

isolated carriage of particularized programming does not translate into a willingness on the part of cable operators to carry broadcasters' multicast programming as a matter of course, and does not provide broadcasters with significant enough incentives to invest in such programming on a widespread basis.

Moreover, because consumers have lived with the current must-carry system for well over a decade, they are accustomed to and now *expect a seamless* viewing experience.⁷⁷ When Congress enacted the present must-carry system, it emphasized that switching signals, then via an A/B switch, was “not an enduring or feasible method of distribution and is not in the public interest,”⁷⁸ emphasizing the “considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal.”⁷⁹ This basic tendency in consumers' behavior has now hardened, after almost a decade of analog must-carry, to form an expectation about the service they will receive. In the current marketplace, cable subscribers essentially demand to be able to access all available sources of programming without noticing any differences based on the technical mode of delivery. This is the case with respect to the ability to receive programs – whether on cable or broadcast television channels – and to surf among them. The same is true with respect to other technologies, such as TiVO and other DVRs – some of which are integrated with cable systems, and even provided by cable operators to subscribers – that themselves scan among the programs cable provides.⁸⁰ It thus borders on the absurd to suggest, as cable advocates do,⁸¹ that cable subscribers would disengage their cable and interrelated devices to view over-the-air multicast programming streams – regardless of the quality or innovative nature of the programming aired on those streams – as part of their daily viewing habits.⁸² Without the certainty that this consumer demand for seamless viewing can be met, multicasting's viability is in real doubt.

D. Notwithstanding These Potential Obstacles, Broadcasters Have Invested Substantial Amounts Of Capital In Transforming Their Communications To Meet Congress' Digital Television Mandate.

Despite these competitive disadvantages that broadcasters face in the digital marketplace, they have made substantial investments in order to meet Congress' DTV mandate and bring the promise of digital television to viewers. The Commission has specifically recognized that the DTV “transition is a significant undertaking,” and that “[i]n order to facilitate the transition, [the agency] must balance the desire for new services with the significant investment and planning

⁷⁷ See generally Discussion Draft Hearing (statement of Robert C. Wright).

⁷⁸ 1992 Cable Act § 2(a)(18).

⁷⁹ S. Rep. No. 102-92, at 45.

⁸⁰ *Twelfth Annual MVPD Report*, 2006 WL 521465, at *42, Table 4.

⁸¹ Cooper & Kirk White Paper at 7-8 & n.3.

⁸² *Id.* at 220-21. This reality also animated Congress's passage of the statutory licensing provisions of the Satellite Home Viewer Improvement Act (“SHVIA”). Pub. L. No. 106-113, 113 Stat. 1501 (1999). There, Congress recognized the need to ensure that satellite television subscribers would not be “required to go to the trouble and expense of installing off-air antennas to improve their reception of local television signals,” in recognition of the fact that the use of such equipment is, at best, inconvenient, and the importance of preserving access to local broadcast signals. See S. Rep. No. 106-51, at 5 (1999).

required by the broadcasters to build new digital facilities and relocate operations.”⁸³ The GAO has similarly found that “[b]roadcasters must make large capital investments to begin broadcasting in digital,” and that many stations have encountered problems in raising the necessary capital.⁸⁴ Specifically, in response to a GAO request, broadcasters estimated that it would cost between \$2.3 million and \$3.1 million per station to comply with the FCC’s initial requirements for digital transmission.⁸⁵ These expenditures, which include *only* the expenses associated with actual facilities and operations (and *not* program production or acquisition costs) amount to anywhere from 11% to 242% of annual station revenues, by GAO’s calculation.⁸⁶ In the aggregate, broadcasters will have spent approximately \$10-16 billion in furtherance of the transition before its conclusion.⁸⁷

Unlike cable’s investments, which have been purely voluntary, broadcasters have built out digital facilities and made other capital expenditures in good-faith compliance with governmental mandates. Completion of the transition has been required by Congress itself in the Communications Act.⁸⁸ In furtherance of its statutory duty to shepherd the country’s broadcasting system into the digital age, the FCC has set deadlines requiring broadcasters to undertake a number of actions, including the construction of facilities providing service to all of the area served by their analog signals (referred to as “replication”) as well as, where relevant, the larger area served by their digital signals (“maximization”).⁸⁹ And broadcasters face significant penalties – and in some instances the “ultimate sanction” of loss of their licenses – for failure to comply with these deadlines.⁹⁰ Given this regulatory backdrop in which Congress has *statutorily mandated*, and the FCC has required, broadcasters to make substantial investments to support the digital transition, it is more than fair for the Commission to take action designed to ensure that broadcast television survives the transition it has been required to undergo.

⁸³ *In re Reallocation and Service Rules for the 698-746 MHz Band (Television Channels 52-59)*, Notice of Proposed Rulemaking, 16 FCC Rcd 7278, 7285 (2001).

⁸⁴ General Accounting Office, *Many Broadcasters Will Not Meet May 2002 Digital Television Deadline*, GAO 02-466, at 16 (April 2002).

⁸⁵ *Id.*; *see id.* at 17, fig. 1.

⁸⁶ *Id.* at 18; *see id.* at 16 n.27.

⁸⁷ Fritts Testimony at 2.

⁸⁸ See 47 U.S.C. § 309(j)(14)(A) (“A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2006.”); *see also Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 301 (D.C. Cir. 2003) (explaining that the DTV “transition is not a market-driven migration to a new technology, but rather the unambiguous command of an Act of Congress”).

⁸⁹ See, e.g., *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18314-18319; *First DTV Periodic Report and Order*, 16 FCC Rcd at 5946; *see also* 47 C.F.R. § 73.624(b), (d)-(f).

⁹⁰ See, e.g., *Second DTV Periodic Report & Order*, 19 FCC Rcd at 18280 (imposing and explaining effect of “use-it-or-lose-it” deadline for replication or maximization of facilities, under which broadcasters that fail to meet deadlines will lose the right to interference protection within certain portions of the areas covered by their authorized digital signals); *In re Remedial Steps for Failure to Comply with Digital Television Construction Schedule*, Report and Order Memorandum Opinion and Order on Reconsideration, 18 FCC Rcd 7174, 7173 (2003) (confirming that broadcasters that fail to timely construct DTV facilities will eventually be subject to the “ultimate sanction” – a requirement that they turn in their analog licenses and cease providing program service to the public).

As the foregoing makes clear, there are weighty public interests at stake here and compelling policy reasons to protect them. By moving to provide broadcasters with certainty that their multicast programming will actually reach consumers that they need in order to move ahead with such programming, the Commission can: help drive forward the digital transition, with all the public interests attendant to that technological shift, including public safety, programmatic, and deficit reduction goals; ensure that that viewing public receives all the benefits that multicasting offers, including diversity of programming; preserve over-the-air television for all Americans; and protect the investments that broadcasters have made pursuant to Congress' and the FCC's commands from being stranded due to the anti-competitive conduct of the cable industry.

II. PREVENTING THE STRIPPING OF MULTICAST SIGNALS WILL NOT RAISE ANY OF THE FIRST AMENDMENT CONCERNS VOICED BY THE CABLE INDUSTRY.

