

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Expanding Consumers Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80

Comments  
of  
Tech Knowledge

April 22, 2016



## Executive Summary

### The Wholesale Proposal Is an Impermissible Common Carriage Requirement

The FCC’s proposed regulations (the “Wholesale Proposal”) would do more than merely create competition in a market for the “equipment” used to access MVPD services that is artificially separated from the underlying MVPD services themselves; the proposed rules would effectively require MVPDs to provide unbundled, nondiscriminatory access to video programming “information flows” that are an essential part of otherwise fully integrated MVPD services. The avowed purpose of the Wholesale Proposal is to enable third parties to combine MVPD’s unbundled programming with “ancillary features” to provide entirely new, “differentiated” services in competition with MVPDs’ underlying services — the same justification that has traditionally been used to impose resale and other wholesale obligations on common carriers under Title II. The FCC cannot accomplish this result in the guise of promoting competition in an artificially created market for “equipment,” because mandatory wholesale requirements are fundamentally common carriage, and the Communications Act prohibits the FCC from treating MVPDs as common carriers.

Indeed, the FCC’s plan to force MVPDs to offer unbundled wholesale access to their underlying service offerings at a price of a zero, primarily for the benefit of software-based Internet “edge” providers like Google, is the regulatory equivalent of gaming the open Internet rules. Forcing MVPDs to unbundle their application level services in order to enable third-parties to provide their own differentiated service offerings would turn MVPD services into the functional equivalent of broadband Internet access services the FCC subjects to Title II regulation.

In short, the Wholesale Proposal would impose a duty on MVPDs to hold out their information flows indifferently in all circumstances in a standardized format that they cannot control and at no charge for the benefit of anyone who wishes to offer navigation equipment or an Internet website. There simply is no way to distinguish the Wholesale Proposal from *per se* common carriage.

## The Wholesale Proposal Would Violate the First Amendment

The Wholesale Proposal would also violate the First Amendment by restricting the speech of MVPDs, limiting MVPDs' right to the liberty of circulation, compelling MVPD speech, and compelling MVPDs to subsidize the speech of others.

### It Would Restrict the Editorial Discretion of MVPDs

The Wholesale Proposal would restrict the editorial discretion of MVPDs in a manner similar to the application of a non-discrimination requirement on parade organizers as discussed in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), a case that is no longer distinguishable on competitive grounds from *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

### It Would Compel MVPD Speech

The Wholesale Proposal would compel speech by forcing MVPDs to publish "information flows" that MVPDs would rather not publish. Because this publication requirement is for a purpose that goes beyond informing consumers about MVPDs' own services and is unrelated to voluntary advertising, the standard announced in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), is inapplicable.

### It Would Compel MVPDs and Content Providers to Subsidize the Speech of Others

The Wholesale Proposal would also compel MVPDs and content providers to subsidize the speech of others by permitting third-parties to enjoy a portion of the benefits of MVPDs' services and copyright holders' video content at a government-regulated rate of zero.

### Strict Scrutiny Applies

The Wholesale Proposal is a content-based restriction on speech that is subject to strict scrutiny for the following reasons:

- The exercise of editorial discretion by the press is not "commercial speech" within the meaning of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980);

- Restrictions on the editorial discretion of the press are subject to strict scrutiny unless justified by “some special characteristic” of the particular medium being regulated, and the FCC’s conclusion in 2015 that MVPDs are effectively competitive destroyed the “special characteristic” on which the Supreme Court relied to justify the application of intermediate scrutiny to cable operators in *Turner I* — i.e., according to the FCC, cable operators’ historical ability to exercise monopoly market power no longer exists;
- The Wholesale Proposal is content-based because one of its fundamental purposes is the alteration of MVPD speech — i.e., permitting third-parties to substitute their own program guides and add their own “complementary features” to MVPDs’ services;
- The Wholesale Proposal is content-based because there simply is no reasonable basis for the FCC’s conclusion that restricting MVPD speech is necessary to remedy a market failure when the FCC has already concluded that MVPDs are effectively competitive — i.e., it is unreasonable to conclude that the level of competition in the artificial market for navigation devices is unrelated to the level of competition among the underlying MVPD services navigation devices are designed to access or that the state of the market for navigation devices presents any greater threat of harm to consumers than the state of the market for MVPDs’ underlying services; and
- The Wholesale Proposal is content-based because it threatens to produce a net decrease in the amount or quality of available speech by giving video content providers incentives to raise their licensing fees to recover lost (or potentially lost) advertising and licensing revenue and/or cut their costs by reducing the amount or quality of the programming they offer — a fate that has already befallen traditional newspapers and the journalism they produce due to the shift from paper to Internet (i.e., software-based) consumption of printed content.

The Wholesale Proposal is also a speaker-based restriction on speech that is subject to strict scrutiny because it singles out certain members of the press for disfavored treatment in a manner

that, for the reasons noted above, carries the inherent risk of undermining First Amendment interests and threatens to diminish the free flow of information and ideas.

The Wholesale Proposal Fails Under Either Strict or Intermediate Scrutiny

First, given that the artificial market for navigation devices is at least as competitive as the market for MVPDs' underlying services, the fact that the market for navigation devices might not be perfectly competitive is insufficient to demonstrate harm justifying the elimination of editorial discretion by a particular class of the press.

Second, the Wholesale Proposal burdens far more speech than necessary to remedy whatever competitive issues might exist with respect to navigation devices, because there are readily-available alternatives that would eliminate any need for a separate navigation device (or separate navigation software) without abrogating MVPDs' editorial discretion. The FCC's failure to give serious consideration to this alternative indicates the FCC's real interest in this proceeding is the unbundling of MVPDs' underlying services for the benefit of Internet "edge" providers, not competition in the artificial market for navigation devices.

### The Wholesale Proposal Raises Substantial First Amendment Questions

Finally, given that the FCC is relying on *Chevron* deference to impose a wholesale unbundling requirement on MVPDs that is not unambiguously authorized by section 549, a court could invalidate the Wholesale Proposal under the doctrine of constitutional avoidance without expressly deciding the First Amendment questions, because the Wholesale Proposal clearly raises substantial First Amendment questions.

<b>The Wholesale Proposal Would Require MVPDs to Offer Their Services for Resale by Third-Parties.....</b>	<b>1</b>
<b>The Wholesale Proposal Would Impose Impermissible Common Carriage Obligations on MVPDs.....</b>	<b>5</b>
The Wholesale Proposal Is Fundamentally Common Carriage -----	7
The Wholesale Proposal Does Not Occupy the ‘Gray Area’ Between Common and Private Carriage -----	9
<b>The Wholesale Proposal Would Violate the First Amendment.....</b>	<b>11</b>
The Wholesale Proposal Would Restrict MVPDs’ Speech and Press Rights -----	11
The Wholesale Proposal Would Compel Speech -----	15
The Wholesale Proposal Is Not Voluntary Advertising .....	16
The Wholesale Proposal Compels More than Mere Consumer Disclosures .....	17
<b>The Wholesale Proposal Would Compel MVPDs to Subsidize the Speech of Others -----</b>	<b>18</b>
<b>Strict Scrutiny Applies -----</b>	<b>19</b>
The Exercise of Editorial Discretion Is Not “Commercial Speech” .....	19
Strict Scrutiny Applies to Per Se Restrictions on MVPDs’ Editorial Discretion .....	20
The Wholesale Proposal Is Content-Based .....	23
The Wholesale Proposal Is Speaker-Based .....	29
The Wholesale Proposal Fails Under Strict or Intermediate Scrutiny .....	30
<b>The Wholesale Proposal Raises Substantial First Amendment Questions-----</b>	<b>31</b>

## The Wholesale Proposal Would Require MVPDs to Offer Their Services for Resale by Third-Parties

Section 549(a) of the Communications Act requires the FCC to “adopt regulations to assure the commercial availability,” to consumers, of “equipment used by consumers to access” MVPD programming and other services offered over MVPD systems, by vendors “not affiliated” with any MVPD.<sup>1</sup> By its plain language, this statute indicates that Congress intended to “create *separate* markets” for navigation devices on the one hand and “cable service” on the other.<sup>2</sup>

