Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
REVISION OF THE COMMISSION'S PROGRAM ACCESS RULES	MB Docket No. 12-68
NEWS CORPORATION AND THE DIRECTV GROUP, INC., TRANSFERORS, AND LIBERTY MEDIA CORPORATION, TRANSFEREE, FOR AUTHORITY TO TRANSFER CONTROL	MB Docket No. 07-18
APPLICATIONS FOR CONSENT TO THE ASSIGNMENT AND/OR TRANSFER OF CONTROL OF LICENSES, ADELPHIA COMMUNICATIONS CORPORATION (AND SUBSIDIARIES, DEBTORS-IN-POSSESSION), ASSIGNORS, TO TIME WARNER CABLE, INC. (SUBSIDIARIES), ASSIGNEES, ET AL.	MB Docket No. 05-192

REPLY COMMENTS OF DIRECTV, LLC

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SUMMARY

After analyzing the state of the market for distribution of video programming, most commenters in this proceeding reach the same conclusion that DIRECTV has: extension of the cable exclusivity prohibition for another five years is necessary to preserve and protect competition and diversity. Although market conditions continue to evolve, the fundamental structure that led Congress to enact the prohibition remain unchanged— a few cable-affiliated programmers continue to control some of the most popular programming available and have the incentive and ability to withhold it in order to disadvantage rival MVPDs. Moreover, there is no evidence that allowing the prohibition to sunset is likely to achieve any procompetitive benefits from exclusivity. Indeed, as the analysis submitted by DIRECTV with its comments demonstrated, cable exclusivity is likely to occur precisely in those cases where it would be most harmful to consumers and competition.

Nor do First Amendment concerns justify a sunset of the prohibition. Over fifteen years ago, the D.C. Circuit considered—and rejected—cable operators' constitutional challenge to the exclusivity prohibition. Applying the same intermediate scrutiny used in that decision to the record in this proceeding would lead to the same conclusion. Once the Commission finds that extension of the cable exclusivity prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming, it will have established the requisite governmental interests that are advanced by the regulation. Extending the prohibition in the form originally enacted by Congress would not burden substantially more speech than necessary to further those interests, for the same reasons that the original statute was deemed narrowly tailored. Here, moreover, the

comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.

In addition, the unusual nature of the cable industry's First Amendment interest further counsels rejection of their constitutional claim. Cable operators here are seeking First Amendment vindication of the right not to sell (for example) hockey games (or perhaps just the HD versions of hockey games) to competitors—in other words, to limit speech they have already engaged in so that commercial rivals cannot disseminate specific content. They argue that the prohibition thus compels cable-affiliated programmers to speak against their will. But where allegations of compelled speech do not involve a compulsion to say something a speaker does not want to say, or to identify with a viewpoint the speaker does not want to be identified with, courts are unlikely to find the alleged compulsion to be of constitutional significance. Here, a cable-affiliated programmer "speaks" the minute it is carried on a cable system, and its speech when carried by a non-cable rival is *exactly the same*. Thus, there is no chance whatsoever that a programmer might be associated with a message not its own, or be compelled to say something it does not wish to say. The only imaginable "compulsion" here is that a cable-affiliated programmer might be required to distribute its message to more viewers than it would like, and to do so via its commercial rivals. This is not a meaningful compulsion from a constitutional perspective. For this reason as well, the First Amendment is no bar to extension.

Accordingly, DIRECTV submits that the Commission should extend the cable exclusivity prohibition in its entirety for another five years.

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REPLY COMMENTS OF DIRECTV, LLC

In its initial comments in this proceeding, DIRECTV, LLC ("DIRECTV") demonstrated that (1) current market conditions necessitate a five-year extension of the cable exclusivity prohibition, (2) there is no procompetitive, efficiency-based rationale for exclusive carriage arrangements between cable-affiliated programmers and cable operators, and (3) such arrangements (if allowed) would be most likely to occur precisely where they would be most harmful to consumers and competition.[1] Most other parties filing comments in this docket agreed. However, some large cable operators and cable-affiliated programmers raised arguments

[1] Comments of DIRECTV, LLC at 6-33 ("DIRECTV Comments"). Unless otherwise noted, all comments discussed herein were filed on June 22, 2012 in MB Docket Nos. 12-68, 07-18, and 05-192.

to the contrary. Although a number of those arguments have previously been rejected by the Commission, we address them in turn below.

In addition, we address the claim that extension of the cable exclusivity prohibition would improperly compromise cable operators' and cable-affiliated programmers' First Amendment rights. As demonstrated below, once the Commission has determined that extension of the prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming, it has established important governmental interests advanced by the regulation that are unrelated to the suppression of free speech. Extending the prohibition in the form originally enacted by Congress does not burden substantially more speech than necessary to further those interests. Accordingly, extension would withstand intermediate scrutiny, making First Amendment concerns no obstacle to maintaining this procompetitive regulatory safeguard.

As the Commission knows, DIRECTV itself is prohibited by merger conditions from entering into exclusive arrangements with affiliated programmers. Nonetheless, DIRECTV has found this restriction no obstacle to vigorous competition, and is prepared to continue operating under this restriction so long as cable operators do. There is no reason to believe that vertically integrated cable operators' continued hostility toward the prohibition arises from a procompetitive motivation. In order to preserve and protect competition and diversity, the Commission should extend the prohibition for another five years.

