

1 Honor.

2 THE COURT: My court reporter has to have it,
3 too. Okay.

4 MR. VERRILLI: On behalf of the commercial
5 broadcasters, I will try simply to provide further focused
6 responses to the specific questions that your Honor has
7 addressed to our side.

8 With respect to the need for discovery, we
9 did say on the very first page of our Rule 56(f) motion
10 that the problem that we faced was twofold: first, that
11 the plaintiffs's summary judgment motion had preceded the
12 date on which we would have filed the motion to dismiss
13 and, therefore, basically cut off our right to do so. And
14 we thought that was wrong.

15 And then we made a second argument, which was
16 that in any event -- and additionally, the plaintiffs'
17 claim could not proceed unless we had a discovery
18 opportunity to test their claims.

19 But that -- we tried to be very clear about
20 that in our papers, anticipating that we might face an
21 argument such as the one that the plaintiffs made here
22 today, and we said very clearly on the very first page of
23 our papers that we believe this case ought to be dismissed
24 on the pleadings, because their construction of the statute
25 was not a fair one, and that this -- and that the SHVIA

1 statute did not impose any obligation that triggered First
2 Amendment review of all.

3 I hope that clarifies that point for your
4 Honor.

5 THE COURT: But I think we agree that this is
6 not an applied challenge, this is a facial challenge to the
7 statute.

8 MR. VERRILLI: We are in complete agreement
9 with your Honor's assessment about that.

10 I would like now to focus on your Honor's
11 question about what the appropriate standard of review is.

12 THE COURT: Please.

13 MR. VERRILLI: The appropriate standard of
14 review is rational basis. The Supreme Court decisions that
15 make that clear are Russ against Sullivan, and Finley. We
16 have cited both of those in our papers.

17 I would like, if I could, to direct the
18 Court's attention to the specific principle in Finley and
19 Russ that we believe controls that question of standard of
20 review, and it is -- here is what the Supreme Court said:

21 There is a basic difference between
22 direct state interference with a protected
23 activity and state encouragement of an
24 alternative activity consummate with legislative
25 policy.

1 In Finley, that's 524 U.S. at 588; and Russ, that's 500
2 U.S. at 193.

3 That's what the case is all about. The basic
4 difference, the SHVIA statute does not interfere with any
5 constitutionally protected activity. It is a choice that
6 is there for the plaintiffs to accept or reject.

7 They have exactly the same ability now as
8 they did before this statute was passed, to decide what to
9 carry and to decide what not to carry, under the normal
10 rules of the marketplace. They are no worse off with the
11 SHVIA statute than they were without it.

12 And there is, I think, a very straightforward
13 way to prove that, your Honor. In our motion to dismiss we
14 made an argument, which I do not believe the plaintiffs
15 responded to in their paper, and it's this: If the
16 plaintiffs were to succeed on their constitutional argument
17 and the SHVIA statute were invalidated, that would wipe out
18 the license that gives them the ability to carry any local
19 broadcaster for free.

20 So, there, the -- if they win, they lose. If
21 they win, they have no right to carry anyone for free. So,
22 there is no sense in which they can be better off by
23 invalidating the statute.

24 And the flip side of that coin is there is no
25 sense in which they are worse off by the existence of the

1 statute. It's as simple as that. That proves why the
2 First Amendment isn't even implicated here, because there
3 is no interference with their activity.

4 The only --

5 THE COURT: What is your view of their
6 argument concerning editorial judgment?

7 Is the selection of channels an act of
8 exercise of editorial judgment?

9 They're saying, like a newspaper editor
10 decides which articles to run, that clearly is activity
11 that cannot be regulated by the government. The government
12 can't tell the newspaper what to put on the front page.

13 And what's being done here is the government
14 is telling these satellite broadcasters what to put on
15 their array of channels, on their menu, that they're
16 privileged to decide to include or not include, and that
17 the advantage being granted here is burdened by this
18 obligation to carry the Bowling Channel or the Golf
19 Channel, and they may not want to carry it.

20 MR. VERRILLI: That's the nub of the case at
21 the motion to dismiss stage, and here is our answer: that
22 that is simply a mischaracterization of this statute.