The FCC’s proposed regulations, however, would do more than merely create competition in a market for the “equipment” used to access MVPD services that is artificially separated from the underlying MVPD services themselves; the proposed rules would effectively require MVPDs to provide unbundled, nondiscriminatory access to video programming “information flows” that are an essential part of *otherwise fully integrated* MVPD services (the “Wholesale Proposal”). The avowed purpose of the Wholesale Proposal is to enable third parties to combine MVPD’s unbundled programming with “ancillary features”<sup>3</sup> such as “integrated search across MVPD content and over-the-top [i.e., Internet] content, suggested content, integration with home entertainment systems, caller ID, and future innovations.”<sup>4</sup> In the communications context, a regulatory regime that involves “buying services or facilities from a facilities-based provider and then, after adding ancillary services or features, reoffering communications services to the public” is known as “resale; a form of wholesale service” that goes well beyond the market for access equipment created by *Carterfone* or envisioned by section 549.<sup>5</sup> The Wholesale Proposal is thus intended to provide third parties with

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<sup>1</sup> 47 U.S.C. § 549(a).

<sup>2</sup> *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 995 (D.C. Cir. 2013) (emphasis added).

<sup>3</sup> *See, e.g., Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 432 (6th Cir. 1998) (describing “resale,” a form of wholesale service, as involving the “buying services or facilities from a facilities-based provider and then, after adding ancillary services or features, reoffering communications services to the public.”).

<sup>4</sup> *See Expanding Consumers Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 16018 at ¶ 27 (2016) [hereinafter NPRM].

<sup>5</sup> *See Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d at 432.

wholesale access to unbundled MVPD content so that third parties can resell new, “differentiated”<sup>6</sup> *services* in competition with MVPDs’ *services*. Indeed, the NPRM describes “competition in the user interface and *complementary features*” as a “fundamental point” of the Wholesale Proposal.<sup>7</sup>

This forced unbundling of MVPDs’ services for resale would be inconsistent with MVPDs’ actual offerings in the marketplace and the express legal definition of “cable service.” Similar to the integrated offering of cable modem services at issue in *Brand X*,<sup>8</sup> MVPDs fully integrate the “transmission” of their services with their programming guides, apps, and other interactive media that are required for consumers to “select or use” their services. Congress codified this integration in Section 522(6) of the Communications Act, which defines “cable service” as *both* “transmission to subscribers” *and* the “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>9</sup> The FCC has previously recognized that Congress intended this definition to include programming selection and search functions within the “service” a cable system provides.<sup>10</sup> In the context of cable service, the FCC has found that (1) “the term ‘transmission’ ... requir[es] active participation in the selection and distribution of video programming,”<sup>11</sup> and (2) that, even after the revisions adopted in the Telecommunications Act of 1996, “the one-way transmission requirement in [the] definition [of cable service] *continues to require* that the cable operator *be in control* of selecting and distributing content to subscribers.”<sup>12</sup> Thus, the functionality the FCC proposes to separate from the underlying “cable service” — e.g., the “information flows” that MVPDs use to create programming guides and offer search functionality as part

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<sup>6</sup> See NPRM at ¶ 27.

<sup>7</sup> NPRM at ¶ 12.

<sup>8</sup> See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 968 (2005).

<sup>9</sup> 47 U.S.C. § 522(6).

<sup>10</sup> Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd. 4798, 4835-37 ¶¶ 64-68 (2002).

<sup>11</sup> Nat’l Cable Television Ass’n, Inc. v. FCC, 33 F.3d 66, 71 (D.C. Cir. 1994).

<sup>12</sup> Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd. 4798, 4836 ¶ 67 (2002) (emphasis added).

of their integrated service offerings — would thus render the mandatory wholesale offering of something *other* than a “cable service” within the meaning of the Communications Act. Section 549 does not authorize the FCC to force cable operators (or any other MVPD) to offer an entirely new wholesale service — in the guise of promoting competition in an artificially created market for “equipment” — that does not even fall within the statutory definition of “cable service.”

The proponents of the Wholesale Proposal do not attempt to conceal the fact that a forced wholesale regime is what they are seeking. They admit the Proposal “would enable third party devices and unique user interfaces to present two-way services,” including “*new* services such as ‘cloud’ DVR and out-of-home viewing.”<sup>13</sup> They claim that “[s]eparating the MVPD user interface from these services will foster innovation in their usage”<sup>14</sup> while ignoring the statutory prohibition on such separation in the definition of “cable service.”<sup>15</sup>

The statutory recognition that programming guides, apps, search functionality, and other interactive media are part of the integrated service a cable operator provides is critically relevant now that many cable operators deliver their services using Internet protocol (IP). Given that “broadband Internet access services” (BIAS) and “cable service” can be (and in many instances, are) delivered using IP on the same underlying network infrastructure (at least in part), a cable operator’s exercise of control over the content and features it chooses to include in its video programming packages and the way it presents those packages to consumers is the *primary distinction* between BIAS and “cable service.” The FCC’s proposal would effectively eliminate this distinction at the wholesale level, rendering the statutory definition of “cable service” largely superfluous with the FCC-created definition of “broadband Internet access service.”

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<sup>13</sup> DSTAC Final Report at p. 318 (emphasis added).

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* (arguing that “[n]othing in legislation, FCC regulation, or market practice today refers to an MVPD’s suite of programming and services as an indivisible bundle, aggregate, or ‘service.’”)

Indeed, the FCC’s plan to force cable operators and other MVPDs to offer unbundled wholesale access to their service offerings at a price of a zero, primarily for the benefit of Internet “edge” providers like Google, is the regulatory equivalent of gaming the open Internet rules. In its 2015 *Open Internet Order*, the FCC expressed concern that a BIAS provider could attempt to evade the open Internet rules “by claiming that a service that is the equivalent of Internet access is a non-BIAS data service not subject to the [open Internet rules].”<sup>16</sup> Notably, the FCC excluded MVPD services from this concern when it acknowledged that “Internet Protocol-video offerings would be considered non-BIAS data services under [the open Internet] rules” because “these services are not a generic platform—but rather a specific ‘application level’ service” (that also happens to be expressly defined by statute as a non-common carrier service).<sup>17</sup> Forcing MVPDs to unbundle their “application level” services in order to enable third-parties to provide their own differentiated services,<sup>18</sup> however, would turn IP-video and other MVPD services into the functional “equivalent” of the “generic platforms” the FCC subjects to Title II regulation. Permitting third parties to aggregate MVPD and third-party content and repackage the combined content using their own, “differentiated” features and user interface would make MVPD content appear indistinguishable from other third-party video content available on the open Internet. From the perspective of the consumer, there would no longer be a recognizable difference between MVPD services and over-the-top video services that use broadband Internet access service.

Section 549 does not give the FCC direct authority to accomplish this result under *Chevron’s* first step, and there is nothing in section 549 that can reasonably be interpreted to authorize this result under *Chevron’s* second step given the conflicts it would create between the statutory definition of “cable service” and the FCC’s definition of “broadband Internet access service.”

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<sup>16</sup> Protecting and Promoting the Open Internet, Report and Order on Remand and Declaratory Ruling and Order, FCC 15-24, 30 FCC Rcd. 5601 at ¶ 207 (Mar. 12, 2015) [hereinafter *Open Internet Order*].

<sup>17</sup> *Id.* ¶ 209.

<sup>18</sup> NPRM at ¶ 27.