I. CURRENT MARKET CONDITIONS SUPPORT EXTENSION OF THE CABLE EXCLUSIVITY PROHIBITION

A. The Basic Market Structure Justifies Continued Regulatory Intervention

Most commenters agree that, although market conditions have changed since the cable exclusivity prohibition was promulgated by Congress in 1992 and last extended by the

Commission in 2007, the basic structure of the market continues to make this safeguard necessary to protect competition and diversity. As the American Cable Association notes, "although the level of vertically integrated programming has risen and fallen over time, and the identity of the vertically integrated cable operators may change, the basic market structure wherein a very few vertically integrated cable operators control much of the most important programming has remained constant."[2] Similarly, Verizon points out that the lingering effects of cable's historical market dominance and its ability to acquire programming assets at a time prior to the entry of competing MVPDs continue to shape the current marketplace and continue to justify extension of the prohibition.[3] The United States Telecom Association confirms this observation by noting that the top cable-affiliated networks (by subscribership and prime-time rating), which have become fixtures on MVPDs' expanded basic packages, were virtually all the same in 1995 as they are today.[4] Others agree that the factors that led Congress to enact the prohibition remain essentially in place today.[5]

[2] Comments of the American Cable Association at 10.

[3] Comments of Verizon at 1-2.

[4] Comments of the United States Telecom Association at 7 (History Channel, launched in January 1995, is the only network not appearing on the 1995 list) (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd. 2060, Appendix H, Tables 6-7 (1996)).

[5] *See, e.g.*, Comments of AT&T Inc. at 9 ("AT&T Comments") (changes in the marketplace "have not fundamentally altered the market structure and concerns that led Congress to adopt the exclusivity ban"); Comments of CenturyLink at 6 (video marketplace "has not changed significantly with respect to the factors most important to the Commission and the court in determining whether the prohibition should be extended"); Comments of DISH Network L.L.C. at 4 ("DISH Comments") (decrease in cable market share "is not sufficient to make foreclosure unprofitable"); Comments of the Independent Telephone & Telecommunications Alliance at 3 (changes in the marketplace have not sufficiently served to preserve and protect competition and diversity, especially with respect to small and rural MVPDs); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association at 4 ("Taken together, these metrics illustrate that the underlying facts that led Congress to promulgate the exclusive contract prohibition, and twice led the Commission to extend it, have not changed"); Comments of the Writers Guild of America, West, Inc. at 7 ("Because cable MVPDs retain control of

Cable-affiliated programmers continue to own some of the most highly rated and broadly distributed video programming networks, without which any MVPD would be at a serious competitive disadvantage. The documentation provided by AT&T demonstrates that those programmers also continue to have the incentive and ability to withhold programming in order to advantage their affiliated cable systems.[6] Moreover, the economic analysis prepared by Professor Kevin Murphy demonstrates that cable-affiliated programmers will find it in their interest to withhold content precisely in those cases where withholding has the worst price impacts for consumers and is thus most detrimental to competition.[7]

Nonetheless, Cablevision and its Madison Square Garden Company ("MSG") affiliate[8] continue to insist that this should not be a concern because "no single programming service—including an RSN—can make or break the competitive viability (or lack thereof) of an MVPD in any particular local market."[9] As an initial matter, this argument ignores the fact that cable-affiliated programmers typically offer more than one programming network, and thus are able to

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a significant amount of must-have programming and are the top providers of video programming both nationally and in 80% of the top 25 DMAs, prohibitions on exclusivity remain necessary to protect market competition").

6 *See* AT&T Comments at 9-23 and Attachments 1-6.

7 Kevin M. Murphy, "Report of Professor Kevin M. Murphy," at 28 (June 22, 2012) ("Murphy Report") (attached as Exhibit A to DIRECTV Comments).

8 MSG describes its affiliation with Cablevision as "only nominal." Comments of the Madison Square Garden Company at 14 ("MSG Comments"). That description is belied by the extent to which the two companies are intertwined. For example, the Dolan family beneficially owns approximately 70 percent of each company, and the companies share a significant number of common officers and directors. *See* Madison Square Garden Co., Definitive Proxy Statement at 69-71 (filed Oct. 13, 2011) (*available at* http://files.shareholder.com/downloads/ABEA-3W02GE/1944758781x0xS1193125-11-269725/1469372/filing.pdf); Cablevision Systems Corp., Definitive Proxy Statement at 92 (filed Apr. 5, 2012) (*available at* http://www.cablevision.com/investor/sec.jsp). The two companies even used the same three lawyers at the same law firm to file their comments in this proceeding.

9 Comments of Cablevision Systems Corporation at 5 ("Cablevision Comments"). *See also* MSG Comments at 9 (no MVPD "will be driven from the video marketplace by exclusive contract arrangements").

amplify the competitive significance of their content through bundling.[10] DISH Network presented an expert analysis showing that the effects of such a strategy can be "super-additive," meaning that "the aggregate benefit of foreclosing a competitor from two networks at the same time exceeds the sum of the benefits that would accrue if each of the two networks were withheld separately."[11] Accordingly, while withholding a single channel can cause significant harm, the relevant inquiry is not limited to the effect of withholding a single channel.

More importantly, Cablevision and MSG raised the same argument in two recent program access cases, and the Commission resoundingly rejected it.[12] As the D.C. Circuit explained in rejecting a similar assertion that complete foreclosure is required to support a program access violation, "[t]he problem with petitioners' argument is that it wrongly assumes an MVPD's lack of commercial attractiveness will never prevent or significantly hinder it from providing satellite programming."[13] Moreover, as the Commission found in 2007, "the more salient point for our analysis is not whether individual competitors will remain in the market if the exclusive contract prohibition were to sunset, but how competition in the video distribution market will be impacted if the exclusive contract prohibition were to sunset."[14] The record in

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[10] *See* DIRECTV Comments at 20-21.

[11] DISH Comments at 7.

[12] *Verizon Tel. Companies and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 15849, ¶ 11 (2011) ("The D.C. Circuit in *Cablevision II* specifically rejected the claim that 'significant hindrance' requires a showing of complete foreclosure"); *AT&T Svcs. Inc. and S. New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 15871, ¶ 11 (2011) (same).