23 If the plaintiffs -- if a satellite operator
24 goes out into the marketplace and negotiates a deal with
25 Channel 7 and pays Channel 7 for the right to carry it on

1 the satellite, if they do that, there is no obligation to
2 carry any other channel that comes with it. They're free
3 to do that.

4 There is no interference with their editorial
5 discretion. They can choose whatever they want. They can
6 choose to not carry whatever they want.

7 What -- the trigger here is when they decide
8 that they want to carry Channel 7 for free, and without
9 getting permission, it's only when they want Channel 7 for
10 free, that there are any other carriage requirements. It's
11 the difference between taking it for free and getting it in
12 the marketplace.

13 THE COURT: Is the Copyright Act an obstacle
14 to their exercise of judgment, or is it the law which
15 grants -- which affords writers and others the right to
16 protect their work and to require that individuals who want
17 to exploit it, pay for it?

18 MR. VERRILLI: Your Honor has said it
19 perfectly. It is the latter. It is a right that is both a
20 property right, protecting the interest of those who engage
21 in creative expression, and it's an incentive to create
22 more expression, because one can get paid for it, and it
23 can't just be taken by somebody else for free.

24 Now, what Congress has done here is make an
25 exception to that general rule that benefits the

1 plaintiffs. It benefits them. Congress said, "Yes, you
2 can take something for free that under any other
3 circumstance you would have to pay for, and that there is
4 no conceivable First Amendment right to take for free."

5 That's what Congress has said here to them.
6 But it has said, "You've got to take it on the package
7 terms, because otherwise you're going to inflict a very
8 serious harm to a policy that is very important to the
9 structure of the national telecommunications, national
10 communications policy. If you can cherry pick, then you
11 will harm the stations not carried, and that will
12 principally hurt those citizens."

13 And if I could actually, rather than put it
14 in my own words, if I could just put it in the Congress'
15 words, from the conference report -- and this is at page
16 101:

17 Providing the proposed license on a
18 market by market basis meets both goals,
19 competition and communications policy, by
20 preventing satellite carriers from choosing to
21 carry only certain stations and effectively
22 preventing many other local broadcasters from
23 reaching potential viewers in their service
24 areas.

25 Now, in the Senate bill that went to

1 conference and became this law, there was a Section 3 which
2 explained the same exact policy. And here is what Section
3 says:

4 The purpose of this Act is to promote
5 competition in the provision of multichannel
6 video services, while protecting the availability
7 of free local over-the-air broadcasting,
8 particularly for the 22 percent of American
9 television households that do not subscribe to
10 any multichannel video programming service.

11 THE COURT: Is that similar to what was said
12 in Turner about the reason for the "must carry"
13 requirement?

14 MR. VERRILLI: Yes, your Honor. But in fact,
15 what this statute seeks to do is to make sure that the
16 objective of that "must carry" statute in Turner is not
17 eroded as the satellite industry encroaches on the cable
18 industry's customers and takes more of them away.

19 THE COURT: How is this case different from
20 Turner, then?

21 MR. VERRILLI: It's easier than Turner. It's
22 way easier than Turner, because that's the Alice in
23 Wonderland quality of the plaintiffs' case, your Honor.
24 In Turner it was a mandatory obligation on cable operators:
25 "You must carry all these broadcast stations. You must."

1 The Supreme Court rejected every argument the
2 plaintiff made there, says Tornillo doesn't apply. The
3 speaker preference argument that your Honor identified
4 earlier doesn't apply. None of those arguments apply. But
5 because this is a mandatory obligation, we give it
6 intermediate First Amendment scrutiny and uphold it.

7 Here, what the Congress has done is said,
8 "Well, we are not going to make it mandatory. We are going
9 to structure this so it's an option. We are going to
10 encourage you to do it. Sure, we hope you do, but it's
11 your call."

12 It's the plaintiff's call whether they do
13 this. It is something that is -- it was -- Turner was
14 mandatory and triggered First Amendment review. This is
15 optional, and it does not.