## The Wholesale Proposal Would Impose Impermissible Common Carriage Obligations on MVPDs

Forcing MVPDs to offer unbundled access to their services at wholesale also conflicts with the statutory scheme by relegating MVPDs, “*pro tanto*, to common-carrier status.”<sup>19</sup> Congress *expressly* exempted MVPDs from common carrier regulation in section 542(c), which exempts “cable service” from “regulation as a common carrier or utility,”<sup>20</sup> and section 153(11), which exempts anyone engaged in “radio broadcasting” (a category that includes satellite television) from being “deemed a common carrier.”<sup>21</sup> The FCC cannot impose common carriage obligations on cable and satellite MVPDs merely because section 549 does not expressly define the term “equipment” and is otherwise silent regarding the Commission’s authority to require MVPDs to offer their services on an unbundled wholesale basis at no charge, because the FCC cannot use *Chevron* deference in a manner that contravenes any specific prohibition in the Communications Act.<sup>22</sup>

First, there is no dispute that the Wholesale Proposal fails under *Chevron* step one — i.e., that section 549 provides “no direct authority” to require MVPDs to unbundle their services or to regulate “software” (e.g., apps and programming guides).<sup>23</sup> The FCC has already admitted that its proposed definition of “equipment” requires it to “interpret ambiguous terms in the Communications Act” (under *Chevron* step two).<sup>24</sup> The agency also notes that the Act’s definition of “telecommunications equipment” in section 153(52) expressly “includes software integral to such equipment

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<sup>19</sup> FCC v. Midwest Video Corp., 440 U.S. 689, 700-01 (1979).

<sup>20</sup> 47 U.S.C. § 541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”).

<sup>21</sup> 47 U.S.C. § 153(11) (“[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”). “The term ‘broadcasting’ means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations,” 47 U.S.C. § 153(7), whether offered for free or on a subscription basis. *See* National Assoc. of Theatre Owners v. FCC, 420 F.2d 194, 202 (DC Cir. 1969), cert. den., 397 US 922 (indicating that “subscription television is entirely consistent with” the definition of “radio broadcasting”).

<sup>22</sup> *See* Verizon v. FCC, 740 F.3d 623, 654 (D.C. Cir. 2014).

<sup>23</sup> *See* EchoStar Satellite LLC v. FCC, 704 F.3d 992, 997 (D.C. Cir. 2013).

<sup>24</sup> NPRM at ¶ 21.

(including upgrades),”<sup>25</sup> whereas Section 549 does not. Section 153(52) thus indicates that, if Congress had unambiguously intended that the term “equipment” in section 549 include software, Congress would have said so.

Second, the Wholesale Proposal is an unreasonable interpretation of section 549 under *Chevron* step two because it is inconsistent with Congress’ express prohibition on the treatment of cable and satellite MVPDs as common carriers.

The fact that some Communications Act provisions governing MVPDs might be categorized as common carrier obligations does not give the FCC “broad”<sup>26</sup> interpretive authority to impose *additional* common carriage obligations on cable and satellite television services under section 549. Congress is free to adopt statutory provisions that expressly contravene the Act’s prohibitions on the treatment of MVPDs as common carriers (within constitutional limits), but in the absence of such express authorization, the FCC is not.

Congress has no statutory obligation to avoid imposing common carrier obligations on those who might not otherwise operate as common carriers . . . . The Commission, on the other hand, has such an obligation with respect to [MVPDs] and the issue here is whether it has nonetheless “relegated [those entities], *pro tanto*, to common-carrier status.”<sup>27</sup>

Because Congress expressly prohibited the FCC from treating cable and satellite MVPDs as common carriers, the ordinary deference afforded to Federal agencies under *Chevron* step two does not include interpretations of the term “equipment” that would empower the FCC to impose common carrier regulations on MVPDs’ underlying *services*.

The Supreme Court recognized this limitation on the FCC’s authority in *Midwest Video Corp.*, in which the Court held that the “unequivocal” prohibition on common carrier treatment in section 153(11) (and by direct analogy, section 542(c)) “forecloses *any discretion* in the Commis-

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<sup>25</sup> 47 U.S.C. § 153(52).

<sup>26</sup> NPRM at ¶ 21.

<sup>27</sup> See *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014).

sion to impose access requirements amounting to common-carrier obligations on broadcast [and cable] systems.”<sup>28</sup> According to the Court, “forcing broadcasters [and cable operators] to develop a ‘nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § [153(11)] of the Act.” Yet that it precisely what the Wholesale Proposal would do here.

### The Wholesale Proposal Is Fundamentally Common Carriage

Though “the Commission’s interpretation and application of the term ‘common carrier’ warrants *Chevron* deference,” deference cannot save regulations that are “*fundamentally* common carriage obligations.”<sup>29</sup> If the Commission’s proposal would subject cable and satellite MVPDs to common carrier treatment, “the regulations [could not] stand.”<sup>30</sup>

The entire history of communications regulation indicates that forcing MVPDs to unbundle their services and offer them for resale at a regulated rate of zero is fundamentally common carriage. Indeed, even wholesale unbundling at cost-based rates (i.e., rates above zero) is such an extreme form of common carriage regulation that the FCC did not require monopoly telephone companies to offer their facilities at wholesale for more than forty years after the Communications Act was initially adopted.<sup>31</sup> When the FCC actually did impose wholesale requirements on telephone companies (in the 1976 *Common Carrier Resale Order*), it acknowledged that requiring common carriers to offer unbundled access to their underlying facilities “would be a departure from the tradition in the communications industry where carriers owning and operating transmission facilities generally supply a complete communications service directly to the ultimate user.”<sup>32</sup> The FCC found its novel approach was justified on policy grounds by the growing demand for non-

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<sup>28</sup> FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 705 (1979) (emphasis added).

<sup>29</sup> Cellco P’ship v. FCC, 700 F.3d 534, 544, 545 (D.C. Cir. 2012) (emphasis added).

<sup>30</sup> Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014).

<sup>31</sup> See Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities, Report and Order, FCC 76-641, 60 F.C.C.2d 261 (1976) [hereinafter *Common Carrier Resale Order*].

<sup>32</sup> See *id.* at ¶ 10.

voice forms of communication that used the telephone network and the existence of “entities desiring to provide a communications service which ‘adds value’ to or ‘augments’ the communications service provided by existing carriers.”<sup>33</sup>

While the *reasons* the FCC imposed wholesale obligations on monopoly telephone carriers are substantively the same as the reasons proffered by proponents of the Wholesale Proposal in the current proceeding, the FCC’s *legal authority* is very different. Though common carriers are not inherently obligated to provide wholesale access to their facilities or services, when the FCC or Congress has chosen to impose comprehensive wholesale obligations on communications service providers, they have imposed such obligations using the FCC’s authority to regulate common carriers in Title II of the Communications Act.<sup>34</sup> In the *Common Carrier Resale Order*, the FCC derived its legal authority for telephony resale mandates from sections 201 and 202 of the Communications Act — provisions that codify the “bedrock consumer protection obligations of a common carrier” and that “have represented the core concepts of federal common carrier regulation dating back over a hundred years.”<sup>35</sup> And when Congress subsequently imposed interconnection, resale, and unbundled access requirements on telephone services in section 251 of the Communications Act, Congress described interconnection as a “general duty” of “telecommunications carriers” (who are classified as “common carriers”) and resale and unbundling as “obligations” of “local exchange carriers” (who comprise a subset of “telecommunications carriers”). The structure of the Communications Act and the history of its implementation thus indicate that wholesale unbundling requirements are fundamentally common carrier in nature.

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<sup>33</sup> See *Common Carrier Resale Order* at ¶ 3.

<sup>34</sup> See *Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 436-39 (6th Cir. 1998).

<sup>35</sup> Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, 16865 at ¶ 15 (1998). See also *Open Internet Order* at ¶ 442 (quoting the same passage with approval).