[13] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 708 (D.C. Cir. 2011) ("*Cablevision II*").

[14] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 61 (2007) ("*2007 Extension Order*), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

this proceeding confirms that competition would be significantly diminished absent extension of the prohibition.

As discussed in DIRECTV's initial comments, DBS operators in particular face competitive challenges going forward that could make them especially vulnerable to cable programming exclusivity. Free Press notes that, because DBS systems provide one-way services, (1) they do not offer a broadband connection that would support Internet access and telephony services, and (2) they must rely upon an increasingly less viable service (DSL) for their Internet connectivity, leading analysts to project that DBS penetration will slowly decline over the next decade.[15] Further complicating matters are the efforts of several cities to severely restrict areas in which satellite receive antennas may be mounted, especially on multiple dwelling units.[16] Adding insult to injury, this initiative has been led by three cities (Boston, Philadelphia, and Chicago) in which cable already enjoys dominant market share (70.5 percent, 66.1 percent, and 58.8 percent, respectively).[17]

Cable operators assert that changes in market conditions recently recognized by the Commission as a basis for sunsetting its "viewability" rule (which requires hybrid cable systems to carry digital must-carry stations in analog format) compel sunset of the prohibition in this proceeding as well.[18] In that proceeding, the Commission found that "eliminating the viewability rule will provide operators the needed flexibility to meet fast-changing consumer

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[15] Comments of Free Press at 3-4 ("Free Press Comments").

[16] *See, e.g.*, File Nos. CSR-8541-O (Philadelphia); CSR-8624-O (Chicago).

[17] *See* Free Press Comments at 7 (providing SNL Kagan data on market share by DMA).

[18] *See, e.g.*, Comments of National Cable & Telecommunications Association at 2 ("NCTA Comments"); Comments of Time Warner Cable Inc. at 3-4 ("TWC Comments").

demands for HD cable services and high speed broadband services."[19] Yet the development that the Commission found "in particular" to justify a sunset was "the widespread availability of small digital set-top boxes that cable operators are making available at low cost (or no cost) to analog customers of hybrid systems."[20] Accordingly, unless someone has recently developed an affordable device that would prevent cable-affiliated programmers from withholding valuable content for anticompetitive reasons, this precedent is inapposite.

The comments also confirm that the Commission cannot rely upon other program access provisions to take the place of the cable exclusivity prohibition. As AT&T notes, compiling evidence necessary to show harm can take months or years, enough time to miss an entire season of a popular program or a sports team.[21] Indeed, DIRECTV had to suffer for nearly a decade without access to RSN programming in Philadelphia before it could document the destructive impact of such withholding to the Commission's satisfaction.[22] In such cases, "time is on the incumbents' side."[23] Moreover, as DISH Network points out, cable-affiliated programmers might have the perverse incentive to enter into exclusive arrangements in order to avoid charges of discrimination from competing MVPDs.[24] Only by extending the prohibition can the

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[19] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, FCC 12-59, ¶ 16 (rel. June 12, 2012).

[20] *Id.*, ¶ 1. *See also id.*, ¶ 14 ("More importantly, unlike in 2007, low functionality/low cost digital equipment is now readily available as an option to cable consumers.").

[21] AT&T Comments at 19, 26.

[22] *Compare DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, ¶¶ 13-14 (2000) (rejecting claim that withholding Philadelphia RSN beginning in 1997 was an unfair practice under Section 628(b)), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *and Adelphia Commc'ns Corp., Time Warner Cable Inc., and Comcast Corp.,* 21 FCC Rcd. 8203, ¶ 149 (2006) (regression analysis shows significant DBS underperformance in markets where RSN has been withheld, including Philadelphia).

[23] AT&T Comments at 26.

[24] DISH Comments at 13.

Commission ensure the level of procompetitive safeguards needed to check cable's anticompetitive incentives.

B. Exclusivity Is Not Necessary to Promote Procompetitive Ends

In their initial comments, DIRECTV and AT&T noted that, if exclusive contracts actually had the procompetitive effect of encouraging innovation and investment in new programming, one would expect to find numerous situations in which non-cable affiliated programmers (who are under no prohibition) have concluded such agreements—but that is not the case.[25] As explained in the report submitted by Professor Kevin Murphy, this is not surprising given the characteristics of the MVPD industry, but it undermines cable operators' assertions that programming exclusivity is efficient and procompetitive. Indeed, because vertical integration can achieve the alignment of incentives that underlies efficient exclusivity, cable-affiliated programmers should be *less* likely to withhold than are non-integrated programmers.[26] Professor Murphy concludes that, "[t]aken together, these factors imply that there likely is little benefit from MVPD exclusives and non-trivial costs in terms of a lack of access to customers."[27]

Nonetheless, cable operators and cable-affiliated programmers continue to insist that extending the cable exclusivity prohibition will preclude them from achieving the benefits that exclusive arrangements purportedly would produce.[28] They raised this same argument in the two prior sunset proceedings, and the Commission rejected it both times. In 2002, the Commission

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25 *See* DIRECTV Comments at 26; AT&T Comments at 27-28.

26 *See* DIRECTV Comments at 28-30 (citing Murphy Report).