The need for Commission action to safeguard broadcasters' ability to transmit multicasts via cable systems without interference from cable operators who wish to prevent that programming from ever reaching viewers is clear. Apparently lacking any sound policy rejoinders that could support their anti-competitive behavior, cable has fallen back on the threat that the Constitution forbids the FCC from extending the analog must-carry regime into the digital context. Given that the Supreme Court has already soundly affirmed the basic carriage structure, it is difficult to see why the technological nature of the signal being sent over the cable systems – analog versus digital, or signals with a continuous range versus a discrete set of values⁹¹ – should compel a different answer under the Constitution. It does not, as demonstrated below.

A. Cable's Alleged First Amendment Interests Are Not the Only Constitutional Interests At Stake.

As a general matter, cable advocates' constitutional arguments against an anti-stripping rule focus myopically on their *own* "constitutional" interests to the exclusion of all others. In struggling to justify their legal position, they attempt to obscure the reality that a variety of other interests of constitutional dimension – namely those of viewers and broadcasters – must be afforded significant weight as well. Evaluation of an anti-stripping requirement, however, necessitates consideration of *all* of the various interests that hang in the balance. Under a proper analysis, it is clear that an anti-stripping mandate is needed in order to ensure that the must-carry regime continues to satisfy important constitutional objectives relating not only to cable operators, but also to the viewing public and the broadcast industry, the latter of which Congress has entrusted to use the public airwaves to provide important program services.

Put in context, cable advocates' self-serving assertions make plain the true reason underlying their desire to retain the ability to strip out multi-stream broadcast content. Simply put, the cable industry wishes to prevent broadcasters from effectively delivering desirable multi-cast programming to viewers and, instead, wants to steal back the ability to reach those viewers (and the advertising dollars they represent) for cable itself. Significantly, cable operators voice

⁹¹ See Leon W. Couch II, *Digital and Analog Communications Systems* 4 (2d ed. 1987).

no objection to analog must-carry, fully admitting that they have “accommodated” themselves to this obligation, as they had to do after the Supreme Court upheld it in *Turner II*.⁹² They also do not appear to object to mandatory carriage of a single stream of high definition programming (and for good reason, because that would be foreclosed by the Supreme Court’s decision in *Turner II* as well). Either of these obligations, however, involves the *exact same amount of cable capacity* as carriage of the entire digital signal, whether it includes multicast program offerings or not.⁹³ The objection to an anti-stripping mandate, then, is merely to the carriage of additional streams of programming that, if entitled to carriage, would compete with cable for viewers and, thus, advertising revenues. Thus, while the language that cable advocates employ may superficially appear to be of a constitutional dimension, in reality their concerns are purely parochial.

When exposed for what it is, it becomes clear that cable operators’ position fully ignores several important constitutional concerns, not the least of which involve the interests of the American viewing public. As an initial matter, the Supreme Court has held that “the people as a whole” – rather than any one set of commercial speakers – “retain their interest in free speech” and that they possess a “collective right” to receive communications from broadcasters.⁹⁴ It is this right, rather than the right of video programming providers (whether cable *or* broadcast), that the Court has characterized as “paramount.”⁹⁵ Regardless of which set of interests is given primary weight, it is well established that the right to receive speech is no less protected by the First Amendment than the right to speak.⁹⁶

In addition, cable operators disregard the reality that over-the-air broadcasting as a whole – and at the very least, the full breadth of diverse content made possible by multicasting technology – will be placed at significant risk without an anti-stripping mandate.⁹⁷ This threat to diverse programming runs directly counter to the First Amendment goal of achieving “the widest possible dissemination of information from diverse and antagonistic sources.”⁹⁸ Indeed, the Supreme Court emphasized this in *Turner I*, recognizing that “[a]t the heart of the First

⁹² Cooper & Kirk White Paper at 16.

⁹³ See *supra* pp. 7-9.

⁹⁴ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁹⁵ *Id.*

⁹⁶ *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003) (Kozinski, J., concurring) (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982)); see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) (“[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.”); *Kleindest v. Mandel*, 408 U.S. 753, 762-63 (1972) (acknowledging a First Amendment right to “receive information and ideas” and stating that freedom of speech “necessarily protects the right to receive”); see also *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (upholding First Amendment rights of citizens to receive political publications sent from abroad).

⁹⁷ See *supra* pp. 11-14.

⁹⁸ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The 1992 Cable Act itself embodied this goal. See 1992 Cable Act § 2(a)(6); see also 47 U.S.C. § 521(4) (listing as among goals of Title VI of the Communications Act, as amended, to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public”).

Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”⁹⁹ Yet cable advocates completely ignore the interests of willing viewers in receiving diverse broadcast programming.

Cable operators similarly overlook broadcasters’ protected interests in reaching their audiences with multicast programming. Broadcasters have a protected First Amendment interest in *effectively* communicating with their audiences¹⁰⁰ and in exercising their editorial discretion in deciding how to program their digital channels, which necessarily includes the right to determine whether to communicate with viewers via multicasting or not.¹⁰¹ As discussed above, and contrary to cable operators’ conclusory assertions, cable carriage is needed to ensure that viewers can actually watch the diverse programming made possible by multicasting. This is true not only because, as a practical matter, television viewers will not watch programming that is not available on cable,¹⁰² but also because, as an economic matter, broadcasters will have little if any incentive to offer such programming if it is not accessible to the vast majority of television viewers who subscribe to cable.¹⁰³ Thus, anti-stripping protections for multicasts are necessary to promote broadcasters’ protected First Amendment interests in effectively communicating with their intended audience.

Extending the existing must-carry rules to cover multi-stream broadcasting is a content-neutral means of ensuring that broadcast television remains a viable and diverse medium for all Americans, especially those without access to cable or DBS. A multicast carriage obligation,

⁹⁹ *Turner I*, 512 U.S. at 641.

¹⁰⁰ See, e.g., *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 790-91 (1988) (“The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (“The First Amendment protects [the speakers’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (“The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.”) (citation and quotations omitted); see also *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-29 (1993) (recognizing that the First Amendment includes the right of a speaker to choose the means of delivery of the message in striking down restriction on use of news racks to distribute commercial speech under the First Amendment); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (“[A] restriction on speech tailored to a particular audience, ‘targeted speech,’ cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, ‘broadcast speech.’”). There can be no dispute, moreover, that broadcasters are, in fact, entitled to the protections of the First Amendment. *Columbia Broad. Sys., Inc. v. DNC*, 412 U.S. 94, 110 (1973) (under the First Amendment, television broadcasters enjoy the “widest journalistic freedom” consistent with their public interest responsibilities); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (recognizing that broadcasting is a medium affected by First Amendment interests).

¹⁰¹ See *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”). Indeed, the FCC has, at least implicitly, recognized this fact, by emphasizing the need to afford broadcasters’ the widest possible degree of flexibility with respect to how to program their digital channels. See, e.g., *DTV Fifth Report & Order*, 12 FCC Rcd at 12812 (reiterating need to “ensure that broadcasters have more flexibility in their business” as it relates to how to program their digital channels, and affording flexibility to “experiment with innovative offerings and different service packages”).