## The Wholesale Proposal Does Not Occupy the ‘Gray Area’ Between Common and Private Carriage

Forcing MVPDs to offer unbundled access to their services at wholesale does not fall within the “gray area” between common and private carriage articulated by the D.C. Circuit Court of Appeals in *Cellco Partnership*.<sup>36</sup> In that case, the court held “there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*.”<sup>37</sup> According to the court, a regulation does not impose common carrier obligations if it leaves “substantial room for individualized bargaining and discrimination in terms.” Conversely, “[i]f a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.”<sup>38</sup>

The Wholesale Proposal falls well within the description of *per se* common carriage: (1) it leaves no room for MVPDs to engage in “individualized bargaining” with respect to the use of the “information flows” they would be required to provide;<sup>39</sup> it requires MVPDs to publish their proprietary “information flows” in a standardized format that “conforms to specifications set by open standards bodies;”<sup>40</sup> it prohibits MVPDs from exercising *any* control over the “user interface and features” of “equipment” that third parties use to access and resell MVPDs’ content;<sup>41</sup> it requires MVPDs to “support” a content protection system that is licensable on “reasonable and nondiscriminatory terms” and is *not* “controlled” by MVPDs;<sup>42</sup> it requires MVPDs to provide “parity of access” to their content to “all” persons indiscriminately<sup>43</sup> “who are involved in the development” of

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<sup>36</sup> *Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

<sup>37</sup> *Id.* at 548.

<sup>38</sup> *Id.* at 547.

<sup>39</sup> NPRM at ¶ 36.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at paras. 50, 58.

<sup>43</sup> *Id.* at ¶ 63.

navigation devices;<sup>44</sup> and it denies MVPDs any opportunity to recover the costs of the Wholesale Proposal from the resellers who would cause those costs or to differentiate their wholesale services in any way. In short, the FCC’s proposal requires MVPDs to “hold themselves out to serve all comers indiscriminately on the same or standardized terms”<sup>45</sup> through unbundled wholesale access to the content that underlies their retail service offerings.

The fact that the FCC would require MVPDs to offer wholesale access to their content at no charge does *not* bolster the FCC’s case. As the court noted in *Verizon*, the FCC cannot claim its regulations do not impose common carrier obligations “simply because it compels an entity to continue furnishing service at no cost.”<sup>46</sup> To the contrary, the inability of MVPDs to negotiate wholesale pricing terms is another factor indicating the Wholesale Proposal imposes common carrier obligations.

It is likewise irrelevant that third parties who choose to offer navigation devices might not actually “transmit” video content<sup>47</sup> and might “have no direct relationship” with an MVPD,<sup>48</sup> because neither is a necessary element of common carriage under the Communications Act.

In sum, the Commission’s proposal suffers from the same flaw as the regulations that were struck down in *Midwest Video II* and *Verizon* — the proposal would impose a duty on MVPDs to “hold out their [information flows] indifferently for public use” in “all circumstances” and in a standardized format that they cannot control and at no charge for the benefit of anyone who wishes to offer navigation equipment or an Internet website.<sup>49</sup> There simply is no way to distinguish the Wholesale Proposal from *per se* common carriage.<sup>50</sup>

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<sup>44</sup> NPRM at ¶ 21.

<sup>45</sup> *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

<sup>46</sup> *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014).

<sup>47</sup> *See Am. Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 24-25 (2d Cir. 1978).

<sup>48</sup> *See Verizon v. FCC*, 740 F.3d at 653.

<sup>49</sup> *Id.* at 656.

<sup>50</sup> *Id.*

## The Wholesale Proposal Would Violate the First Amendment

“There can be no disagreement on an initial premise: 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”<sup>51</sup> — a point the FCC apparently concedes.<sup>52</sup> The FCC also appears to concede that, by forcing MVPDs to publish their proprietary “information flows” in a standardized format, the Wholesale Proposal would compel MVPDs to speak.<sup>53</sup> The FCC does not consider in the NPRM, however, that the Wholesale Proposal would also restrict the speech and press rights of MVPDs by limiting their editorial discretion and the liberty of circulation and would compel MVPDs to subsidize the speech of others.

### The Wholesale Proposal Would Restrict MVPDs’ Speech and Press Rights

The Wholesale Proposal would restrict the speech of MVPDs by limiting their editorial discretion and circulation rights. “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.”<sup>54</sup> MVPDs do this through their exercise of editorial discretion, both as ordinary speakers and as members of the press.<sup>55</sup>

“Once the expressive character [of an MVPD’s fully integrated service offering] is understood, it becomes apparent that [the Wholesale Proposal would have] the effect of declaring [MVPDs’ and content providers’] speech itself to be [a] public accommodation.”<sup>56</sup>

An apt analogy to the expressive character of MVPD services is provided by the Supreme Court’s discussion of parades in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515

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<sup>51</sup> *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 636 (1994).

<sup>52</sup> NPRM at ¶ 45.

<sup>53</sup> *See id.* (citing First Amendment cases involving compelled speech).

<sup>54</sup> *Turner I*, 512 U.S. at 641.

<sup>55</sup> See Fred Campbell, *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 *Neb. L. Rev.* 559, 583 (2016).

<sup>56</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995).

U.S. 557 (1995). In *Hurley*, the Court noted there is a significant First Amendment difference between a mere march and a parade:

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one.<sup>57</sup>

A parade’s organizers “define who can be a social actor and what subjects and ideas are available for communication and consideration.”<sup>58</sup> It is “not limited to its banners and songs [i.e., the parade’s “content”], however, for the Constitution looks beyond written or spoken words as mediums of expression” to symbolic expression, including the act of walking in uniforms.<sup>59</sup>

When an MVPD chooses the programming it will display, organizes it into packages (or programming “tiers”), and decides the order in which individual programs will appear in its program guide, the character of its expression is similar to that of a parade organizer who chooses who will march, organizes the marchers into complementary groups, and decides the order in which each participant (e.g., marching band) will proceed down the avenue. Like any other parade organizer, an MVPD defines “what subjects and ideas are available for communication and consideration,”<sup>60</sup> and prioritizes their order of presentation to the audience. And, because every program an MVPD chooses to include in (or exclude from) its service “affects the message conveyed” by the MVPD, the Wholesale Proposal would require MVPDs to alter their expressive content.<sup>61</sup>

As noted above, the ability of an MVPD to engage in this form of expression (i.e., editorial discretion) is the primary difference between an MVPD service and the “broadband Internet access service” mandated by the Commission’s net neutrality rules — the latter being a service the FCC

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<sup>57</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. at 568.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 569.

<sup>60</sup> *Id.* at 568.

<sup>61</sup> *Id.* at 572-73.

deems analogous to marching from here to there merely to reach a destination. The Wholesale Proposal would destroy this distinction and MVPDs' right to exercise editorial discretion by compelling them to relinquish their unfettered control over the subjects and ideas that are available for consideration when subscribers use their services and the order in which their content is presented to viewers.

To the extent the Court's discussion of the distinction between *Hurley* and *Turner I* is directed at the *expressive character* of MVPD speech, it is dicta.<sup>62</sup> The distinction the Court drew between parades and the MVPD speech at issue in *Turner I* was decisional only with respect to the different *results* the Court reached despite the fact that the character of the expression at issue was directly analogous. *Hurley's* discussion of *Turner I* suggests that regulations compelling MVPD speech might be more easily justified than regulations governing participation in parades, but it would be a bridge too far to posit that *Hurley* means an MVPD's decisions regarding the content it chooses to display and the way it chooses to present that content have no expressive characteristics that merit more than rational basis or *Central Hudson* review under the First Amendment absent the existence of some other "special characteristic." Otherwise the Court's opinion in *Hurley* would have effectively overruled *Turner I* rather than distinguished it.

Even to the extent *Hurley* suggests that MVPDs are entitled to less rigorous First Amendment protection than parade organizers, the salience of the Court's distinction has been weakened by subsequent events. When distinguishing *Turner I*, the Court noted that, unlike the parade organizers in *Hurley*, local communities had traditionally given cable operators a "monopolistic opportunity to shut out some speakers" through exclusive franchises, which is the critical fact that gave rise to the government's interest in "allow[ing] for the survival of broadcasters" through must carry regulations.<sup>63</sup> According to the Court, the government's interest in *Turner I* "was not the alteration

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<sup>62</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. at 576-78.