27 Murphy Report at 18.

28 *See* Cablevision Comments at 7; Comments of Comcast Corporation and NBCUniversal Media, LLC at 12 ("Comcast Comments"); TWC Comments at 13; Comments of Discovery Communications, LLC at 4-10 ("Discovery Comments").

noted that the number of national programming networks (including cable-affiliated networks) had increased substantially, and concluded that "the retention of the exclusivity prohibition will not reduce the incentives to create new or diverse programming."[29] The explosive growth in national networks has continued, with today's approximately 800 networks more than doubling the 294 that existed in 2002.[30] In 2007, the Commission noted that cable-affiliated programmers had only rarely exercised their option to seek approval of exclusive arrangements; moreover, all three networks (CourtTV, Speed, and SyFy) that were the subjects of exclusivity petitions that were denied had flourished despite the lack of exclusivity.[31] From this, the Commission concluded that the "purported benefits" of exclusivity would not "outweigh the harm to competition and diversity in the video distribution marketplace that would result if we were to lift the exclusive contract prohibition."[32] Even more recently, although Cablevision and MSG claimed procompetitive benefits from withholding the HD feed of two RSNs, they were able to "put forth no evidence demonstrating that this withholding strategy has resulted in increased investment in the networks or that it has improved the quantity and quality of programming on the networks."[33]

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[29] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, 17 FCC Rcd. 12124, ¶ 64 (2002) ("*2002 Extension Order*").

[30] *See Revision of the Commission's Program Access Rules*, 27 FCC Rcd. 3413, Appendix B, Table 1 (2012) ("*Notice*").

[31] *2007 Extension Order*, ¶ 63.

[32] *Id.*

[33] *Verizon Tel. Cos. and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13145, ¶ 33 (MB 2011); *AT&T Svcs. Inc. and S. New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13206, ¶ 34 (MB 2011).

The one exclusive distribution arrangement that cable operators would prefer to focus upon is DIRECTV's NFL Sunday Ticket, a service that provides subscribers access to out-of-market professional football games in addition to the in-market games that are available for free via over-the-air broadcast. For example, Cox asserts that "[i]t certainly defies logic that the Commission's concerns about access to regional sports networks owned by cable operators much smaller than DirecTV would not extend to the control exercised by DirecTV over one of sports' most popular properties."[34]

Yet this now-familiar complaint is clearly misguided. First, NFL Sunday Ticket is exactly the kind of exclusive arrangement that any cable operator could enter into: *i.e.*, an arrangement with a non-cable affiliated programmer.[35] Indeed, because of the merger conditions under which it operates, DIRECTV could not have entered into this exclusive arrangement if it were affiliated with the programmer. Here, unlike a cable-affiliated RSN, the NFL has no incentive to favor any particular MVPD in order to disadvantage rivals of an affiliated company.

Second, NFL Sunday Ticket is the exception that proves the rule with respect to the rarity of exclusive programming distribution arrangements. As explained by Professor Murphy, NFL Sunday Ticket is unusual because, unlike most other programmers that would have to forego all revenue from carriage by MVPDs not part of the exclusive agreement, the NFL can recapture some of that income in the form of advertising revenue generated from carriage of those same games broadcast on local channels. "Essentially, Sunday Ticket can be thought of as a vertical product differentiation in which the program supplier (the NFL) provides the major substitute for

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[34] Comments of Cox Communications, Inc. at 3 n.5 ("Cox Comments").

[35] Indeed, cable operators have vied for this content when it has periodically become available. *See, e.g.*, S. Donohue and M. Reynolds, "Ticket too high," MULTICHANNEL NEWS (Nov. 14, 2004) (available at http://www.multichannel.com/article/116625-Ticket_too_high.php).

its own product."[36] It is this peculiar quality that makes exclusivity efficient for the NFL and procompetitive for the MVPD industry in this instance.

C. The Commission Should Consider Streamlining the Process for Securing a Public Interest Exclusivity Determination

The cable exclusivity prohibition is not absolute, as an exclusive contract is permissible if the Commission determines that it is in the public interest.[37] Cable operators complain that the ability to petition for approval of an exclusive arrangement is not sufficient, as the process "can be long and burdensome."[38] Given their failure to even attempt to avail themselves of this option over the last 15 years, this lament rings hollow.

Nonetheless, the Commission should consider streamlining the public interest petition process to enhance its efficiency and timeliness. For example, AT&T proposes that such petitions should be automatically deemed granted if no one files a timely opposition.[39] DIRECTV supports the adoption of that approach.

In addition, the Commission could adopt a rebuttable presumption based on its findings in the *2010 Program Access Order*. In that proceeding, the Commission specifically concluded that it is "highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect" of significantly hindering competition.[40] Based on that conclusion, the Commission could adopt a rebuttable presumption

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36 *See* Murphy Report at 29.

37 47 U.S.C. § 548(c)(2)(D).

38 Comcast Comments at 12. *See also* Discovery Comments at 8 (complaining that the exclusivity ban "forces programmers to seek advance permission before entering into such arrangements").

39 AT&T Comments at 5.

40 *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 51 n.200 (2010) ("*2010 Program Access Order*").

that exclusive distribution arrangements involving local news and local community or educational programming would serve the public interest. Such a presumption would align the burden of production for cases involving exclusive distribution of such local programming,[41] and would also be consistent with Congress's intent that the prohibition be "limited to national and regional cable programmers."[42]

II. First Amendment Concerns Do Not Preclude Extension

Comcast, Time Warner Cable, and NCTA assert that the cable exclusivity prohibition violates cable operators' First Amendment rights.[43] This is not the first time large cable MSOs have made this claim. Over fifteen years ago, the D.C. Circuit considered—and rejected—their facial challenge to Section 628(c)(2)(D).[44] Applying intermediate scrutiny because the statute was "content-neutral on [its] face," the Court held that the cable exclusivity prohibition advanced the government's substantial interest in promoting "fair competition in the video marketplace" by "regulating vertically integrated programmers and operators."[45] It found that the exclusivity prohibition was justified in part by "the unique power that vertically integrated companies have in the cable market."[46] The Court also found the alleged impact on cable operators' speech to be "conjectural" and too "attenuated" to support their First Amendment claims.[47] Moreover, given

41 In other words, a complainant MVPD would have the burden of production both when challenging an exclusive for terrestrially-delivered local programming under Section 628(b) and when challenging a public interest petition under Section 628(c)(2)(D).