¹⁰² See *supra* pp. 13-14.

¹⁰³ See *id.*

therefore, is fully consistent with the First Amendment as long as it furthers an important governmental interest and is narrowly tailored to serve that interest.¹⁰⁴ As the following analysis makes clear, there is no question that extending the existing must-carry rules to multicasting satisfies intermediate scrutiny and thus does not violate the First Amendment.

B. The Cable Industry’s Best Efforts Cannot Change The Nature Of Broadcast Carriage Protections: Such Protections Have Never Been and Will Not Be Subject To Strict Scrutiny.

The paramount objective of the First Amendment is to ensure that government regulation does not “suppress, disadvantage, or impose differential burdens upon speech because of its content.”¹⁰⁵ Government regulation of speech “because of [agreement or] disagreement with the message it conveys”¹⁰⁶ is presumptively invalid and accordingly subject to “the most exacting scrutiny” under the Constitution.¹⁰⁷ In contrast, federal regulation unconcerned with the content of speech is subject to intermediate scrutiny – *not strict scrutiny*.¹⁰⁸ Because “their purpose is not to proscribe disfavored messages but rather to combat some other perceived evil, with speech burdened as an unintended side-effect,”¹⁰⁹ content neutral regulations “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”¹¹⁰

Whether a regulation is content-based or content neutral is generally apparent on the face of the enactment.¹¹¹ Hence, “[a]s 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.”¹¹²

¹⁰⁴ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁰⁵ *Turner I*, 512 U.S. at 642 (citing *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

¹⁰⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (concluding that a “content-based speech restriction . . . can stand only if it satisfies strict scrutiny”) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

¹⁰⁷ *Turner I*, 512 U.S. at 642.

¹⁰⁸ See *id.* (explaining that “regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”) (internal citation omitted); *Satellite Broad. & Commc’ns Ass’n v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001) (reiterating that “a content neutral measure that imposes incidental burdens on speech . . . is . . . subject to intermediate First Amendment scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968)). Moreover, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791 (1989) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

¹⁰⁹ *Sharkey’s, Inc. v. City of Waukesha*, 265 F. Supp. 2d 984, 994 (E.D. Wis. 2003).

¹¹⁰ *Turner I*, 512 U.S. at 642.

¹¹¹ See *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”).

¹¹² *Turner I*, 512 U.S. at 643 (citations omitted).

“By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”¹¹³

There can be no dispute that must-carry rules are content-neutral. Indeed, the Supreme Court has twice held that cable must-carry rules are subject to intermediate scrutiny.¹¹⁴ Must-carry rules “impose obligations upon all [cable] operators . . . regardless of the programs or stations the cable operator has selected or will select.”¹¹⁵ For this reason, the Fourth Circuit more recently concluded that the satellite analog to the cable must-carry rules also was subject to intermediate scrutiny.¹¹⁶ As the court correctly explained, must-carry rules do not “show a content-based preference for broadcast television over cable television; they merely indicate[] that local broadcast television [is] intrinsically valuable and therefore worth protecting.”¹¹⁷

More specifically, the Supreme Court has been quite clear that neither the obligations that the must-carry requirements place on cable operators, nor the concomitant privileges must-carry rules grant broadcasters, are content-based. The obligations must-carry rules place on cable operators do not “impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select[.]”¹¹⁸ Indeed, by their terms, they apply to all cable operators regardless of the nature or content of their programming.¹¹⁹ Likewise, the carriage rights afforded to broadcasters “are also unrelated to content” because they “benefit all . . . broadcasters who request carriage – be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular.”¹²⁰ Thus, both the plain language and “manifest purpose” of the existing must-carry rules indicate that the “overriding objective” is “not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for . . . Americans without cable.”¹²¹

¹¹³ *Id.* (citations omitted).

¹¹⁴ *See id.* at 643 (explaining that “must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech”); *Turner II*, 520 U.S. at 189 (reaffirming that must carry rules are “content-neutral regulation” and thus subject to “the intermediate level of scrutiny”).

¹¹⁵ *Turner I*, 512 U.S. at 644.

¹¹⁶ *See Satellite Broad. & Comm'n's Ass'n*, 275 F.3d at 355.

¹¹⁷ *Id.*; *see also Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 484 (S.D.N.Y. 2004) (explaining that “[h]ad the must-carry provisions distinguished based on the content of speech, they would have been subjected to strict scrutiny, the Court’s most nondeferential standard”).

¹¹⁸ *See Turner I*, 512 U.S. at 644.

¹¹⁹ 47 U.S.C. § 534(a) (applying carriage obligations to “each cable operator,” without limitation based on content of programming carried by operator); *id.* § 534(b)(1)(A) (excluding some cable operators from carriage obligations only on the basis of the number of usable activated channels and number of subscribers).

¹²⁰ *Turner I*, 512 U.S. at 645.

¹²¹ *Id.* at 645-46. In fact, the true choice in *Turner I* was between the application of the standard of review applicable to broadcast regulations under *Red Lion* or the intermediate scrutiny standard that the Court applied in the end. *See id.* at 637-38. But in no way did the Supreme Court express any sympathy for the cable operators’ contention that *strict scrutiny* should apply to the evidently content neutral must-carry rules.

Extending the protections of the must-carry regime to multi-stream programming would serve the same content-neutral aims of the existing rules, *i.e.*, preserving a diverse array of programming for all Americans but especially those without cable. A recent study shows that nearly 600 broadcast stations offer multicast programming, including news, weather, sports, foreign language and religious programming.¹²² Thus, contrary to the arguments of the cable industry, the diverse programming options multicasting brings to broadcast television increases the content neutral value of the must-carry regime. As the Supreme Court explained, the must-carry rules reflect the content-neutral “recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.”¹²³ Nevertheless, the cable industry claims that strict scrutiny applies because, in their view, cable operators no longer have “bottleneck monopoly power” over television programming delivery.¹²⁴

This argument is misplaced. First, as explained above, the need to preserve an array of programming for viewers, and not cable’s bottleneck power over the industry, was the principal justification for the existing must-carry rules. Cable’s bottleneck power, while a cause for significant concern, was not the basis of the Supreme Court’s decision to apply intermediate scrutiny.¹²⁵ In fact, the issue of bottleneck control does not bear in any way on the question of whether extending must-carry mandates to multi-stream broadcasting would be considered content-based or content-neutral. It simply is immaterial.

Second, even assuming that cable’s bottleneck control is somehow relevant, the cable industry’s articulation of the current state of competition – which underpins their entire argument – is faulty at best. The crux of the cable industry’s argument is that the growth of DBS and the influx of other alternatives to traditional cable prove that the cable industry no longer exercises bottleneck control.¹²⁶ As explained above, however, broadcasters are at a greater competitive disadvantage now than existed when Congress first enacted must-carry rules in 1992.¹²⁷ In particular, since 1992, the number of television households that rely solely on broadcast television has decreased from roughly 40 percent to 14 percent.¹²⁸ Broadcast television stations’ audience shares also have dropped “as cable and DBS penetration, the number of cable channels, and the number of broadcast networks continue to grow.”¹²⁹ Now more than 85% of television

¹²² See *Twelfth Annual MVPD Report*, 2006 WL 521465, at *5; *Second DTV Must Carry Order*, 20 FCC Rcd at 4550 (separate statement of then-Commissioner Martin dissenting in part and approving in part).