<sup>63</sup> *Id.* at 577.

of speech, but the survival of speakers,” an interest the Court considered sufficiently “compelling, or at least important,” to address “the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny.”<sup>64</sup>

Competition with cable was the “exception rather than the rule”<sup>65</sup> when *Hurley* was decided in 1995, but today competition among MVPDs is the rule rather than the exception. Within a few years of the *Hurley* decision, the government implemented multiple policies to promote competition with cable operators, including the adoption of a statutory prohibition on granting exclusive cable franchises (in the 1992 Cable Act),<sup>66</sup> the authorization of satellite television services that were launched in 1994 (DIRECTV) and 1996 (DISH Network), and the elimination (in the Telecommunications Act of 1996) of a prohibition on the provision of cable service by incumbent telephone companies. Though these efforts took time to bear fruit, they yielded a ripe crop by 2015, when the FCC adopted a rebuttable presumption that cable operators are subject to effective competition on a nationwide basis due to market changes over the last twenty years.<sup>67</sup> Indeed, the level of competition in the video marketplace has increased so dramatically that, in 2014, the FCC began modifying its rules to prevent broadcast TV stations from exercising “undue bargaining leverage”<sup>68</sup> over MVPDs.<sup>69</sup> The monopolistic behavior of cable operators that Congress once feared was a threat to the survival of broadcast television, and on which the Court relied to distinguish *Hurley* from *Turner I*, no longer exists.

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<sup>64</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995).

<sup>65</sup> Amendment to the Commission’s Rules Concerning Effective Competition, 30 FCC Rcd. 6576, at ¶ 3 (2015) [hereinafter *Cable Effective Competition Order*].

<sup>66</sup> 47 U.S.C. § 541(a)(1) (revised in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460).

<sup>67</sup> *Cable Effective Competition Order* at ¶ 6.

<sup>68</sup> FCC Takes Action to Improve Retransmission Consent Process, 2014 WL 1284555, at \*1 (OHMSV Mar. 31, 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-326347A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-326347A1.pdf).

<sup>69</sup> Amendment of the Commission’s Rules Related to Retransmission Consent, 29 FCC Rcd. 3351, 3357-58, ¶¶ 9-10 (2014).

Like the parade organizers in *Hurley*, in this proceeding “there is no assertion comparable to the [*Turner I*] claim that some speakers will be *destroyed* in the absence of the challenged law” (i.e., the Wholesale Proposal).<sup>70</sup> According to the FCC’s own findings, cable operators are no longer the only video “parade” in town.

Finally, the Wholesale Proposal also violates MVPDs’ right to exercise their liberty of circulation under the Press Clause.<sup>71</sup> “The free press clause protects not only the words which appear on a newspaper’s pages, but its printing and circulation as well.”<sup>72</sup> There is a plethora of Supreme Court cases applying strict scrutiny to invalidate laws that violated the liberty of circulation, including: a city ordinance that gave a mayor unfettered discretion to deny applications to place news racks on public property, *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750 (1988); a city ordinance prohibiting the dissemination of circulars, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); and a tax specifically targeting newspapers, *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936). Circulation gives MVPDs the right to determine what programs to include in their services, and “[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”<sup>73</sup> The Wholesale Proposal would infringe that right by prohibiting MVPDs from controlling the packaging and presentation of their own services.<sup>74</sup>

### The Wholesale Proposal Would Compel Speech

As noted above, the NPRM appears to concede that the Wholesale Proposal would compel MVPDs to speak — a concession that is undoubtedly correct.

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<sup>70</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995) (emphasis added).

<sup>71</sup> See Fred Campbell, *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 Neb. L. Rev. 559, 583-94 (2016).

<sup>72</sup> *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000).

<sup>73</sup> *Ex parte Jackson*, 96 U.S. 727, 728 (1877).

<sup>74</sup> See DSTAC Final Report at 316 (describing the purpose of the Wholesale Proposal as prohibiting MVPDs from controlling the services they provide).

The Commissions errs, however, in its assumption that the Wholesale Proposal is commercial speech entitled to the more lenient standard of First Amendment review for compelled speech that was applied in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and its progeny, including the D.C. Circuit Court of Appeals en banc decision in *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014). The NPRM suggests that federal courts apply the *Zauderer* standard to any government regulation that compels the disclosure of “purely factual and uncontroversial” information irrespective of the purpose for or the context within which the disclosures are mandated.<sup>75</sup>

But the D.C. Circuit clarified just last year that *American Meat Institute* stands for the more limited proposition that *Zauderer* applies to disclosure regulations when the interest at stake sweeps more broadly than the government’s ordinary interest in preventing consumer deception.<sup>76</sup> In *Nat’l Ass’n of Manufacturers v. SEC*, 800 F.3d 518, 523 (D.C. Cir. 2015), the court held that *Zauderer* and its progeny apply *only* when the government-compelled speech at issue involves “voluntary commercial advertising.” The court stated that “‘outside that context’ (commercial advertising) the ‘general rule’ is ‘that the speaker has the right to tailor the speech’ and that this First Amendment right ‘applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.’”<sup>77</sup>

It should be obvious that an FCC rule compelling MVPDs to publish their proprietary information in a standardized, machine-readable format for the benefit of their competitors is neither “voluntary” nor is it “advertising.” Because *Zauderer* does not “reach[] compelled disclosures that

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<sup>75</sup> See NPRM at ¶ 45.

<sup>76</sup> *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”).

<sup>77</sup> *Id.* (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)).

are unconnected to advertising or product labeling *at the point of sale*,<sup>78</sup> the *Zauderer* standard would be inapplicable to the Wholesale Proposal in the D.C. Circuit.

The Wholesale Proposal Compels More than Mere Consumer Disclosures

Even if *Zauderer* were not limited to voluntary advertising, a more rigorous standard would apply to the Wholesale Proposal because it would compel MVPD speech for a purpose that goes beyond informing consumers about MVPDs' own services.<sup>79</sup> There is an important distinction, which appears to be recognized in all Federal Courts of Appeal applying *Zauderer*,<sup>80</sup> between government disclosure requirements aimed at informing consumers about a company's own products or services and disclosure requirements aimed at helping a company's competitors.<sup>81</sup> The Second Circuit Court of Appeals recently applied this distinction in *Safelite Grp., Inc. v. Jepsen*, which addressed a law prohibiting insurance companies and claim administrators from mentioning their affiliated repair companies unless they also name a competitor.<sup>82</sup> The court held that forcing insurance companies and claim administrators to "choose between silence about the products and services of their affiliates or give a (random) free advertisement for a competitor . . . is a regulation of content going beyond disclosure about the product or services offered by the would-be speaker."<sup>83</sup> The court noted that, because the requirement deters the speaker from mentioning any repair facilities at all, it "thereby deters helpful disclosure to consumers," which "does more to inhibit First Amendment values than to advance them."<sup>84</sup>

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<sup>78</sup> Nat'l Ass'n of Manufacturers v. SEC, 800 F.3d 518, 521-22 (D.C. Cir. 2015) (emphasis added).

<sup>79</sup> *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014).

<sup>80</sup> *See id.* at 264-65 ("But all of our case law applying *Zauderer* review to factual, commercial disclosure— indeed, as far as we know, all federal cases applying *Zauderer* in that context—has dealt with disclosure requirements about a company's own products or services.").

<sup>81</sup> *See, e.g., id.* at 263-64 (2d Cir. 2014).

<sup>82</sup> *Id.* at 260.

<sup>83</sup> *Id.* at 264.

<sup>84</sup> *Id.* at 264.