42 S. Rep. No. 102-92, 102nd Cong., 1st Sess., at 28 (1991) ("Senate Report").

43 *See* Comcast Comments at 9-10; TWC Comments at 11-17; NCTA Comments at 17-18.

44 *Time Warner Entm't Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner I*").

45 *Id.* at 977-78.

46 *Id.* at 978.

47 *Id.* at 979.

that "Congress considered [cable operators'] argument and concluded that the benefits of these provisions—the increased speech that would result from fairer competition in the video programming marketplace—outweighed the disadvantages—the possibility of reduced economic incentives to develop new programming," the Court declined to second-guess the legislative judgment embodied in the statutory scheme.[48]

The cable industry now argues that, *even if* the Commission concludes that the exclusivity prohibition remains "necessary" to preserve competition and diversity, extension of the prohibition would *still* violate the First Amendment because cable no longer enjoys "bottleneck" monopoly power.[49] As discussed below, there is nothing in the record in this proceeding that would indicate that the D.C. Circuit's analysis would lead to a different finding today than it did in 1996.

Moreover, the unusual nature of the cable industry's First Amendment claim provides another basis for rejecting their constitutional claim. Cable operators do not seek to vindicate their right to speak freely or to disseminate their speech as widely as possible. Nor do they even seek the right not to speak. Rather, they seek to protect their economic right to limit speech they have already engaged in so that commercial rivals cannot disseminate specific content. Thus, while Cablevision wants to secure distribution of its RSN over multiple MVPD platforms, and is even willing to allow telco competitors to distribute the SD feed of that programming, it asserts a First Amendment right to deny those telcos the ability to distribute the exact same "speech" in HD format. Presumably, Comcast and Time Warner Cable would also like to withhold programming from MVPD rivals while achieving the widest possible distribution of that same

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48 *Id.*

49 TWC Comments at 2-3.

content among non-overlapping cable systems. In these circumstances, a court could also find extension of the exclusivity prohibition constitutional on the grounds that it does not meaningfully "compel" the speech of cable-affiliated programmers.

A. Extension of the Cable Exclusivity Prohibition Advances an Important Governmental Interest and Does Not Burden Substantially More Speech Than Necessary

In past cases considering constitutional challenges to the program access rules, the D.C. Circuit has applied the intermediate scrutiny standard governing content-neutral restrictions.[50] "A regulation will be upheld under intermediate scrutiny 'if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"[51] As applied to the Commission's predictive judgment, the intermediate scrutiny standard considers whether the agency has "draw[n] 'reasonable inferences based on substantial evidence.'"[52] Substantial evidence, in turn, "does not require a complete factual record—[the courts] must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency."[53]

1. Important Governmental Interest

With respect to the first prong of the inquiry—the importance of the governmental interest asserted—cable's position appears to be that "preserv[ing] and protect[ing] competition

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50 *Time Warner I*, 93 F.3d at 978 ("The vertically integrated programmer provisions are thus not 'structured in a manner that raise[s] suspicions that their objective was, in fact, the suppression of certain ideas.'"); *Cablevision II*, 649F.3d at 710.

51 *BellSouth Corp. v. FCC*, 144 F.3d 58, 69-70 (D.C. Cir. 1998) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

52 *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("*Turner I*")).

53 *Id. See also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) ("In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required").

and diversity in the distribution of video programming"[54] is insufficiently important. This, they argue, is because the *Time Warner I* decision allegedly hinged on the "bottleneck" monopoly then possessed by cable operators. Accordingly, they argue, unless the Commission finds a "bottleneck" today, there can be no important governmental interest in maintaining the exclusivity ban.[55]

A Commission finding that the exclusivity ban remains "necessary" to preserve and protect competition and diversity should be sufficient to reject this challenge in its entirety. In any event, the *Cablevision II* court has already addressed this argument in upholding the Commission's closing of the terrestrial loophole, explaining that in order to survive intermediate scrutiny:

> the Commission need show only that vertically integrated cable operators remain dominant in some video distribution markets, that the withholding of highly desirable terrestrially delivered cable programming, like RSNs, inhibits competition in those markets, and that providing other MVPDs access to such programming will "promot[e] ... fair competition in the video marketplace." *The Commission has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition.*[56]

In concluding that the Commission need not establish that "cable companies retain a stranglehold on competition nationally," the *Cablevision II* court rejected the argument that "bottleneck control" is somehow necessary to establish a sufficiently important government interest to justify regulation.

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[54] 47 U.S.C. 548(c)(5).

[55] *See* Comcast Comments at 10; NCTA Comments at 17; TWC Comments at 13 (each citing Judge Kavanaugh's dissent in *Cablevision II*, 597 F.3d at 1326).

[56] *Cablevision II*, 649 F.3d at 712 (emphasis added and internal citations omitted).

Nor were Congress's concerns in enacting the 1992 Cable Act limited to addressing only "bottleneck" market power. Indeed, Section 628 itself makes no reference to market power or bottleneck control. Rather, Congress was also concerned that cable-affiliated programmers have the "incentive and ability to favor their affiliated cable operators" over unaffiliated MVPDs.[57] Moreover, the statute's legislative history makes clear that it "does not amend existing antitrust laws," but instead "provides new FCC remedies" that differ from traditional antitrust remedies.[58] Congress clearly meant to protect against something more than the anticompetitive exercise of market power or "bottleneck" control by vertically integrated cable companies already addressed by antitrust laws.[59] And just as clearly, if the exclusivity prohibition is "necessary" to accomplish these goals, it serves an "important" governmental interest.

2. Narrowly Tailored Burden

The cable industry also questions whether the exclusivity prohibition remains sufficiently tailored to meet the asserted governmental interest. Judicial application of the intermediate scrutiny standard has made clear that the question here is not whether the remedy is the least intrusive means of addressing the problem; it is simply whether the "recited harms are real, not merely conjectural, and [whether] the regulation will in fact alleviate these harms in a direct and

[57] 1992 Cable Act, § 2(a)(5).