¹²³ See *Turner I*, 512 U.S. at 648 (citation omitted); see also *id.* at 649 (explaining that “Congress’ acknowledgement that broadcast stations make a valuable contribution to the Nation’s communication system does not render the must-carry scheme content-based”).

¹²⁴ See Cooper & Kirk White Paper at 6-7.

¹²⁵ See *Turner I*, 512 U.S. at 652.

¹²⁶ See Cooper & Kirk White Paper at 7.

¹²⁷ See *supra* note 18.

¹²⁸ See *Twelfth Annual MVPD Report*, 2006 WL 521465, at *5; *Turner I*, 512 U.S. at 645.

¹²⁹ *Twelfth Annual MVPD Report*, 2006 WL 521465, at *30 (“As we reported last year, broadcast television stations’ audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of broadcast networks continue to grow.”).

households subscribe to some form of MVPD service, such as cable or DBS.¹³⁰ Moreover, the obstacles posed by vertical integration that plagued broadcasters at the time of the enactment of the 1992 Cable Act persist today.¹³¹

That the source of the competitive pressure placed on broadcast television is slightly more diffuse than in 1992 is not of constitutional significance.¹³² As the Fourth Circuit posited, “[s]uppose, for example, that five different television delivery mediums each served 15 percent of television households, together serving 75 percent of those households.”¹³³ Under the cable industry’s misguided approach, “it would mean that Congress could not impose must-carry rules on any of the mediums because stations denied carriage on any one medium would lose access to only 15 percent of their audiences and therefore would not suffer substantial deterioration. That cannot be the law.”¹³⁴ Accordingly, the court rightly concluded that “[t]ogether, cable and satellite would pose an overwhelming threat to independent broadcasters if neither were bound by carriage rules.”¹³⁵

In sum, the Supreme Court has confirmed that must-carry rules are content neutral and therefore subject to intermediate scrutiny: carriage rules “preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television, and in particular, to ensure that broadcast television remains available as a source of video programming for those without cable.”¹³⁶ Extending these same rules from analog broadcasting to multicasting does not alter this conclusion. The cable industry’s “ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry.”¹³⁷

C. The Interests Upheld By The Supreme Court In *Turner II* Fully Apply Here And Have Become Even More Important Today In The Transition To The Digital Television World.

To satisfy intermediate scrutiny, a regulation must vindicate an important government interest.¹³⁸ As the Supreme Court has twice explained, must-carry rules advance at least two interrelated important government interests: (1) “preserving the benefits of free, over-the-air

¹³⁰ *Id.* at *3.

¹³¹ *See, e.g., id.* at *49 (providing that “currently, six of the top 20 nonbroadcast video programming networks (ranked by subscribership) are vertically integrated with a cable operator”).

¹³² Even with some growth in DBS market share, cable remains the dominant force in the television market. *See Twelfth Annual MVPD Report*, 2006 WL 521465, at *5 n.70 & Table 1.

¹³³ *Satellite Broad. & Commc’ns Ass’n*, 275 F.3d at 361.

¹³⁴ *Id.*

¹³⁵ *Id.* at 362

¹³⁶ *Turner I*, 512 U.S. at 652.

¹³⁷ *Id.*

¹³⁸ *Turner II*, 520 U.S. at 189.

local broadcast television”; and (2) “promoting the widespread dissemination of information from a multiplicity of sources.”¹³⁹ Extending must-carry rules to multicasting advances both of these clearly-established interests, as well as an interest in fair competition in the video programming market. In addition, carriage rights for multi-stream broadcasting furthers the more recent government interest in transitioning from analog to digital delivery of programming.

First, an assurance of carriage for multi-stream broadcasting would preserve the benefits of free, over-the-air television. The Supreme Court has confirmed that “protecting non[-]cable households from [the] loss of regular television broadcasting service due to competition from cable systems’ is an important federal interest.”¹⁴⁰ Indeed, broadcast television is in even greater need of cable carriage than it was when the Supreme Court decided both *Turner* cases.¹⁴¹ Broadcast television stations rely exclusively on advertising dollars for revenue, whereas cable and DBS providers, as well as other video programming suppliers, have two revenue streams – advertising and subscription fees. As cable and DBS continue to increase digital capacity, single stream broadcast programming simply will not be able to compete for advertising revenue, revenue that is already spread thin across an increasing number channels. These advertising dollars are needed to preserve broadcast television as the source of free television programming to the millions of Americans who do not have access to, or cannot afford, subscription-based services.

It is important to recognize, however, that the existing must-carry regime is not concerned only that the broadcast medium survive generally, but also that a “significant numbers of broadcast stations . . . denied carriage will either deteriorate to a substantial degree or fail altogether.”¹⁴² Congress understood that the most immediate consequence of non-carriage of broadcast programming was “the loss of the independent stations needed to provide those viewers with a rich mix of broadcast programming from multiple sources.”¹⁴³ Thus, the cable industry mischaracterizes the nature of the inquiry by focusing exclusively on whether broadcast television will continue to exist at all, while ignoring altogether whether particular stations that are denied multicasting carriage will fail in the absence of federal intervention. The goals of the must-carry regime would not be “satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service to Americans without cable.”¹⁴⁴

In this instance, there can be no doubt that multicast channels will “deteriorate to a substantial degree or fail altogether” in the absence of access to cable viewers via must-carry mandates.¹⁴⁵ Broadcasters understand that viewers are increasingly interested in niche

¹³⁹ *Turner I*, 512 U.S. at 662; *see also Turner II*, 520 U.S. at 189-90 (“We decided then, and now reaffirm, that each of those is an important governmental interest.”).

¹⁴⁰ *Turner I*, 512 U.S. at 663 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

¹⁴¹ *See supra* note 18.

¹⁴² *Turner I*, 512 U.S. at 666.

¹⁴³ *Satellite Broad. & Commc'ns Ass'n*, 275 F.3d at 357.

¹⁴⁴ *Turner II*, 520 U.S. at 192.

