc. ¶ 4 [hereinafter "Segel Affidavit"]; Affidavit of E. Roger Williams, President and Chief Operating Officer of The Travel Channel, Inc. ¶ 4 [hereinafter "Williams Affidavit"]; Affidavit of Douglas V. Holloway, Senior Vice President - Affiliate Relations of USA Networks ¶¶ 4 & 7 [hereinafter "Holloway Affidavit"].

<sup>57/</sup> *See* McGuirk Affidavit ¶ 18; Davatzes Affidavit ¶ 5; Burchill Affidavit ¶ 8; Holloway Affidavit ¶ 7.

In contrast, with the imposition of new must carry requirements:

- Cable program networks will be displaced from cable systems that currently carry them, as additional broadcast stations obtain must carry rights.<sup>58/</sup> The must carry statute silences speech;
- New diverse cable program networks, such as The Sci-Fi Channel, The Cartoon Network, and Court TV will be unable to reach their intended audiences.<sup>59/</sup> Contrary to generalized assertions, cable channel capacity is very tight, and the imposition of must carry rules will foreclose speech;<sup>60/</sup>
- These consequences occur regardless of the preferences of the viewing public.<sup>61/</sup> Unlike the FCC's prior rules, the must carry statute operates without any role for viewer preferences and is thus antagonistic to the paramount First Amendment interests of viewers.

The impermissible First Amendment impact of the must carry statute is well illustrated by the situation present in Pinole, California. The cable system serving that area, Viacom Cable, is a 37 channel system that currently carries nine commercial broadcast stations. Under the 1992 Cable Act must carry provisions, four additional commercial broadcast stations must be carried. The Viacom cable system has one vacant channel. Instead of the cable operator exercising its editorial discretion to select who should speak through that channel, instead of a cable program network being given an equal opportunity to vie for that channel, instead of cable subscribers' influencing what speech they wish to receive through that channel, the must carry statute mandates by government fiat that one broadcast station is entitled to the vacant channel as an

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<sup>58/</sup> See McGuirk Affidavit ¶ 27; Davatzes Affidavit ¶¶ 6-7; Burchill Affidavit ¶ 10; Segel Affidavit ¶¶ 7-10; Collins Affidavit ¶¶ 12 & 17.

<sup>59/</sup> McGuirk Affidavit ¶¶ 25-27; Robertson Affidavit at ¶ 7; Holloway Affidavit ¶¶ 9-10.

<sup>60/</sup> See McGuirk Affidavit ¶¶ 24-26; Davatzes Affidavit ¶ 7; Masters Affidavit ¶ 6; Collins Affidavit ¶¶ 15-17; Segel Affidavit ¶¶ 9-10 & 12; Robertson Affidavit ¶¶ 5 & 7; Williams Affidavit ¶ 6; Holloway Affidavit ¶¶ 8-10.

<sup>61/</sup> See Davatzes Affidavit ¶ 8; Robertson Affidavit ¶ 8; Burchill Affidavit ¶ 11; Segel Affidavit ¶ 12; Holloway Affidavit ¶ 11.

additional means through which to speak, and that three others are entitled to bump existing programming to obtain carriage.<sup>62/</sup>

2. Despite Congressional Rhetoric, the Must Carry Statute is Overbroad, Protectionist Legislation

The "findings" and legislative history of the 1992 Cable Act are larded with purported government interests and rationales seeking to justify the abridgement of First Amendment rights the must carry requirements occasion. Yet one looks in vain for any discussion or justification for the elevation of broadcaster speech over the speech of CNN, C-SPAN, Lifetime, and the other cable program networks -- except for the assertion that not all space on cable systems is being governmentally reserved for broadcasters. None of the Congressional findings directly addresses or purports to justify this action. This failure to weigh the infringement of cable program network's First Amendment rights alone undercuts the elaborate legislative history the broadcasters have concocted.

Under any First Amendment standard, the must carry statute must fall. Congress has asserted that "assuming arguendo that Associated Press is not controlling," the O'Brien standard properly applies, and the carriage and channel position requirements of the Act pass muster under that standard. See H.R. Rep. No. 628 at 62; S. Rep. No. 92 at 57. That is wrong. The new carriage requirements -- like their predecessors -- "clearly fail" to survive scrutiny even under the O'Brien test. See Quincy, 768 F.2d at 1448. First, Congress has utterly failed to substantiate that any significant threat to local broadcasting exists. Second, where speech is involved,

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<sup>62/</sup> See McGuirk ¶¶ 28-29. See also Holloway Affidavit ¶ 9.