[58] Senate Report at 29.

[59] In any event, cable operators still have significant market power. As the D.C. Circuit recently recognized, the "clustering and consolidation" of cable systems have "bolster[ed] the market power of cable operators," and some local markets remain "'highly susceptible to near-monopoly control by a cable company.'" *Cablevision II*, 649 F.3d at 712. As a result, cable operators have been able to increase their rates at more than double the rate of inflation since 2007. According to the Commission's most recent report on cable industry prices, over the period from 2007 to 2010, the average monthly price for expanded basic service increased by over 15 percent while the consumer price index increased by just 7 percent over the same period. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 27 FCC Rcd. 2427, Table 3 (MB 2012) (showing price of expanded basic service increasing from $47.27 in 2007 to $54.44 in 2010, while CPI increased from 134.7 to 144.2).

material way."[60] Cable nonetheless argues, as it did unsuccessfully before the *Cablevision II* court, that extension of the exclusivity prohibition is not sufficiently tailored because it is both overinclusive and underinclusive. Those arguments have as little merit here as they did when previously considered and rejected.

Alleged Overinclusiveness. Cable's first overbreadth claim is that the exclusivity prohibition is too blunt a tool: because it prohibits all exclusive arrangements involving cable-affiliated programming and cable operators, it is "far more restrictive than necessary" to advance the government's asserted interests.[61] Such a ban is overbroad, the argument goes, because it applies even to cable-affiliated programming that could not be used to harm competition, and does not require a specified finding of harm.[62]

To begin with, this is factually incorrect. The exclusivity prohibition, as currently constituted, does *not* flatly ban all cable-affiliated exclusives with cable operators. Rather, it provides a safety valve under which cable-affiliated programmers can offer exclusive programming where such exclusivity would not harm competition.[63] Thus, the statute addresses the cable industry's claims of overbreadth by giving cable-affiliated programmers the ability to peel back the exclusivity prohibition in appropriate cases.[64] As discussed above, moreover, DIRECTV supports proposals raised in this proceeding to make this safety valve easier to use by

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60 *Cablevision II*, 649 F.3d at 711 (*citing Turner I*, 512 U.S. at 664).

61 TWC Comments at 15.

62 *Id.* at 15-16.

63 47 C.F.R. § 76.1002(c)(5).

64 Where an exclusive arrangement will not cause consumer harm, cable operators and affiliated programmers may seek approval of the arrangement under Section 1002(c)(5) of the Commission's rules. Indeed, the Supreme Court has repeatedly found that such "case-by-case analysis of the fact situations" is the "cure" for "whatever overbreadth may exist" in a given law. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

adopting presumptions, especially for the categories programming where the cable industry claims exclusivity would be most beneficial: local news and public affairs programming. In addition, cable-affiliated programmers have bypassed this procedure altogether by using terrestrial delivery to engage in exclusive arrangements for such local and hyper-local content,[65] providing yet another avenue for relief in appropriate cases.

In any event, the Supreme Court disposed of this argument definitively when it upheld the must-carry statute in *Turner II*. There, as here, the cable industry claimed that the governmental restriction that compelled them to speak would apply even where there was no harm from refusing to do so.

> Appellants say the must-carry provisions are overbroad because they require carriage in some instances when the Government's interests are not implicated. . . . [But i]t appears, for example, that 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 "substantially broader than necessary to achieve the government's interest." Even on the doubtful assumption that a narrower but still practicable must-carry rule could be drafted to exclude all instances in which the Government's interests are not implicated, our cases establish that content-neutral regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech."[66]

The cable exclusivity prohibition has a similarly limited effect. Cable operators concede that, even if the prohibition were lifted, exclusive programming distribution arrangements would

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65 *See* Cablevision Comments at 8-9 (discussing local news channels and high school sports channels carried exclusively and delivered terrestrially). Although the Commission extended the general prohibition on unfair practices in Section 628(b) in the *2010 Program Access Order,* a cable operator can offer such local content exclusively unless and until a complaining MVPD can show that withholding such local content caused harm to competition.

66 *Turner II*, 520 U.S. at 216-17 (internal citations and quotations omitted). *See also New York State Club Ass'n*, 487 U.S. at 14 ("To succeed in its challenge, appellant must demonstrate from the text of Local Law 63 and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally") (citing *Broadrick,* 413 U.S. at 613-15 (referring to the overbreadth doctrine as "strong medicine" that should be used "sparingly and only as a last resort," and noting that a law is constitutional unless it is "substantially overbroad")).

continue to be rare.[67] Accordingly, as in *Turner II*, although the prohibition is broadly *drafted*, it is narrow *in application*. Moreover, as demonstrated in DIRECTV's initial comments, exclusive arrangements between cable-affiliated programmers and cable operators are likely to occur only where they cause the most consumer harm. In such circumstances, a broad prohibition is an appropriate policy tool.

Here, moreover, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive."[68] Time Warner Cable, among others, has argued that the Commission cannot take a more granular approach, because applying the exclusivity ban to a particular subset of programming would be "starkly content-based" and thus subject to strict scrutiny.[69] To be clear, DIRECTV believes that restrictions on all cable-affiliated programming, or restrictions on all "marquee" programming, or restrictions on RSNs specifically, would each be content-neutral. In each case, as the *Cablevision II* court put it, "there is absolutely no evidence, nor even any serious suggestion," that any particular formulation "is intended to disfavor certain messages or ideas."[70] Yet it remains true that the broader formulation allays even theoretical concerns that a more granular approach might reveal a "special hostility towards the particular biases thus singled out."[71]

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67 *See* Comcast Comments at 3; Cox Comments at 3; Discovery Comments at 4.