The disclosure requirements in the Wholesale Proposal similarly go beyond informing consumers about MVPDs services. The Proposal’s “information flow” disclosures are not limited to assuring that viewers know which programs an MVPD offers and on which channels it offers them; that information is already provided by MVPDs through their point-of-sale disclosures and affiliated programming guides. The sole purpose of the Proposal’s disclosure is to give third-parties the ability to alter the services MVPDs actually offer so that unaffiliated companies can better compete with MVPDs for the attention of viewers in the video marketplace — “a very serious deterrent to [MVPDs’] commercial speech” that is inconsistent with the Court’s reasoning in *Zauderer* under any reasonable interpretation of its scope.<sup>85</sup> Similar to the disclosure requirement in *Safelite Grp., Inc. v. Jepsen*, the Wholesale Proposal would deter MVPDs from investing in providing their own programming guides, apps, and other interactive media, which would do more to inhibit First Amendment values than advance them.

### The Wholesale Proposal Would Compel MVPDs to Subsidize the Speech of Others

To the extent the Wholesale Proposal would not compel MVPDs to speak directly, it would still require MVPDs to subsidize the speech of others. As noted above, the functionality included in an MVPD’s service goes well beyond the bare transmission of video content. MVPDs aggregate content into fully integrated packages and choose how to present those packages through the exercise of editorial discretion. The exercise of this editorial discretion includes the production of video and other content by MVPDs themselves as well as the negotiation of licenses to display content subject to copyrights held by third-parties, all of which entails considerable expense on the part of MVPDs. In addition to royalties and advertising revenue splits, MVPDs’ expenses include the transaction costs of negotiating content licenses, which typically define a program’s “channel position, tier placement, acceptable advertising, scope of distribution permitted, security require-

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<sup>85</sup> *Safelite Grp., Inc. v. Jepsen*, 764 F.3d at 264.

ments and consistent presentation of branded content.”<sup>86</sup> The costs of producing content, aggregating third-party content rights, and presenting the resulting package that comprises an MVPD’s service accounts for a significant proportion of their overall expenses.

The Wholesale Proposal would force MVPDs to subsidize unaffiliated companies by permitting third-parties to enjoy a portion of the benefits of these expenditures by MVPDs at a government-regulated rate of zero. It would also “impose costs and obligations” on content providers<sup>87</sup> and transfer a portion of the value of content providers’ copyrights to unaffiliated third-parties by interfering with copyright holders’ ability to control the distribution and presentation of their content, including their ability to realize or share in all advertising revenue generated by their content.<sup>88</sup>

### Strict Scrutiny Applies

The NPRM suggests that, if the *Zauderer* standard does not apply, the Wholesale Proposal would be subject to the intermediate scrutiny criteria for “commercial speech” set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).<sup>89</sup> Strict scrutiny is the appropriate standard, however, because the Wholesale Proposal would impose content- and speaker-based burdens and/or compulsions on MVPDs’ exercise of editorial discretion, a form of speech that is not “commercial” within the meaning of *Central Hudson*.

#### The Exercise of Editorial Discretion Is Not “Commercial Speech”

As a threshold matter, the *Central Hudson* criteria for reviewing “commercial speech” is inapplicable to MVPDs. Though MVPDs are typically commercial entities, the commercial aspects of an MVPD’s service are “inextricably intertwined with otherwise fully protected speech.”<sup>90</sup> Like

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<sup>86</sup> DSTAC Final Report at p. 304.

<sup>87</sup> DSTAC Final Report at p. 312.

<sup>88</sup> *Id.* at p. 313.

<sup>89</sup> See NPRM at ¶ 45.

<sup>90</sup> *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (U.S. 1988).

newspapers and other members of the press who publish and disseminate mass media communications, MVPDs “are in the business of expression,”<sup>91</sup> and “the editorial function itself is an aspect of ‘speech’”<sup>92</sup> that is afforded greater First Amendment deference than “speech proposing a commercial transaction.”<sup>93</sup> If restrictions on MVPDs’ editorial discretion were mere “commercial speech” within the meaning of *Central Hudson* (decided in 1980), the Court need not have bothered with its analysis of cable operators’ editorial rights before applying intermediate scrutiny in *Turner I* (decided in 1994). The Court could simply have cited *Central Hudson* and been done with it.

#### Strict Scrutiny Applies to Per Se Restrictions on MVPDs’ Editorial Discretion

That does not mean, however, that the intermediate scrutiny applied in *Turner I* is ipso facto applicable to the Wholesale Proposal. Ordinarily, content- or speaker-based restrictions on speech are subject to strict First Amendment scrutiny whereas content- and speaker-neutral restrictions are subject to intermediate scrutiny. “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based,”<sup>94</sup> and laws that “restrict the speech of some elements of our society in order to enhance the relative voice of others” are speaker based.<sup>95</sup> “Deciding whether a particular regulation is content based or content neutral is not always a simple task,”<sup>96</sup> however, and not “all regulations distinguishing between speakers warrant strict scrutiny.”<sup>97</sup>

“But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger of abuse by the State,’ and so are always sub-

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<sup>91</sup> See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 761 (1988).

<sup>92</sup> *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

<sup>93</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980).

<sup>94</sup> *Turner I* at 643.

<sup>95</sup> *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

<sup>96</sup> *Turner I* at 642.

<sup>97</sup> *Id.* at 657.

ject to at least some degree of heightened First Amendment scrutiny.”<sup>98</sup> The Court has declared that “no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes,” for analyzing restrictions on MVPD speech under the First Amendment, especially given the “changes taking place in the law, the technology, and the industrial structure related to telecommunications.”<sup>99</sup>

At the same time, the Court has repeatedly “affirmed an essential proposition: The First Amendment protects the *editorial independence* of the press.”<sup>100</sup> The Court has thus subjected restrictions on the editorial discretion of the press to strict scrutiny *unless* intermediate scrutiny is justified by “some special characteristic of’ the particular medium being regulated.”<sup>101</sup>

As it subsequently noted in *Hurley*,<sup>102</sup> the Court was clear in *Turner I* that its decision to apply intermediate scrutiny to cable must carry regulations was justified by the “special characteristic” of state-sponsored monopoly market power that cable operators possessed in the 1990s.<sup>103</sup> In particular, the Court distinguished the application of intermediate scrutiny to cable operators in *Turner I* from the application of strict scrutiny to newspapers in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), even though “both may enjoy monopoly status in a given locale,” based on the

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<sup>98</sup> *Id.* at 640-41 (internal citations omitted) (quoting *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

<sup>99</sup> *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741-42 (1996).

<sup>100</sup> *Turner I* at 653.

<sup>101</sup> *See Id.* at 660-61 (quoting *Arkansas Writers’ Project, Inc.*, 481 U.S. at 228-29).

<sup>102</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995).

<sup>103</sup> *See, e.g., Agape Church, Inc. v. F.C.C.*, 738 F.3d 397, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“*Turner’s* conclusion was expressly based on the state of the marketplace in the early 1990s.”). Indeed, even under the application of intermediate scrutiny, “[o]nly one Justice believed the government could justify even the limited restriction on editorial discretion imposed by the must-carry rules without a finding of monopoly market power, whereas four Justices would have held that the facts regarding cable market power were insufficient to demonstrate that the must-carry rules were narrowly tailored.” Fred Campbell, *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 *Neb. L. Rev.* 559, 631 (2016) (internal footnote omitted) (citing *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 225, 229 (1997) (Breyer, J., concurring, O’Connor, J., dissenting)).

degree of control each could exercise over access to its respective medium.<sup>104</sup> The Court noted that a “daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications,” but a cable operator with a local monopoly could exercise “control over most (if not all) of the television programming” distributed to homes in a local community,<sup>105</sup> a problem that the potential demise of broadcast television threatened to exacerbate.