"[p]recision of regulation must be the touchstone. . . ." <sup>63/</sup> Here, however, the means Congress has chosen are grossly overinclusive and bear little relation to the problem Congress purportedly has sought to correct. When the rhetoric is stripped away, the requirements themselves make clear that despite the packaging, must carry is designed simply to protect broadcasters. The fact that must carry is coupled with retransmission consent makes Congress' real intent unmistakable.

a. The Asserted Governmental Interests are Completely Unsubstantiated and, therefore, Insubstantial

The courts have made clear that the naked assertion of the importance of a governmental interest, even by Congress, is inadequate to withstand challenge. <sup>64/</sup> We do not contend that Congress can have no interest in the preservation of free over-the-air broadcasting, <sup>65/</sup> but as the Supreme Court has "long recognized[,] . . . even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." <sup>66/</sup> Here, the government's assertion that new carriage provisions are necessary to ensure the health and survival of local broadcasting cannot withstand analysis.

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<sup>63/</sup> NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted). See News America Publishing, Inc. v. FCC, 844 F.2d 800, 805 (D.C. Cir. 1988) (when a government restraint on speech is at issue, "the Supreme Court has . . . insisted on a closer fit between a law and its apparent purpose than for other legislation.").

<sup>64/</sup> Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984); Schad, 452 U.S. at 72-73; Quincy, 768 F.2d at 1455 n.44.

<sup>65/</sup> Plaintiffs emphatically dispute, however, the apparent premise of the legislation that giving broadcasters preferred rights to reach cable audiences and insulating broadcasters from competition from cable program networks will "promote diversity" in the video marketplace. See 1992 Cable Act, § 2(a)(6). The quality and variety of the video programming produced by cable program networks over the past several years -- made possible in part by the elimination of protectionist measures such as must carry -- refutes any such notion. And it is fallacious to suggest that the character of broadcast programming will improve by virtue of reduced competition from cable program networks.

<sup>66/</sup> Minneapolis Star, 460 U.S. at 592.

(1) The Threat of Discontinued Carriage on which the 1992 Cable Act is Based is Unfounded

As the Quincy court made clear, the First Amendment does not countenance governmental rules that aim to protect local broadcasters rather than local broadcasting. 768 F.2d at 1460.

While Congress asserts that it was compelled to act to maintain "the existence of local broadcast stations and their ability to serve the public,"<sup>67/</sup> any claim that the continued existence of broadcasting is threatened is as exaggerated as were reports of Mark Twain's premature demise.

First, Congress' entire "evidence" on the subject is anecdotal and survey information demonstrating only that not every cable operator is carrying every broadcaster in its market.<sup>68/</sup> Not even Congress or the broadcasters are suggesting that full carriage in all circumstances should be the rule. And as made clear by the FCC Staff Report, which Congress cited approvingly, most broadcast stations are being carried by cable systems.<sup>69/</sup> The House Report admits the same thing.<sup>70/</sup> Indeed, the Act itself asserts that broadcast programming "remains the most popular programming on cable systems." 1992 Cable Act § 2(a)(19). If so, the need to give broadcasters preferred rights over cable program networks is counter-intuitive.

The structure of the must carry scheme further evidences the fact that it was not designed to meet Congress' alleged concerns regarding protecting the local broadcasting system. Neither the FCC nor Congress has established a baseline of localism that should be protected in all

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<sup>67/</sup> S. Rep. No. 92 at 59; H.R. Rep. No. 628 at 63.

<sup>68/</sup> See S. Rep. No. 92 at 42-44, 59; H.R. Rep. No. 628 at 51-55.

<sup>69/</sup> Staff Report, Policy and Rules Division of the Mass Media Bureau, Cable System Broadcast Signal Carriage Report, Sept. 1, 1988, at 10 ["1988 Staff Report"] See S. Rep. No. 92 at 42-44, 59 (citing 1988 Staff Report); H.R. Rep. No. 628 at 64 (same).

<sup>70/</sup> See H.R. Rep. No. 628 at 52 (stating that "the Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations. . . .").

circumstances. Instead, the must carry scheme focuses upon the fortuitous element of the capacity of the cable system. A subscriber to a 36-channel system is mandated to receive up to 12 broadcast stations, while a subscriber to a 60-channel system may receive 20, even if the two systems are in the same television market. Must carry is not a solution to a problem of broadcasting, but a way to protect broadcasters.