68 *Hill v. Colorado*, 530 U.S. 703, 730 (2000).

69 TWC Comments at 19.

70 *Cablevision II*, 649 F.3d at 717.

71 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992).

Alleged Underinclusiveness. Cable also argues that the exclusivity ban is underinclusive because it applies only to cable-affiliated programming, and not programming affiliated with other large MVPDs.[72] Here again, the courts have spoken definitively to cable's argument.

> Were the Commission to persist in regulating only the conduct of cable operators in the face of evidence that exclusive dealing arrangements involving other MVPDs have similar negative impacts on competition, then our analysis would necessarily change. But nothing in the present record suggests such unjustified discrimination. . . . We therefore decline to strike down the Commission's order as "fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective."[73]

The record contains no evidence that exclusive dealing arrangements involving non-cable MVPDs have any negative impact on competition. Moreover, because DIRECTV is already subject to conditions that include a prohibition on exclusive arrangements with affiliated programmers, the only major MVPD not covered by this limitation is DISH Network—which has no affiliated programming. Absent supporting evidence, cable has no basis to claim that a prohibition on cable-affiliated exclusivity is merely "anti-cable bias."[74]

In any event, it makes sense to treat cable operators differently than other MVPDs—even MVPDs larger than some cable operators—because cable operators have non-overlapping franchise areas and thus do not compete against one another. Thus, a programmer affiliated with Time Warner Cable could grant exclusive rights to other cable operators without compromising Time Warner Cable's exclusivity in its franchise areas. In this way, a cable-only exclusive strategy would allow the programmer to achieve distribution to cable's aggregate 58.5 percent

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[72] TWC Comments at 21; Cablevision Comments at 5. As DIRECTV has argued in prior proceedings, the Commission has neither legal authority to extend the prohibition to non-cable affiliated programmers nor any policy basis for doing so. *See, e.g.,* Further Comments of DIRECTV, Inc., MB Docket No. 07-29, at 2-7 (filed Jan. 4, 2008); Further Reply Comments of DIRECTV, Inc., MB Docket No. 07-29, at 2-7 (filed Feb. 12, 2008).

[73] *Cablevision II*, 649 F.3d at 713 (citation omitted).

[74] TWC Comments at 16.

share of MVPD subscribers nationwide (and much higher percentages in many key DMAs). By contrast, a programmer affiliated with DIRECTV or DISH Network could not grant an exclusive to any other MVPD without violating an exclusive arrangement with its affiliated distributor. Accordingly, although DBS operators have a combined MVPD market share of 33.9 percent, an affiliated programmer that wanted to grant an exclusive could not achieve that scale of distribution. At most, it could reach the 19.9 percent of MVPD subscribers served by DIRECTV,[75] or approximately one-third the number of subscribers reached through a cable-only exclusive. Under these circumstances, cable operators are justifiably treated differently because of their unique competitive position.

B. The Exclusivity Prohibition Does Not Meaningfully Compel Programmer Speech

As discussed above, a simple application of the intermediate scrutiny analysis used in *Time Warner I* and *Cablevision II* is sufficient to demonstrate the constitutionality of extending the exclusivity prohibition. Yet such an extension would be constitutional for another reason implicit to, but not discussed directly in, those cases: the exclusivity prohibition does not meaningfully compel the speech of cable-affiliated programmers in the first place.

In seeking to cloak itself in the First Amendment, cable argues that its industry is "not unlike the newspaper industry."[76] But the speech at issue here is not the *Washington Post's* editorial page, and the Commission is no censor. What cable wants is not to "speak" in the usual sense. Rather, it seeks the right *not* to sell, say, hockey games—or perhaps even HD versions of hockey games—to competing MVPDs that would like to buy them. Cable interests want, in

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[75] This figure is calculated using the figures in the *Notice*, Appendix A footnote 9 (19.8 million DIRECTV subscribers divided by 99.645 million MVPD subscribers).

[76] TWC Comments at 15.

other words, to protect their economic right to limit speech they have already engaged in by denying certain content only to commercial rivals. They thus argue that the exclusivity prohibition compels cable-affiliated programmers to speak against their will.[77]

Cable is certainly correct that their essential claim is a compelled speech case. Courts have determined that cable programmers and distributors are First Amendment speakers when they choose to distribute programming.[78] They have also recognized that the First Amendment protects not only the right of speakers (even corporate speakers) to speak, but also their right not to speak.[79]

But not every allegation of compelled speech rises to the level of a constitutional violation. In compelled-speech cases such as this one, courts balance the level of government coercion affecting speech with the level of government interest required to justify such coercion.[80] Most often, courts do so explicitly in terms of the level of scrutiny involved—finding that, in cases of more serious compulsion, strict scrutiny is required, while in cases where compulsion is deemed to be of less constitutional significance, intermediate or even rational-basis scrutiny is required.[81] In other cases, courts might simply find that the compulsion in

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[77] *Id*.

[78] *Time Warner I*, 93 F.3d at 966 (*citing Turner I*, 512 U.S. at 636).

[79] *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.")

[80] *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("*Wooley*") (finding that differences between various alleged violations of negative First Amendment rights are "matters of degree").

[81] *Compare Knox v. Serv. Employees Intl. Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) ("*Knox*) (affirming that, where state law permits "union shop" for public sector activities, "any procedure for exacting fees [for political activities of union] from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights" and, "to underscore the meaning of this careful tailoring," reaffirming that "measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest.") (internal quotations and citations omitted); *with Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) ("*Zauderer*") ("We do not suggest that disclosure

question is or is not constitutionally significant without reference to a particular level of scrutiny.[82] In either context, the key question is the nature and significance of the alleged compulsion.