*Turner I*’s distinction between newspapers and cable operators has largely disappeared now that cable operators are presumed subject to effective competition on a nationwide basis.<sup>106</sup> In *Time Warner Cable*, the Second Circuit Court of Appeals acknowledged that “a day may well come” when “rapidly increasing competition in the video programming industry may undermine [the] conclusion in the not-too-distant future” that the cable medium should be subject to intermediate scrutiny.<sup>107</sup> The Second Circuit concluded that day had “not yet arrived” in all markets nationwide as of 2011, and thus that intermediate scrutiny was appropriate with respect to a cable regulation that “calls for a ‘case-by-case’ assessment of the anticompetitive effect of an MVPD’s purported discrimination against an unaffiliated network.”<sup>108</sup> In other words, the court concluded intermediate scrutiny remained applicable to MVPD regulations *that require market-by-market factual findings* because there was evidence sufficient to support a “reasonable judgment” that MVPDs can exercise monopoly market power in at least some geographic markets.<sup>109</sup> This limitation on the court’s holding in *Time Warner Cable* (correctly) implies that intermediate scrutiny is no longer applicable to

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<sup>104</sup> *Turner I*, 512 U.S. at 656. See also *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 145 (2d Cir. 2013) (“In conjunction with their local monopolies, cable operators exercised ‘bottleneck’ control, a power that allowed them to prevent certain programming networks from reaching consumers in particular geographic areas.”).

<sup>105</sup> *Turner I*, 512 U.S. at 656.

<sup>106</sup> *Cable Effective Competition Order* at 6577-78, ¶ 6.

<sup>107</sup> *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 155, 161 (2d Cir. 2013).

<sup>108</sup> *Id.* at 161.

<sup>109</sup> *Id.* at 161-64.

per se restrictions on MVPD speech. As D.C. Circuit Judge Kavanaugh recently noted, “A Supreme Court decision that says, in essence, ‘Because there is now a monopoly, this regulation is permissible’ does not mean ‘Even when there is no monopoly, this regulation is permissible.’”<sup>110</sup> Now that the FCC has adopted a presumption that MVPDs are subject to effective competition on an nationwide basis, the First Amendment’s essential protection for the independence of the press requires the application of strict scrutiny to per se restrictions on MVPDs’ exercise of editorial discretion.

#### The Wholesale Proposal Is Content-Based

Assuming, for sake of argument, that it is not essential to apply strict scrutiny to restrictions on the editorial discretion of the press in the absence of a “special characteristic,” strict scrutiny would still apply because the Wholesale Proposal is content-based. The government’s purpose is the controlling consideration when determining whether a regulation is content-based,<sup>111</sup> and here, one of the FCC’s “fundamental” purposes is the alteration of MVPD speech, i.e., that third-parties be allowed to substitute their own program guides and add “complementary features” to MVPD services.<sup>112</sup> It is axiomatic that a regulation is content-based when the government expresses a fundamental interest in altering the speech of the press.<sup>113</sup>

While the FCC describes its other reasons for the Wholesale Proposal largely in content-neutral terms, its seemingly neutral justifications are “highly artificial.”<sup>114</sup> The government cannot be allowed to avoid strict scrutiny merely by concocting ostensibly content-neutral purposes that are unreasonable on their face. Yet that is precisely what the FCC proposes to do here.

The FCC claims the Wholesale Proposal is “based on three fundamental points”: (1) the “market” for navigation devices is not competitive; (2) to enable such competition, it is “essential”

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<sup>110</sup> *Agape Church, Inc. v. FCC*, 738 F.3d 397, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

<sup>111</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>112</sup> NPRM at ¶ 12.

<sup>113</sup> *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995).

<sup>114</sup> *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 59 (D.D.C. 1993) (Williams, J., dissenting), vacated, 512 U.S. 622 (1994), and vacated sub nom. *Nat’l Interfaith Cable Coal., Inc. v. FCC*, 512 U.S. 1230 (1994).

that unaffiliated companies be given wholesale access to MVPD services<sup>115</sup>; and (3) to enable such competition, the FCC must prohibit MVPDs from exercising any control over wholesale access to their services.<sup>116</sup> As a threshold matter, however, all three points hinge on a single purpose — correcting the “harm” caused by an alleged lack of competition in the artificial market for navigation devices — a purpose that is fundamentally inconsistent with the FCC’s conclusion in 2015 that the market for MVPD services is effectively competitive on a nationwide basis.

To the extent there is effective competition among MVPD services, it is axiomatic that there must also be effective competition among navigation devices (the primary purpose of which is to provide access to MVPD services), because:

1. To the extent MVPDs serving a particular geographic market do not use the same navigation devices, consumers can choose from among *at least* as many different navigation devices as MVPD services;
2. To the extent 1 or more MVPDs serving a particular geographic market each provide consumers with the option of choosing among more than 1 navigation device, consumers’ choice of navigation devices (assuming the first proposition is true) will *exceed* their choice of MVPD service providers; and
3. To the extent navigation devices are already offered by third-parties, the degree of competition in the market for navigation devices will also be greater than in the market for MVPDs’ underlying services.

Given that propositions 1 and 2 are true for the *nationwide* satellite television providers (meaning there are *at least* 4 different navigation device options in every geographic market), and the third

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<sup>115</sup> The FCC euphemistically describes this point as “competition in the user interface and complementary features,” a euphemism that reveals a content-based purpose. NPRM at ¶ 12.

<sup>116</sup> The FCC euphemistically describes this point as “entities that build competitive navigation devices, including applications, need to be able to build those devices without seeking permission from MVPDs.” NPRM at ¶ 12.

proposition is also true, it would be absurd for the FCC to conclude that consumers have fewer choices with respect to navigation devices than they do with respect to competitive MVPD services.

Even if every MVPD offered only 1 navigation device, each navigation device was exactly the same, and there were no third-party navigation devices, the beneficial effects of competition in the artificial market for navigation devices would still be no less than in the market for MVPD services:

1. Companies who are involved in the development of navigation devices would still have the *same* opportunity to design, manufacture and market devices to 3 or more different MVPDs in virtually every geographic market (as of 2015, the FCC found that approximately 99.7 percent of homes in the U.S. have access to at least three MVPDs, and nearly 35 percent have access to at least four MVPDs<sup>117</sup>);
2. Competition in the market for MVPD services gives MVPDs the *same* incentives to differentiate their services by offering navigation devices to consumers at competitive prices and with competitive features as the incentives effective competition gives MVPDs to constrain the price and maintain the quality of their underlying services; and
3. As a result, the benefits to consumers of effective competition among MVPDs are the *same* for navigation devices as for MVPDs' underlying services.

Indeed, in its most recent video competition report, the FCC found that “MVPDs differentiate their services from their competitors’ services to compete, obtain new subscribers, and retain existing subscribers”<sup>118</sup> in a variety of ways, *including through the features available on MVPDs navigation devices*.<sup>119</sup> There simply is no reasonable basis for the FCC’s conclusion that restricting MVPD

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<sup>117</sup> *Cable Effective Competition Order* at ¶ 4.

<sup>118</sup> Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, 30 FCC Rcd. 3253 at ¶ 81 (2015) [hereinafter *16th Video Competition Report*].

<sup>119</sup> *See id.* at ¶ 82 (2015) (noting that MVPDs differentiate their services through navigation device features such as digital video recording (or “DVR”).

speech is necessary to remedy a market failure when the FCC has already concluded that MVPDs are effectively competitive — i.e., it is unreasonable to conclude that the level of competition in the artificial market for navigation devices is unrelated to the level of competition among the underlying MVPD services navigation devices are designed to access or that the state of the market for navigation devices presents any greater threat of harm to consumers than the state of the market for MVPDs’ underlying services.