¹⁴⁵ *See Multicast Multishows* (“[M]any broadcasters say they will scrap or scale back their multicasting plans if the FCC doesn’t mandate cable carriage.”).

programming and that multi-stream broadcasting provides the opportunity to compete for viewers and advertisers in this market. To remain competitive broadcasters must finance and develop niche programming to air on their multicast streams. Although broadcasters need the advertising revenue they can derive from the cable audience to finance such multicast programming, they have found it nearly impossible to negotiate full cable and satellite carriage of their multicast programming. This makes perfect sense. There are strong disincentives for cable operators, particularly given the increased concentration discussed above, voluntarily to carry multicast programming.¹⁴⁶ “Simply stated, cable has little interest in assisting through carriage, a competing medium of communication. As one cable-industry executive put it, ‘our job is to promote cable television, not broadcast television.’”¹⁴⁷

This is even more true with respect to multi-stream programming – a directly competitive product. That is, there are few (if any) cable channels that duplicate the programming schedule and format of the major broadcast networks. However, multicast channels, like independent broadcast stations, offer niche programming that mirrors – and thus challenges for viewers – the programming of cable stations that often are vertically integrated with the cable operators. Absent must-carry requirements, “[c]able operators would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience advertisers. Independent local broadcasters tend to be the closest substitutes for cable programs, because their programming tends to be similar, and because both primarily target the same type of advertiser[.]”¹⁴⁸

Broadcasters are, as we have shown, faced with a Hobson’s choice.¹⁴⁹ They can either finance and develop multicast programming in the hope that cable operators might choose to carry a station that competes directly with its subsidiary programming vehicle, or refrain from producing multicast programming and watch as their collective market share further erodes. And consumers in the marketplace now expect to be able to view broadcast product over cable in a seamless fashion. Absent assurance of carriage, multicasting simply is not a viable enterprise for the vast majority of broadcasters.¹⁵⁰ Accordingly, extending the must-carry regime to multicasting serves an important government interest by preserving these valuable programming vehicles.

Second, multi-stream carriage obligations would promote the widespread dissemination of information from a multiplicity of sources. “[I]t has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and

¹⁴⁶ See Fritts Testimony at 9 n. 14.

¹⁴⁷ *Turner II*, 520 U.S. at 201 (internal citation omitted).

¹⁴⁸ *Id.* at 200 (internal citation omitted).

¹⁴⁹ See *supra* p. 13.

¹⁵⁰ In fact, approximately 80 percent of broadcasters have made clear that multicasting is not a worthy investment absent must-carry protection. See *Twelfth Annual MVPD Report*, 2005 WL 521465, at *33.

antagonistic sources is essential to the welfare of the public.”¹⁵¹ Multicasting will provide viewers with an abundance of diverse programming that is often targeted to the interests of the local community.¹⁵² Such programming includes local news, traffic, sports and weather as well as coverage of local government proceedings and public affairs programming.¹⁵³ It will also increase “source” diversity by giving independent programmers a venue for new offerings. Contrary to the arguments of the cable industry, the government has an interest in ensuring that viewers of broadcast television have access to a wide array of “broadcast stations” – which in turn ensures diverse programming.¹⁵⁴

Thus, to the extent the cable industry “question[s] the substantiality of the Government’s interest in preserving something more than a minimum number of stations in each community, their position is meritless.”¹⁵⁵ As the Supreme Court explained, “[t]hough it is but one of many means of communications, by tradition and use for decades now [broadcast television] has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.”¹⁵⁶ Accordingly, “Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.”¹⁵⁷ Multi-stream broadcasting, and the array of programming it can provide to viewers, particularly those without access to cable, fulfills this promise.

Third, multicast carriage also would advance fair competition in the market for television programming. At least four Justices of the Supreme Court (including four of the seven Justices that remain from the *Turner* decisions) have made clear that “protect[ing] broadcast television from . . . unfair competition by cable systems” is an important government interest.¹⁵⁸ Protecting broadcasters from unfair competition remains an important government interest today, particularly given the integration that has occurred in the cable industry since these cases were decided and the strong economic disincentives to carriage of multicast programming.

Finally, there is yet another – and entirely new – important government interest here: promoting the swift transition to digital television. The transition to digital television “represents a critical evolutionary step in broadcast television” and is a major national policy goal.¹⁵⁹ This transition delivers at least two significant benefits to the public: (1) it allows for the delivery of a

¹⁵¹ *Turner I*, 512 U.S. at 663-64 (citations and internal quotations omitted); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (explaining that “increasing the number of outlets for community self-expression” represents a “long-established regulatory goal[] in the field of television broadcasting”).

¹⁵² *See supra* at pp. 4-7.

¹⁵³ *See supra* pp. 5-6.

¹⁵⁴ *See Turner II*, 520 U.S. at 193.

¹⁵⁵ *Id.* at 193.

¹⁵⁶ *Id.* at 194 (citations omitted).

¹⁵⁷ *Id.*

¹⁵⁸ *Turner I*, 512 U.S. at 652; *see also Turner II*, 520 U.S. at 189-90.

¹⁵⁹ *2002 Biennial Review Order*, 18 FCC Rcd at 13825.

superior quality broadcast and additional data employing the same amount of spectrum currently used by a single analog stream; and (2) by freeing analog spectrum, the digital transition offers significant public safety benefits.¹⁶⁰ However, the FCC has found that the success of the transition depends in large measure on the “programs, enhanced features, and services” that DTV can offer consumers.¹⁶¹ For this reason, the FCC has “urge[d] broadcasters to increase the amount of digital and high definition programming” they offer.¹⁶² Broadcasters have responded through their efforts to develop and offer multi-stream broadcasting to viewers. Consequently, an FCC requirement that ensures that multicasts reach the vast cable audience certainly would promote an important government interest.

D. A Prohibition On Stripping Multi-Stream Broadcasts Would Not Be Substantially More Restrictive Than Necessary To Promote These Critical Government Interests.

Last, a regulation satisfies “intermediate scrutiny” so long as it “does not burden substantially more speech than necessary” in furthering the important government interests.¹⁶³ Importantly, the regulation “need not be the least restrictive or least intrusive means of doing so. Rather, the requirement . . . is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”¹⁶⁴ Thus, the extension of the existing carriage scheme to multicasting need only “materially advance[] at least one substantial government interest in a narrowly tailored manner.”¹⁶⁵ Carriage rules for multicasting easily meets this standard. In fact, as explained herein, extending cable’s current carriage obligations to digital broadcasting, including multicasting, imposes far *less* of a burden on cable operators than the existing must-carry rules that the Supreme Court has upheld as narrowly tailored.

In *Turner II*, the Supreme Court made clear that the existing must-carry rules were “narrowly tailored to preserve a multiplicity of broadcast stations for . . . American households without cable.”¹⁶⁶ The must-carry rules were not a heavy burden on cable operators because many broadcasters opted for retransmission consent instead of relying on their must-carry rights. Thus, at that time, “no more than a few hundred of the 500,000 cable channels nationwide are occupied by network affiliates opting for must carry, a number insufficient to render must-carry

¹⁶⁰ See *supra* at p. 3.

¹⁶¹ *DTV Fifth Report & Order*, 12 FCC Rcd at 12832.

¹⁶² *First DTV Periodic Report and Order*, 16 FCC Rcd at 5950-51; see *DTV Fifth Report & Order*, 12 FCC Rcd at 12822 (“By permitting broadcasters to assemble packages of services that consumers desire, we will promote the swift acceptance of DTV and the penetration of DTV receivers and converters.”); *id.* at 12827 (“Broadcasters can best stimulate consumers’ interest in digital services if able to offer the most attractive programs, whatever form they may take, and it is by attracting consumers to digital, away from analog, that the spectrum can be freed for additional uses.”).