16 The idea that this would be subject to
17 stricter scrutiny than the statute in Turner turns the
18 world upside down. That's our basic point with respect to
19 that.

20 Then, if I might make one point on the
21 Unconstitutional Condition Doctrine which your Honor
22 raised, which is important here?

23 THE COURT: Yes.

24 MR. VERRILLI: The law, we think, is clear.
25 Again, it's Russ, it's the Regan case, it's a number of

1 other cases, that government can offer a benefit and can
2 impose conditions on the benefit, so long as the conditions
3 are defining the scope of the benefit, to make sure that it
4 furthers the policy Congress wants to further.

5 THE COURT: Well, can Congress punish a group
6 of individuals by a statute it creates in conditioning a
7 grant of government privileges?

8 MR. VERRILLI: No, your Honor.

9 THE COURT: Is that what's being done here?

10 MR. VERRILLI: It's not even close. And the
11 idea here, your Honor, if I might draw on something that
12 may -- I'm sure is familiar to your Honor, the Canons of
13 Judicial Ethics prevent federal judges from holding
14 positions in political parties. They prevent federal
15 judges from engaging in public political activities.

16 THE COURT: Thankfully.

17 MR. VERRILLI: Well, Congress couldn't pass a
18 statute depriving citizens of those rights. But it can,
19 there can be laws that say if you're going to participate
20 in a particular federal function of great importance, these
21 restrictions are necessary for that function to be carried
22 out properly.

23 This is the exact analogy here. What
24 Congress has said is:

25 We want to create a license situation

1 here, a license opportunity, but we don't want to
2 do it in a way that destroys an important federal
3 policy and harms the 22 percent of households
4 that don't have any cable or satellite paid
5 programming. So, we are going to structure the
6 benefit with conditions that define its scope,
7 and insure that it is only used to serve the
8 policy we want it to serve.

9 THE COURT: All right.

10 MR. VERRILLI: That means it's not an
11 unconstitutional condition.

12 THE COURT: I don't think I need you to
13 address the taking argument.

14 MR. VERRILLI: Thank you, your Honor.

15 THE COURT: Thank you.

16 ARGUMENT BY INTERVENOR PUBLIC BROADCASTERS

17 MR. LYNCH: Good morning, your Honor. My
18 name is Mark Lynch. I'm here for the public broadcasters.

19 For the reasons that my colleagues have set
20 forth, this is not a First Amendment case, because the
21 satellite carriers never had a First Amendment right to
22 carry for free anybody's broadcast programming.

23 And this statute gives a benefit, and for the
24 reasons Mr. Verrilli explained, the condition that's
25 imposed on that benefit is not an unconstitutional

1 condition. So, I agree completely with the people that
2 appeared before me, that this is not a First Amendment
3 case.

4 But if, if you decide that some First
5 Amendment scrutiny is applicable here, we would submit that
6 it's rational basis under Red Lion.

7 Now, the reason for that is as set forth in
8 the complaint, there are only a limited number of orbital
9 positions available for satellite broadcasters. Under
10 these circumstances, both the Federal Communications
11 Commission and the D.C. Circuit have recognized that the
12 demand for orbital positions exceeds the capacity.

13 Now, when you've got a situation where there
14 are more people that want to speak than can speak, when
15 there are more people that want to use a scarce resource
16 than can -- than the resource is available, as the Supreme
17 Court held in Red Lion, you have to adjust the First
18 Amendment analysis.

19 Where there is scarcity, where there is a
20 limited availability to speak, it's idle to posit that
21 everyone has an unbridgeable right to speak. Now,
22 consequently, Red Lion and cases following it have
23 established that in broadcasting, a relaxed standard of
24 First Amendment scrutiny applies.

25 Now, my colleagues on the other side of the

1 aisle here will cite concurrence and dissent and law review
2 articles and all manner of materials to suggest to you that
3 Red Lion has been heavily criticized. But the fact of
4 matter for the trial court is, Red Lion is still good law.
5 The Supreme Court affirmed it as recently as the Turner 1
6 case.

