

elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"),<sup>36/</sup> limit the size of the audience that these programmers are able to reach, see Meyer v. Grant, 486 U.S. 414, 422-23 (1988) (invalidating a law prohibiting paying people to collect signatures for an "initiative petition" because, inter alia, "it limits the number of voices who will convey [the] message and the hours they can speak and, therefore, limits the size of the audience they can reach."), and reduce the quantity of expression. Riley v. National Federation of the Blind of N.C., 487 U.S. 781, 787-95 (1988) (striking down provisions of statute which used percentages to decide the legality of fundraiser's fee because the scheme served to chill speech and "ultimately 'reduc[e] the quantity of expression'") (citation omitted).

TBS's cable networks compete with non-integrated programmers and with programmers such as ESPN, CNBC and A&E, in which broadcast companies such as ABC and NBC have a significant ownership interest. Regulations which permit only these programmers to secure carriage on cable systems at the expense of programmers like TBS would limit the audience to whom TBS's networks could speak, thus placing TBS's networks at a competitive disadvantage with respect to the dissemination of speech. Such a result violates the First Amendment's ban on Government interference in the marketplace of ideas by favoring the speech of one entity over that of another. See, e.g., Buckley v. Valeo, 424 U.S. at 48-49; Pacific Gas & Elec. Co. v. P.U.C. of California, 475 U.S. 1, 20 (1986).<sup>37/</sup>

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<sup>36/</sup> See also Quincy Cable TV, 768 F.2d at 1451-1452; Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir. 1977) (a direct burden on speech exists where restrictions are "intended to curtail expression...indirectly by favoring certain classes of speakers over others.") (citations omitted), cert. denied, 434 U.S. 829 (1977).

<sup>37/</sup> The legislative history of the 1992 Cable Act is silent with respect to the constitutional problems presented by Section 613, perhaps because Congress expected the Commission to act

Second, regulations of this nature would unconstitutionally intrude upon the editorial discretion of cable operators by limiting their ability to offer program services of vertically integrated programmers, see Quincy, 768 F.2d at 1452 n.39 (affirming First Amendment protection for editorial discretion).<sup>38/</sup> Similarly, by pre-determining which types of services may or may not be included in the system's line-up, the regulations would also impermissibly mandate speech. See Riley, 487 U.S. at 795 ("[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech"). This interference with editorial discretion that targets only certain types of speakers is far different than the structural regulation that has been constitutionally upheld for broadcasting. Compare National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

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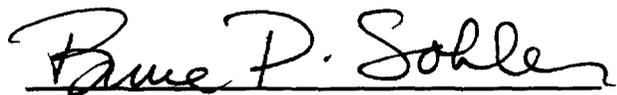
carefully and with "precision" in this sensitive constitutional area. See NAACP v. Button, 371 U.S. 415, 438 (1963).

<sup>38/</sup> The courts have allowed one special exception to the principle that government cannot intrude upon editorial functions of the media. That exception is reserved for broadcasting which, by virtue of the scarcity of frequencies available within the electromagnetic spectrum, requires limited regulation in the public interest. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding constitutionality of FCC's "fairness doctrine"); News America Publishing, Inc. v. FCC, 844 F.2d 800, 805 (D.C. Cir. 1988) ("special 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"). Whatever the merits of the "scarcity" rationale, see id. at 811 (noting that "new technology may render the [scarcity] doctrine obsolete -- indeed, may have already done so"), it has no application to cable television. See Quincy, 768 F.2d at 1447-50; Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985) ("Despite the superficial similarity between broadcasting and cable television, there are significant differences between the two media that have First Amendment consequences."), aff'd on other grounds, 476 U.S. 488 (1986); Home Box Office, 567 F.2d at 44-46 (rejecting application of the scarcity rationale to cable, and finding no "constitutional distinction between cable television and newspapers" with respect to the permissibility of government intrusions into First Amendment rights).

## CONCLUSION

For the foregoing reasons, TBS strongly urges the Commission to use the discretion granted to it by Congress to carefully craft the channel occupancy limits mandated by Section 613 in a way which not only vindicates the public interest in obtaining access to diverse, high quality programming, but which also seeks to avoid the clear constitutional problems which this provision may present. The Commission may best serve the public interest by ensuring that creative, innovative enterprises like TBS and other cable programmers are permitted to survive and to expand the programming options available to consumers, consistent with longstanding Commission policy and the directive of the 1992 Cable Act to enhance and not to impair diversity.

Respectfully submitted,



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