¹⁶³ *Turner II*, 520 U.S. at 213.

¹⁶⁴ *Ward*, 491 U.S. at 798-99 (citations and quotations omitted).

¹⁶⁵ *Satellite Broad. & Commc’ns Ass’n*, 275 F.3d at 356.

¹⁶⁶ *Turner II*, 520 U.S. at 215-16 (citations omitted).

substantially broader than necessary to achieve the government's interest."¹⁶⁷ And, even if the cable industry could conjure up a somewhat less restrictive regime, the Supreme Court has made clear that "content-neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'"¹⁶⁸ In so holding, the Supreme Court further rejected the cable industry's supposedly less restrictive alternatives, including the use of the A/B switch.¹⁶⁹ The Supreme Court found that the "technical shortcomings" of A/B switches, which "can create signal interference and add complexity to video systems," rendered this a false and unworkable alternative to must-carry.¹⁷⁰

There can be no doubt that must-carry for multi-stream broadcasting is even less of a burden than the existing regime. In their attempt to convert their business objectives into a First Amendment question, cable operators prefer to focus exclusively on the prefix "multi-," in the hopes that the mere label will connote a tremendous burden imposed on operators' systems. This focus is misplaced. As we showed at the top of this White Paper, even without recent technological advances, the digital broadcasting that allows for multicasts does not require the use of any additional cable capacity *whatsoever*.¹⁷¹ Rather, each broadcast station occupies the same amount of spectrum (6 MHz) whether the broadcaster employs analog or digital technology.¹⁷² Thus, carriage of multi-stream broadcasts would place no more of burden of cable operators than the existing must-carry rules that the Supreme Court has already determined are constitutional. Technology has, however, advanced so as to render the burden less extensive than before. Digital compression technology now allows the entire digital signal to be transmitted using only 3 MHz – half the capacity used by a single analog channel.¹⁷³ Continued innovation is likely to produce more advanced compression technology that will allow for even more efficient use of bandwidth.¹⁷⁴ In fact, the FCC has remarked that compression technologies allow for up to twelve programming streams in 6 MHz.¹⁷⁵ Thus, cable advocates are simply wrong, as an engineering matter, about the nature of the multicasting product. As an absolute matter, multi-stream must-carry would impose less of a burden than the must-carry obligations previously upheld by the Supreme Court.

¹⁶⁷ *Id.* at 217 (citations and internal quotation marks omitted).

¹⁶⁸ *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (other citations omitted).

¹⁶⁹ *See id.* at 219-23; *see supra* p. 7.

¹⁷⁰ *Turner II*, 520 U.S. at 221; *see also supra* p. 7.

¹⁷¹ *See supra* pp. 7-9.

¹⁷² *See First DTV Must Carry Order*, 16 FCC Rcd at 2615 n.111. Moreover, as explained above, the statutory scheme governing carriage makes clear the amount of spectrum occupied by a broadcaster's signal – and *not* the number of programming streams that may be transmitted using that spectrum – provides the relevant analytical framework for analyzing the extent of the burden placed on cable operators by must-carry. *See supra* pp. 8-9.

¹⁷³ Fritts Testimony at 12; Discussion Draft Hearing at 35 (prepared statement of Robert C. Wright); *First DTV Must Carry Order*, 16 FCC Rcd at 2615 n.111, 2616 n.115; Merrill Weiss Group Study at 12.

¹⁷⁴ *See Twelfth MVPD Annual Report*, 2006 WL 521465, at *7; Barrett Remarks at 20.

¹⁷⁵ *See supra* note 35.

In addition, overall cable system capacity has increased. Cable bandwidth is now 750 MHz, an increase of over 80 percent since 1999.¹⁷⁶ Indeed, cable operators have enough system capacity that a multicasting carriage requirement is unlikely to foreclose cable systems from carrying other programs of their choice. Moreover, a number of cable operators have announced plans to launch digital simulcast and/or voluntary dual carriage, a fact that evidences their excess channel capacity.¹⁷⁷ Thus, coupled with the compression technology that has reduced the burden of must-carry as an absolute matter, the burden of carrying broadcasters' multicasting programming has diminished further still.¹⁷⁸

The FCC recognized this in finding it "important to clarify that broadcast stations operating only with digital signals are entitled to mandatory carriage under the Act."¹⁷⁹ Thus, the Commission explained "that the burden on a cable operator to carry such stations is de minimis, with regard to new digital-only stations, and is essentially a trade-off in the case of a station substituting its digital signal in the place of its analog signal."¹⁸⁰ The FCC's pronouncement makes clear that must-carry for multi-stream broadcasting would place no greater burden on cable operators than an obligation to carry a single digital channel containing one HDTV program stream (*i.e.*, the "primary video" that the FCC has *already* said that cable operators must carry). Given the technical reality that several multicast streams within a single digital signal take up the same amount of spectrum as a single digital stream containing one HDTV program stream, then must-carry for multi-stream broadcasting is merely the same "trade-off" for the analog signal and imposes the same "de minimis" burden on cable operators that the FCC described with respect to HDTV.

For all these reasons, the cable industry's analogy to a bookstore being forced to increase the shelf space for a particular publisher from one book to six books is particularly inapt.¹⁸¹ A more accurate analogy would be a situation in which the bookstore owner increased its shelf space by more than 80 percent while the local publishers used less shelf space than they previously used. In such a case, the burden on the hypothetical bookstore owner, just like the actual cable operator, has diminished. The cable industry's bookstore analogy ignores entirely the technological advances of that have occurred in recent years.

In sum, the Supreme Court has made clear that the existing must-carry regime is narrowly tailored to achieve important government interests. Due to technological advances, cable capacity has markedly increased, and at least six standard multi-stream signals can be carried using half the spectrum space required to transmit one analog signal. Accordingly, a

¹⁷⁶ See Merrill Weiss Group Study at iii, 27; *Second DTV Must Carry Order*, 20 FCC Rcd at 4521 n.35 (reporting that "the majority of cable subscribers are connected to systems with at least 750 MHz capacity, and that operators continue to build out their facilities").

¹⁷⁷ See *id.* at 76.

¹⁷⁸ See Merrill Weiss Group Study at 13-15.

¹⁷⁹ *First DTV Must Carry Order*, 16 FCC Rcd at 2605.

¹⁸⁰ *Id.*

¹⁸¹ See Cooper & Kirk White Paper at 4-5.

multi-stream carriage rule would not sweep more broadly than necessary and does not violate the First Amendment.

III. THE PROTECTION OF DIGITAL BROADCAST TELEVISION DOES NOT IMPLICATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution provides, in pertinent part, that no private property “shall . . . be taken for public use, without just compensation.” U.S. CONST. amend. V. However, not all laws that impose some restrictions on property rise to the level of a taking under the Fifth Amendment.¹⁸² Rather, “government regulation, by definition, involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. *To require compensation in all such circumstances would effectively compel the government to regulate by purchase.*”¹⁸³ As the Supreme Court long ago explained, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁸⁴

To determine whether government action rises to the level of a compensable taking, the Supreme Court has recognized two discrete categories of cases: (1) *per se* takings, *i.e.*, government action that results in a “permanent physical occupation” or denies the owner of all economically-beneficial use of property;¹⁸⁵ and (2) partial takings, *i.e.*, government regulation that burdens private property in a manner that, among other things, unfairly interferes with the owner’s “investment-backed expectations.”¹⁸⁶ Here, the cable industry cannot mount a serious claim that a taking has occurred under either approach.