Congress is of course free to enact a statutory provision aimed at creating an artificial market for navigation devices that is separate from the market for MVPDs’ underlying services, irrespective of whether the provision enhances consumer welfare,<sup>120</sup> but Congressional enactments cannot alter the courts’ First Amendment analysis. Specifically, if the creation of an artificial market coupled with a demand for “perfect” (or an otherwise unreasonable level of) competition in that artificial market were enough to justify the application of less-than-strict scrutiny to regulations that abridge the First Amendment rights of the press, the editorial independence of the press (and the application of strict scrutiny generally) would be effectively destroyed.<sup>121</sup> The government could easily regulate speech for objectively unreasonable (but ostensibly content-neutral) “purposes,” even when the government’s subjective interest is the suppression of particular content or viewpoints, because “perfect” competition is impossible to achieve outside the context of theoretical models. For example, if a municipality wanted to bypass the Court’s decision in *Hurley* to apply strict scrutiny to restrictions on parades, the municipality could simply assert that 365 days per year is insufficient to provide adequate competitive opportunities for individual parade organizers to exercise editorial discretion for marches down Main Street, and thus, that intermediate scrutiny is applicable to restrictions on parade organizers who wish to use the town’s primary thoroughfare.

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<sup>120</sup> See *Gen. Instrument Corp. v. F.C.C.*, 213 F.3d 724, 732 at n. 7 (D.C. Cir. 2000) (questioning whether creation of a separate market for navigation devices enhances consumer welfare).

<sup>121</sup> This would be true even if the government’s purpose with respect to navigation devices in section 549 and/or this particular proceeding was (or is) subjectively unrelated to content.

Given the inherent difficulty in determining the government’s subjective intent, a regulation that abridges speech for facially content-neutral purposes is nevertheless subject to strict scrutiny if those purposes are objectively unreasonable.<sup>122</sup> The FCC’s desire to promote an unspecified level of additional competition in a market that is already effectively competitive is just such a purpose.

But even if the stated purpose of the Wholesale Proposal could be considered reasonable despite the FCC’s *Cable Effective Competition Order*, the Proposal would be subject to strict scrutiny because it threatens to produce a net decrease in the amount of available speech (and, ironically, discourage competition in the market for MVPDs’ underlying services).<sup>123</sup> The Wholesale Proposal does not “address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content,” and the NPRM indicates it is unclear whether the FCC has “the authority and enforcement mechanisms to address such concerns.”<sup>124</sup> Yet, as the FCC acknowledges every year in its video competition report, many content providers rely on advertising splits and licensing fees obtained from MVPDs as their primary sources of revenue.<sup>125</sup> To the extent the Wholesale Proposal prevents content providers from controlling their advertising revenue and the presentation of their programming through their licensing agreements with MVPDs and thus reduces their ability to generate revenue (or reduces their certainty in either respect), the Proposal would give content providers incentives to raise their licensing fees to recover lost (or potentially lost) advertising revenue and/or cut their costs by reducing the amount or quality of the programming they offer.

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<sup>122</sup> See, e.g., *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 161-64 (2d Cir. 2013) (analyzing whether the FCC had made a “reasonable judgment” that MVPDs can exercise monopoly market power).

<sup>123</sup> Cf. *Turner I* at 647 (noting that must carry regulations “do not produce any net decrease in the amount of available speech.”).

<sup>124</sup> NPRM at ¶ 80.

<sup>125</sup> See *16th Video Competition Report* at ¶ 8.

This is not a speculative concern: It is a fate that has already befallen newspapers and the journalism they produce in the Internet era. The shift to Internet consumption of printed content, in combination with other factors, has already resulted in a corresponding shift in advertising revenues from traditional (vertically integrated) newspaper and magazine publishers to (horizontal) search engines and digital content aggregators (e.g., Google), leaving many newspapers “in perilous financial straits.”<sup>126</sup> Newspapers have responded by reducing costs, including by laying off journalists, closing news bureaus here and abroad, cutting back on news coverage, and investing in less investigative journalism.<sup>127</sup>

The shift in advertising revenue from newspapers to Internet companies has not, however, led to a corresponding increase in the quantity of original journalism Internet companies provide or the quality of journalism as a whole. “[D]espite its increasing prominence as a place where people access news and advertisers spend money, the Internet remains a distribution medium, not a source of original news content,” and “it is unclear whether the Internet will be sufficiently profitable to invest in local investigative journalism.”<sup>128</sup>

There is nothing unconstitutional about the woes of newspapers or the decline in journalism caused by the market’s shift from the consumption of textual news printed on paper to digital print on the Internet. But a government effort to replicate this result for video content through forced access to MVPDs’ services via “software” — e.g., ordinary web access and search engine functionality like that which has undermined traditional journalism — is a constitutional issue that deserves strict scrutiny.

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<sup>126</sup> Christine A. Varney, *Dynamic Competition in the Newspaper Industry*, 199 *Antitrust Counselor* 1 (2011).

<sup>127</sup> See Maurice E. Stucke & Allen P. Grunes, *Toward A Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector’s Unique Role in Our Democracy*, 42 *Conn. L. Rev.* 101, 110 (2009).

<sup>128</sup> See *id.*

## The Wholesale Proposal Is Speaker-Based

Even if a court were to conclude that the Wholesale Proposal is content-neutral, strict scrutiny would apply because the Proposal “single[s] out certain members of the press for disfavored treatment”<sup>129</sup> in a manner that “carries the inherent risk of undermining First Amendment interests” and threatens to “diminish the free flow of information and ideas.”<sup>130</sup>

There is no question that the Wholesale Proposal disfavors MVPDs by requiring them to offer wholesale access to their underlying video content and applications while exempting other participants in the video marketplace from similar treatment, including online video distributors who “increasingly compete” with MVPD services (e.g., Netflix).<sup>131</sup> Though the Supreme Court rejected the “automatic” application of strict scrutiny to such regulations in *Turner I*, it acknowledged “[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.”<sup>132</sup> More recently, in *Citizens United*, the Court stated that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers.”<sup>133</sup> Though MVPDs’ exercise of editorial discretion with respect to political speech could, in theory, be distinguished from their choices with respect to entertainment programming, the Supreme Court has “long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”<sup>134</sup> *Citizens United* thus indicates that targeted restrictions on the editorial discretion of the press are presumptively invalid.

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<sup>129</sup> *Turner I*, 512 U.S. at 653.

<sup>130</sup> *Id.* at 661.

<sup>131</sup> *16th Video Competition Report* at ¶ 83.

<sup>132</sup> *Turner I*, 512 U.S. at 649, 659.

<sup>133</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 315 (2010).

<sup>134</sup> *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011).

The discriminatory regulation envisioned by the Wholesale Proposal would be subject to strict scrutiny even if the per se rule for political speech announced in *Citizens United* is inapplicable. In its analysis of this issue in *Turner I*, which singled out a select portion of the press for imposition of a wholesale burden (must carry) that is less invasive than the Wholesale Proposal, the Court applied intermediate scrutiny (1) due to the “special characteristics” of the disfavored medium (i.e., cable operators’ historical monopoly power over programming), and (2) because there was no risk that must carry would undermine First Amendment interests.<sup>135</sup> As noted above, however, (1) this special characteristic no longer exists, and (2) the impact of the Internet on traditional print journalism indicates there is a substantial risk that the Wholesale Proposal would undermine First Amendment interests in the context of video content as well.

The Wholesale Proposal Fails Under Strict or Intermediate Scrutiny

Because the Wholesale Proposal would fail to pass constitutional muster under either strict or intermediate scrutiny, the following analysis specifically applies the criteria for intermediate scrutiny only, a level of scrutiny that requires the FCC to demonstrate that its Proposal would in fact advance substantial government interests in a direct and material way without burdening substantially more speech than necessary.<sup>136</sup>

First, as noted above, the recited harms to competition in the artificial market for navigation devices are not “real,” let alone substantial.<sup>137</sup> The FCC’s claim that the artificial market for navigation devices is not competitive is simply not credible given its 2015 conclusion that the MVPD market is presumptively competitive nationwide. The fact that the market for navigation devices might not be perfectly competitive is insufficient to demonstrate harm justifying the elimination of editorial discretion by MVPDs on a nationwide basis.

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<sup>135</sup> *Turner I*, 512 U.S. at 649, 661.

<sup>136</sup> *Id.* at 664.

<sup>137</sup> *Turner I*, 512 U.S. at 664.