Furthermore, any claim that broadcasting is sinking toward extinction is unsupportable. In fact, available data demonstrates that the current broadcast market is robust. According to the FCC's factfinding, the total number of commercial television stations increased by almost 25 percent since the demise of the must carry rules.<sup>71/</sup> During the same time period, average profits among network affiliates have remained extremely high -- over 20 percent of net revenues.<sup>72/</sup> The profit margins of network affiliates are higher than that of any service industry in the United States.<sup>73/</sup> Among independent stations, average profits have increased approximately 400 percent from 1989 to 1990, continuing a positive trend in average profits since 1988.<sup>74/</sup> This increase in profitability is all the more significant because of the large increase in the number of independent stations during the 1980s.<sup>75/</sup> As in Quincy, it has not been -- and cannot be -- "proven that without the protection afforded by the must carry rules the economic health of local broadcast television is threatened by cable." 768 F.2d at 1455.

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<sup>71/</sup> Florence Setzer & Jonathan Levy, FCC Office of Plans and Policy, Broadcast Television in a Multichannel Marketplace 15 (June 1991) [hereinafter "Broadcast Television Report"].

<sup>72/</sup> Id. at 36.

<sup>73/</sup> Layton Franko, Is Retransmission Consent Necessary?, Electronic Media, Mar. 9, 1992, at 16.

<sup>74/</sup> Doug Halonen, Independents See Profits Rise, Electronic Media, Sept. 2, 1991, at 3.

<sup>75/</sup> Broadcast Television Report at 38.

In short, this is not a matter of quibbling with isolated factual flaws in the legislative record. Rather, that record is so defective that it cannot support the government's asserted interest in mandating carriage of broadcast stations at the expense of the First Amendment rights of cable programmers, cable operators, and the public, and this Court need not, and should not, accept those findings. See Sable Communications, 109 S. Ct. at 2838.

(2) **The 1992 Cable Act is Based on the Fundamentally Flawed Premise that Cable Systems are an Essential Facility**

Another erroneous Congressional premise is that government-mandated carriage on cable systems is essential to the survival of broadcasting. Without must carry, the vast majority of broadcast stations are being carried. Moreover, at most, cable systems provide duplicative means of access for broadcasters to their viewers.

Homes within a television station's community can receive over-the-air signals, regardless of whether a cable system is also present. As the Quincy court noted, "local broadcasters . . . already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether." 768 F.2d at 1452-53. Cable systems, on the other hand, enter the home only when invited, and that invitation remains open only so long as the operator provides a sufficiently attractive package of information and entertainment at a price worth paying.

This is simply not a situation in which the cable system constitutes an "essential medium" upon which local broadcasters are dependent for their survival.<sup>76/</sup> Yet, the 1992 Cable Act

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<sup>76/</sup> See Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978) (stating that a facility is "essential" if "duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.") Cable television is not an "essential facility" because its facilities are duplicative of broadcasting. Id. at 992. Moreover, even if it were an essential facility, it is not required to

(continued...)

asserts, incorrectly, the opposite.<sup>77/</sup> Moreover, the legislative history is replete with statements premised on this incorrect notion that cable carriage constitutes the sole means by which broadcast stations can reach the public.<sup>78/</sup>

Those who subscribe to cable service possess redundant means of receiving broadcast stations. The vast majority of cable systems continue to carry virtually a full complement of broadcast stations -- without being compelled to do so. Even in the isolated instances in which a cable system has discontinued carriage of a broadcast station, the FCC has recognized that subscribers possess an inexpensive means of switching between the cable service and over-the-air broadcasting -- an "A/B" or input selector switch. See Century, 835 F.2d at 296, 300-04.

(3) Retransmission Consent is Inconsistent with the Government's Claimed Interest

Finally, the essential nature of the governmental interests in ensuring cable subscribers receive broadcast signals is undercut by the retransmission consent option, which empowers private parties -- broadcast stations -- to override the governmental interests by withholding the signal from a cable operator unless the station gets paid. As the Supreme Court has recognized, departures from the uniform pursuit of an asserted governmental interest raises doubts as to

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<sup>76/</sup>(...continued)

share its facilities with its competitors at the expense of undermining its ability to serve its customers. Id. at 992-93.

<sup>77/</sup> See 1992 Cable Act § 2(a)(7)-(9). See also id. § 2(a)(17) ("Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive") (emphasis added).

<sup>78/</sup> See, e.g., S. Rep. No. 92 at 56 (concluding that "carriage on cable systems is essential for local television stations to have access to viewers"); H.R. Rep. No. 628 at 60 (same); S. Rep. No. 92 at 59 ("If local television stations are not carried on their cable system, cable subscribers will be denied access to federally-allocated broadcast stations"); H.R. Rep. No. 628 at 64 (same). Other portions of the legislative history directly contradict these statements, demonstrating their untruth. See S. Rep. No. 92 at 36 (stating that, despite the retransmission consent provisions, "broadcast signals will remain available over the air for anyone to receive").