Foremost, the cable industry concedes that the existing must-carry regime does not result in a taking. Thus, by definition, extending the regime to include multi-stream broadcasting does not result in a taking. To overcome their concession that the existing regime is constitutional, the cable industry advances two incomplete arguments – a faulty *per se* taking argument devoid of any permanent physical occupation and a meager partial taking claim devoid of any investment-backed expectations – in the hopes that, together, they will have more force. But the combination of two unsuccessful constitutional arguments does not increase their force; it merely highlights why the cable industry essentially abandoned these arguments in *Turner* – preservation of broadcasting, digital or otherwise, does not run afoul of the Takings Clause under any theory.

¹⁸² See, e.g., *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (explaining that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense”) (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-10 (1923)).

¹⁸³ *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis added).

¹⁸⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁸⁵ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

¹⁸⁶ *Penn Cen. Transp. Co. v. City of New York City*, 438 U.S. 104, 124 (1978).

A. The Cable Industry Has Conceded That Must-Carry Requirements Are Not A Taking Under The Fifth Amendment.

Cable has, by its *own* admission, “accommodated itself to the . . . single-channel must-carry requirement enacted in 1992.”¹⁸⁷ The cable industry remarkably contends that only the extension of must-carry to multi-stream broadcasting “would raise the Fifth Amendment problem.”¹⁸⁸ The cable industry’s position is a *non sequitur*. Compression technology has markedly reduced any burden that the existing must-carry regime imposes on the cable industry.¹⁸⁹ Both analog and digital signals – whether a single HDTV signal or multiple multicast signals – require the exact same amount of capacity.¹⁹⁰ If the current analog must-carry requirement does not impose a taking on the cable industry, then neither does a multi-streaming carriage requirement.

Furthermore, the cable industry’s contention that only multi-stream must-carry is a taking ignores the myriad other cable regulations that would impose a taking under this theory. For example, if multi-stream must-carry is a taking so too are the interconnection, unbundling, and resale requirements of the 1996 Telecommunications Act.¹⁹¹ In addition, congressional requirements and FCC regulations that set aside channels for public, educational, or governmental (“PEG”) use would be constitutionally infirm as well.¹⁹² The cable industry makes no attempt to distinguish its takings claim regarding multi-stream must-carry from the takings claim against the existing must-carry regime it essentially abandoned in *Turner* – let alone the multitude of related and similar FCC regulations that it artfully dodges. The cable industry’s cherry-picked takings claim raised in opposition to multi-stream must-carry should be seen for what it is: a last-ditch effort to find a constitutional hook to an otherwise unappealing policy argument. Regardless, as explained below, the cable industry’s substantive taking arguments are without merit.

B. There Is Simply No Taking Created By Extending Carriage Rights Into the Digital Context.

To qualify under the Supreme Court’s “very narrow” *per se* takings rule, government action must be accompanied by a “required acquiescence” in a “permanent physical occupation” of land or real property¹⁹³ or impose a regulatory burden “so onerous that its effect is tantamount to a direct appropriation or ouster[.]”¹⁹⁴ As the Supreme Court has explained, “the Fifth Amendment concerns itself solely with the ‘property,’ *i.e.*, with the owner’s relation as such to

¹⁸⁷ Cooper & Kirk White Paper at 16.

¹⁸⁸ *Id.*

¹⁸⁹ *See supra* pp. 7-9.

¹⁹⁰ *See id.*

¹⁹¹ *See* 47 U.S.C. § 251(c).

¹⁹² *See id.* § 531(b).

¹⁹³ *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987) (citing *Loretto*, 458 U.S. at 436).

¹⁹⁴ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

the physical thing and not with other collateral interests which may be incident to his ownership.”¹⁹⁵ Hence, a *per se* taking is “relatively rare [and] easily identified.”¹⁹⁶ As the Supreme Court explained in *Loretto*, a permanent physical occupation of land or real property “is an obvious fact that will rarely be subject to dispute” and therefore “whether a permanent physical occupation has occurred presents relatively few problems of proof.”¹⁹⁷ On this basis, in *Loretto*, the Court found the installation “of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall” to be a *per se* taking.¹⁹⁸

The claims of the cable industry in this instance are a far cry from the “obvious” physical taking that occurred in *Loretto*. Multicast must-carry would entail no such “permanent physical occupation” of a cable system’s property; the physical installation of “plates, boxes, wires, bolts, and screws” is entirely different than requiring a cable system to devote a fraction of its bandwidth to broadcasters. The cable bandwidth used by multicast programming streams transmits bits of data through electrons (with respect to coaxial cable) or photons (with respect to fiber optic cable) at the speed of light. The cable operator retains complete control over the cable headend equipment, its local offices and all other transmission equipment, *i.e.*, the physical property.¹⁹⁹

This type of technological accommodation fundamentally differs from the “*easily identified*” appropriation of physical property that must occur before a *per se* taking is found. For this reason, in the more than two decades since *Loretto*, no court has extended the permanent physical occupation rationale to the technological (much less the digital) realm.²⁰⁰ In fact, in a factually analogous case, the Federal Circuit rejected a claim that the “unwanted movement of telecommunications traffic across its loops . . . constitutes a government-authorized physical taking of . . . property.”²⁰¹ Multi-stream broadcast transmissions simply cannot be shoehorned into the physical occupation rubric, and there is no *per se* taking here.

¹⁹⁵ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Lingle*, 544 U.S. at 537 (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”).

¹⁹⁶ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002).

¹⁹⁷ *Loretto*, 458 U.S. at 437; *see also Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 n.17 (“When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.”).

¹⁹⁸ *Loretto*, 458 U.S. at 438.

¹⁹⁹ For this same reason, multi-cast must-carry certainly does not impose a regulatory burden that deprives cable operators of “*all economically beneficial us[e]*” of their property.” *Lucas*, 505 U.S. at 1019; *Lingle*, 544 U.S. at 539 (explaining that “[i]n the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor”) (citation omitted).

²⁰⁰ *See, e.g., Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693 (2001); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1444 (D.C. 1994) (distinguishing between “physical co-location” and “virtual co-location” and that the former, but not the latter, constitutes a physical taking).

²⁰¹ *Qwest Corp.*, 48 Fed. Cl. at 693 (explaining that while a “government-mandated co-location of one party’s equipment on another party’s premises constitutes a physical taking of the occupied space . . . it is another question

Nor is there any regulatory taking in the continued protection of broadcast. The last refuge of any commercial enterprise that cannot successfully oppose regulation on policy grounds is the invocation of a regulatory takings argument. With very few exceptions, they fail. The regulatory taking inquiry examines three factors: (1) the character of the government action; (2) the economic impact of the government action; and (3) reasonable investment-backed expectations.²⁰² Here, must-carry is minimally invasive, imposes no additional burden on cable systems (indeed, through compression technology, the burden can be *decreased*), and does not interfere with any investment-backed expectations.