Courts will find that an alleged compulsion rises to constitutional significance where the government seeks to force people or corporations to say something they do not want to say or to identify with a viewpoint with which they do not wish to be identified. As the Supreme Court put it, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[83] Thus, for example, the State of New Hampshire cannot require Jehovah's Witnesses to drive with "Live Free or Die" license plates,[84] the City of Boston can exclude gay groups from its St. Patrick's Day Parade based on concerns that parade viewers would associate the ideologies of the marchers with that of Boston itself,[85] a newspaper cannot be required to give politicians with whom it disagrees a

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requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

82 *E.g., Rumsfeld v. Forum for Academic and Inst. Rights, Inc.* 547 U.S. 47, 64-65 (2006) ("*Rumsfeld*") (finding no constitutional violation in amendment requiring law schools to give equal space to military recruiters without discussion of "scrutiny," where level of compulsion was not deemed significant).

83 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("*Barnette*").

84 *Wooley*, 430 U.S. at 717 (holding that state could not require Jehova's Witnesses to purchase license plates with motto "Live Free or Die," despite asserted interest in fostering "appreciation of history, state pride, and individualism"); *Barnette*, 319 U.S. at 642 (holding that school board could not compel students, under threat of expulsion, to salute the United States Flag or recite the Pledge of Allegiance).

85 *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (permitting city to ban group from parade, finding that parade viewers would associate the ideologies of the marchers with the parade organizers, forcing the organizers to "speak").

platform to respond to editorials,[86] and (most recently) public sector unions cannot set up a "union shop" and assess fees on non-members for political activities without creating an "opt-in" mechanism for such non-members.[87] In each of these cases, the Court found either actual compulsion (being required to deliver an unwanted message) or, at the very least, that a party might be associated with viewpoints other than its own.

Where these two factors are absent, or where the compelled speech is merely "factual" and not "ideological," however, courts are far less likely to find an alleged compulsion to be of constitutional significance. Thus, for example, the federal government can require law schools to give equal space to military recruiters,[88] Ohio can require lawyers to disclose factual information in advertisements,[89] California can prohibit mall operators from excluding protesters,[90] Texas can require abortion providers to give "factual" information to patients,[91] and the IRS can require disclosure of payments made to lawyers.[92]

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86 *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that Florida statute requiring newspapers to afford free space to candidate for reply is unconstitutional because of its intrusion into the function of the editors).

87 *Knox*, 132 S. Ct. at 2295-96.

88 *Rumsfeld*, 547 U.S. at 60-62 (reasoning that requirement "neither limits what law schools may say nor requires them to say anything," that "recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*," that the requirement "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters" and that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse").

89 *Zauderer*, 471 U.S. at 651 (upholding State's requirement that attorney include in advertisements a disclosure that clients may be responsible for costs of litigation where requirement concerned "purely factual and uncontroversial information about the terms under which his services will be available").

90 *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (reasoning that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner" and that "no specific message is dictated by the State to be displayed on appellants' property" so "[t]here consequently is no danger of governmental discrimination for or against a particular message").

91 *See, e.g., Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (holding that Texas law requiring a physician who was to perform an abortion to display a sonogram

The exclusivity prohibition falls within the latter line of cases. By definition, a cable-affiliated programmer "speaks" the minute it is carried on a cable system. Its speech when carried by a non-cable rival is *exactly the same*. There is thus no chance whatsoever that a programmer might be associated with a message not its own, or be compelled to say something it does not wish to say. The only "compulsion"—if one can call it that—is that it might be required to distribute its message to more listeners than it would like, and to do so via its commercial rivals. This is far afield indeed from the concerns animating the compelled speech cases. Indeed, it is not really compelled *speech* at all.

Given the lack of compulsion here, even the intermediate scrutiny test adopted in *Time Warner I* and followed in *Cablevision II* is likely too strict. In those cases, the D.C. Circuit followed the analysis originally adopted by the Supreme Court in *Turner I*. In that case, the cable industry claimed that the must-carry rules compelled speech by requiring cable operators to broadcast messages with which they disagree.[93] The *Turner I* Court found the compulsion acceptable both because it was content neutral and because, "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would

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and make audible the fetal heartbeat, and to explain the results of each procedure, and requiring a mother to complete a form indicating that she had received the required materials did not compel physicians' speech and thus did not violate the First Amendment because required information was not ideological but, rather, truthful and nonmisleading, and did not fall under the rubric of compelling "ideological" speech that triggers First Amendment strict scrutiny).

[92] *U.S. v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (holding that IRS summons requiring an attorney to give identifying information regarding the payee or persons on behalf of whom cash payments in excess of $10,000 were made was not compelled speech, as it required the attorney only to provide the Government with information that his clients had given him voluntarily, not to publicly disseminate a message with which he disagreed); *see also Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir.), *cert. denied,* 131 S. Ct. 3003 (2011) (holding that SEC requirement that institutional investment manager divulge certain information was not compelled speech).

[93] *Turner I*, 512 U.S. at 653 (noting that "appellants contend that the provisions (1) compel speech by cable operators, (2) favor broadcast programmers over cable programmers, and (3) single out certain members of the press for disfavored treatment").

assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[94] Here, by contrast, there is no risk that a cable-affiliated programmer will be compelled to say something it does not want to say or be associated with a message not its own. In such circumstances, the alleged compulsion simply does not rise to the level even of that found permissible in *Turner I*.

CONCLUSION

The cable exclusivity prohibition continues to be necessary to preserve and protect competition and diversity in the video programming distribution market. Extending the prohibition will therefore serve an important governmental interest, and will not unduly burden the First Amendment rights of cable-affiliated programmers. For the foregoing reasons and those set forth in DIRECTV's initial comments, the Commission should extend the cable exclusivity prohibition contained in Section 628(c)(2)(D) in its entirety for another five years.

Respectfully submitted,

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[94] *Id.* at 655.