7 THE COURT: In Turner 1, they discussed --

8 MR. LYNCH: They discussed Red Lion and they
9 said, specifically:

10 We understand that our scarcity rationale
11 has been criticized, but we see no reason to
12 depart from it at this time as the basis for our
13 broadcasting jurisprudence.

14 So, it is the law of the land today.

15 Now, the D.C. Circuit recognized that in the
16 Time-Warner case, which involves satellite broadcasting.
17 The issue there was whether the four to seven percent
18 set-aside violated the First Amendment. And in that case,
19 the D.C. Circuit held that the Red Lion rationale applies
20 to satellite broadcasting, and that a relaxed level of
21 scrutiny under the First Amendment is appropriate.

22 Now, you may ask yourself, what does "relaxed
23 level of scrutiny" mean?

24 That question is directly answered in
25 National Citizens Committee for Broadcasting, the

1 Supreme Court case. And that case makes clear that under
2 this relaxed standard of Red Lion, regulations of
3 broadcasting will be upheld if they are a reasonable means
4 of promoting the public interest in diversified mass
5 communication.

6 Now, clearly, the SHVIA statute satisfies
7 that, that standard. The reason for the carriage
8 requirements under SHVIA is the same as the reason for the
9 carriage requirements under the "must carry" regime that
10 was upheld in Turner, and that is to preserve the viability
11 of our system of free over-the-air broadcasting that -- and
12 making sure that that system is available to everyone, not
13 just the people who subscribe to cable, not just the people
14 who subscribe to satellite, but also people like me, who
15 still rely on a plain old television antenna to get the
16 channels into their homes.

17 And the fear is that if you -- if, as cable
18 and satellite become more dominant, they will attract
19 advertising in the case of commerce stations, they will
20 attract contributors in the case of noncommercial stations,
21 and those stations that are stuck on the over-the-air mode
22 will -- their sources of revenue will dry up and they will
23 die.

24 And that goal, that policy goal of
25 maintaining over-the-air broadcasting, free over-the-air

1 broadcasting, was found sufficient in Turner and should be
2 easily sufficient in this case.

3 THE COURT: All right.

4 MR. LYNCH: The final point I would like to
5 make, they complain that this is an intrusion on their
6 editorial discretion.

7 Well, as Mr. Verrilli and Mr. Lobue pointed
8 out, they have a choice. They can walk right away from
9 this program. They don't have to come into this in the
10 first place.

11 But even when they come into it, the
12 imposition on their editorial discretion is much, much less
13 intrusive than what was upheld in Red Lion, where you had
14 the reply time to someone who is attacked. You had to
15 provide equal time to a political candidate who was
16 endorsed.

17 In the CBS case which followed Red Lion,
18 networks had to make way for federal candidates.
19 And then in Turner itself you had to carry all of the
20 stations, and you had no choice in the matter.

21 Here, you have a choice, and the
22 impositions -- if they can be construed as impositions at
23 all -- are much less intrusive than in these other cases
24 that have been sustained under the Red Lion standard.

25 MR. LYNCH: Thank you.

1 THE COURT: Thank you.

2 Well, Mr. Cooper, it's been three against
3 one. I'm ready to hear from you now.

4 MR. COOPER: Thank you, Judge Lee. And may
5 it please the Court.

6 ARGUMENT BY THE PLAINTIFFS

7 MR. COOPER: Your Honor, I do have quite a
8 bit of ground to cover, and I will start, however, your
9 Honor, where you started, with the issue of the power under
10 the Copyright Clause to authorize the provisions at issue
11 here.

12 Put aside for a moment the First Amendment,
13 and let's focus on the copyright power. Your Honor, this
14 is not a legitimate exercise of the Copyright Clause power
15 that Congress has.

16 That was the only power that Congress relied
17 upon to exercise this. This is a copyright license, after
18 all, your Honor, that is at issue, a statutory copyright
19 license, burdened, fettered, with the "must carry"
20 condition.

21 But your Honor, the defendants cannot cite to
22 a single precedent for Congress conditioning the use of a
23 copyrighted work on the forced display of another
24 copyrighted work. And that is what is at issue here.

25 If we select any station, Channel 4,