First, the character of multi-stream broadcasting establishes that no regulatory taking occurs in this instance. Multicast must-carry simply “adjust[s] the benefits and burdens of economic life to promote the common good.”²⁰³ Moreover, as *Penn Central* explains, “[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”²⁰⁴ Rather, “[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole*.”²⁰⁵ As explained above, multi-stream must-carry has a minimal impact – if any – on the cable system *as a whole*. Broadcasters would utilize bandwidth that the cable industry concedes they already have the statutory right to occupy.

Moreover, the “character of the government action is best viewed in the context of the industry it regulates.”²⁰⁶ Cable is a heavily regulated industry, which has for at least four decades been subject to a host of federal and state regulations that range from rate regulation to programming regulation to regulation of the use of public rights-of-way – not to mention the existing must-carry regime.²⁰⁷ Carrying the current carriage rules over to multi-stream

entirely whether the telecommunications traffic (*i.e.*, electrical impulses) of a competing carrier on the host carrier’s equipment pursuant to a mandatory lease can be considered a ‘physical taking’ of that equipment.”).

²⁰² See *Penn Cen. Transp. Co.*, 438 U.S. 124.

²⁰³ *Id.* at 124.

²⁰⁴ *Id.* at 130.

²⁰⁵ *Id.* at 130-31 (emphasis added).

²⁰⁶ *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 861 (9th Cir. 2001), *cert. granted by*, 536 U.S. 903 (2001), *aff’d*, 538 U.S. 216 (2003).

²⁰⁷ See generally *Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Subpart I, Part 21, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters*, 2 FCC 2d 725, 728-34 (1966) (holding that the Commission’s authority under the Communications Act includes the authority to regulate cable TV); *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968) (upholding the FCC’s power to regulate cable TV); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (“An Act to amend the Communications Act of 1934 to provide a national policy regarding cable television.”); H.R. Rep. No. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (explaining that the Cable Communications Policy Act of 1984 “establishes a national policy that clarifies the current system of local, state and federal regulation of cable television”); S. Rep. No. 102-92, at 1 (explaining that

broadcasting thus does not evidence a regulatory taking. “Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”²⁰⁸ The cable industry is no different.

Second, there is no negative economic impact in extending must-carry to multi-stream broadcasting. Digital broadcasting, including multicasting, not only maintains the *status quo* – it actually decreases the burden on the cable industry by dramatically reducing the percentage of bandwidth that must-carry occupies. “A regulation that does not decrease the value of regulated property does not give rise to a taking claim.”²⁰⁹ In short, there is no plausible argument that extending must-carry to multi-stream broadcasting produces a negative economic impact of any consequence.

Third, and most importantly, the cable industry has no reasonable investment-backed expectations. The cable industry’s assertion that it has upgraded its facilities for the purpose of employing this digital capacity for its own uses is unfounded.²¹⁰ Cable knows that must-carry for analog is already in place; does not object to HDTV; and made investments fully understanding capacity that would *continue* to be devoted to supporting broadcasting.²¹¹ In fact, under the must-carry statute, the proportion of a cable system devoted to broadcast carriage could be as high as 1/3 of the cable system’s total programming capacity.²¹² It is untenable to suggest that there are reasonable investment-backed expectation in the use of programming streams that the cable industry concedes broadcasters can continue to use – so long as they transmit a single HDTV stream instead of multicasting. A “reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need.”²¹³

In addition, there can be no reasonable investment-backed expectation that the must-carry regime would remain unchanged in perpetuity. The cable industry should have anticipated, as it probably has, that the must-carry regime would be updated to account for evolving technology and the advent of the digital era. Simply put: parties “in a highly regulated field such as FCC

1992 carriage “bill ensures that cable subscribers will have access to local broadcast signals”); *In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Memorandum Opinion and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20845, 20571-72 (2000) (clarifying that cable systems are obligated to carry local broadcasters’ digital signals).

²⁰⁸ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

²⁰⁹ *Hendler v. United States*, 36 Fed. Cl. 574, 588 (Fed. Cl. 1996) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593-94 (1962)).

²¹⁰ See Cooper & Kirk White Paper at 24.

²¹¹ See S. Rep. No. 102-92, at 1 (explaining that “the bill ensures that cable subscribers will have access to local broadcast signals”); see *In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20845, 20571 (2000) (clarifying that cable systems are obligated to carry local broadcasters’ digital signals).

²¹² 47 U.S.C. § 534(b)(1).

²¹³ *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

licensing can have no distinct investment-backed expectations that include reliance upon a legislative and regulatory status quo.”²¹⁴

C. Even if There Were a Taking, Cable Is Already Compensated for Carriage By Subscriber Charges.

Even if there were any sort of taking here, which there is not, the cable industry’s claim that they are wholly uncompensated for their carriage of broadcast programming is disingenuous. As the FCC’s recent study on a la carte programming shows, approximately \$15 of all cable price packages – or almost 30% of the average basic package – represents charges for basic broadcast programming.²¹⁵ What cable seeks is thus double compensation. Indeed, the reason cited by consumer groups for their opposition to carriage protections for multi-stream programming is that cable operators will increase cable rates if that programming is provided to cable customers.²¹⁶

CONCLUSION

For all these reasons, the FCC should move immediately to update the 1990s must-carry regime to include carriage of multi-stream broadcasts. By preventing cable operators from stripping out any portion of multi-stream broadcasts and thus blocking that programming from ever reaching willing viewers, the Commission will: (i) promote the development and deployment of this valuable component of the digital television viewing experience by removing the barriers to broadcasters’ success in the digital age that cable operators have erected; (ii) encourage the swift transition to digital television; (iii) preserve free, over-the-air broadcasting as a whole; (iv), in the process, further the protected interests of broadcasters and viewers alike in disseminating and receiving broadcast communications. Such action is wholly consistent with the First Amendment and does not implicate the Takings Clause of the Fifth Amendment. Therefore, none of the constitutional straw men raised by cable advocates should delay the FCC from revising the existing carriage regime to meet the first digital broadcasting challenge of the new millennium.

²¹⁴ *Folden v. United States*, 56 Fed. Cl. 43, 61 (2003), *aff’d*, 379 F.3d 1344 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 2935 (2005); *see also Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646 (1993) (“[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts, Concrete Pipe’s reliance on ERISA’s original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted.”) (citations and quotations omitted).

²¹⁵ *See Video Programming Services Further Report* at 19 & n.20, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf; *see also* 1992 Cable Act § 2(a)(19) (“[A] substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations.”).

²¹⁶ Ted Hearn, *Multicast Aligns Cable, Consumer Groups – ‘92 Foes Side With Operators Against Digital Must-Carry*, Multi-Channel News, Sept. 19, 2005, <http://www.multichannel.com/article/ca6257800.html?display=policy>.