



LEASED ACCESS MANDATES INFRINGE ON THE FIRST AMENDMENT RIGHTS OF CABLE OPERATORS, AND THE FCC SHOULD DECLINE TO ENFORCE THE REGULATIONS

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The proliferation of online video content in the past decade has expanded viewer choice and disrupted the legacy broadcast and cable markets. It is encouraging that the Federal Communications Commission (FCC) and a wide range of commenters have expressed support for comprehensive media law reform. This comment explains that, in light of competitive dynamics in television markets, the FCC's leased access rules are likely no longer constitutional and the FCC should decline to enforce them.

The rules survived constitutional review in the past only because of cable operators' substantial market power, which justified, in the eyes of the Supreme Court in *Turner I*, diminished First Amendment rights for cable operators. The Supreme Court's justification for intermediate scrutiny for cable access regulations—bottleneck monopoly power—has largely evaporated. As explained below, if litigated today, courts would likely subject these rules to strict scrutiny, as courts would for speech restrictions for other media distributors like bookstores and internet providers.

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ACCESS REGULATIONS FOR CABLE OPERATORS ARE CONSTITUTIONAL SOLELY WHEN OPERATORS POSSESS “BOTTLENECK MONOPOLY POWER” OVER TV CONTENT

Congress created the leased access laws for cable operators in 1984.¹ Under these rules, cable operators are required to lease a subset of their channel capacity to programmers unaffiliated with them.² These controversial rules have had meager effects on additional programming and competition,³ and continuing to enforce them burdens cable operators with compliance requirements and infringes on their First Amendment rights. In its Further Notice of Proposed Rulemaking (FNPRM), the FCC asked,

In seeking comment on updating the FCC’s leased access rules, we also seek comment on whether our rules implicate First Amendment interests. If so, what level of First Amendment scrutiny is appropriate, and how does that analysis apply to our existing rules and the potential changes we seek comment on here, in light of the statutory obligations of Section 612? In this context, we also seek comment on whether there have been any changes in the video distribution market since Congress and the FCC first addressed these issues that are relevant to the First Amendment analysis. For instance, are there relevant changes in the distribution market that we should now consider? Is the FCC’s 2015 decision regarding effective competition relevant to this analysis?⁴

Access mandates—like leased access—imposed on media distributors have been litigated several times before because cable operators’,⁵ newspaper publishers’,⁶ and internet access providers’ decisions about what content to transmit to subscribers and what content to omit are protected by the First Amendment.⁷

Content-neutral access regulations for cable operators are justified, the Supreme Court held in the 1994 *Turner I* case, solely because cable operators at the time possessed “bottleneck monopoly power” over TV content.⁸ In the *Turner I* case, the Supreme Court recognized that channel set-aside mandates “reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.”⁹ Despite this regulation of speech, the Court declined to apply strict scrutiny to the access regulations for cable, as it did in *Miami Herald v. Tornillo* for access regulations for newspapers.¹⁰ Unlike laws for print media, laws requiring cable operators to carry

¹ 47 U.S.C. § 532(b)(1).

² 47 U.S.C. § 532(b)(1).

³ *Leased Commercial Access; Modernization of Media Regulation Initiative, Proposed Rule by the Federal Communications Commission, MB Docket Nos. 07-42, 17-105; FCC 18-80, 3* (2018) (comments of Charles H. “Charlie” Stogner, President, LAPA and CEO, StogMedia). Stogner characterizes leased access as “a promising concept that the FCC strangled at birth.”

⁴ *Leased Commercial Access; Modernization of Media Regulation Initiative*, 83 Fed. Reg. 30639 (proposed June 29, 2018) (to be codified at 47 C.F.R. pt. 76).

⁵ *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

⁶ *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The Court held that a statute requiring newspapers to give political candidates a right to equal space to respond to critics violated the Press Clause.

⁷ In 1997, the Supreme Court subjected internet content regulations to strict scrutiny: “[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].” See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

⁸ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661 (1994). The Court notes that the must-carry regulations “are justified by the special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators.”

⁹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994).

¹⁰ *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

content they don't wish to carry, the Court held, are subject to intermediate scrutiny.¹¹ Bottleneck monopoly power is the basis for cable's junior varsity First Amendment rights.¹²

THE FCC SHOULD DECLINE TO ENFORCE LEASED ACCESS LAWS BECAUSE CABLE OPERATORS NO LONGER POSSESS BOTTLENECK MONOPOLY POWER OVER TV CONTENT

The DC Circuit Court of Appeals relied on *Turner I* when it found in 1996 that the leased access rules are subject to intermediate scrutiny.¹³ However, the competitive TV marketplace and intervening cases at the DC Circuit and the Supreme Court put the constitutionality of leased access in doubt. There is ample evidence that cable operators no longer possess bottleneck monopoly power over TV content.

It was the express finding of the DC Circuit Court of Appeals in 2009 that cable operators “no longer have the bottleneck power over programming that concerned the Congress” in the 1990s.¹⁴ Cable's market power has deteriorated even further in the nine years since the DC Circuit made that determination. Unlike in the 1990s, cable operators face significant competition in most local markets from satellite and telco TV providers. Over 99 percent of US households have at least three pay-TV options,¹⁵ and cable has lost over 15 million subscriber households since 2002.¹⁶ In 1997, when *Turner II* was decided, cable had over 90 percent of the pay-TV market.¹⁷ Cable operators' market share has shrunk nearly every year since, and in 2015 cable had around 54 percent market share.¹⁸

This competitive marketplace has stimulated massive investment and choice in TV programming. The typical household has access to far more channels than in the past. Independent researchers found that a typical US household in 1999 received about 50 TV channels.¹⁹ By 2014, the typical household received over 200 TV channels.²⁰ In 2018, there will be an estimated 520 scripted TV series available, which is up nearly 50 percent from just five years ago.²¹

¹¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994).

¹² *Comcast v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (J. Kavanaugh, concurring) (noting that “the Court rested that conclusion [access regulations must satisfy only intermediate scrutiny] on ‘special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators . . .’”).

¹³ *Time Warner v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996).

¹⁴ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

¹⁵ Federal Communications Commission, *Eighteenth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, January 17, 2017, table III.A.5.

¹⁶ Compare Federal Communications Commission, *Ninth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, December 31, 2002, table 1 (recording 68.8 million cable households) with Federal Communications Commission, *Eighteenth Annual Assessment*, table III.A.5 (recording 53.2 million cable households).

¹⁷ Federal Communications Commission, *Fifth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, December 23, 1998, 11.

¹⁸ Federal Communications Commission, *Eighteenth Annual Assessment*, table III.A.5 (recording 53.2 million cable households, which is 54 percent of the total—99.4 million households). Furthermore, cord cutting—the consumer practice in recent years of dropping a pay-TV subscription in favor of broadcast or internet-based TV—is putting further competitive pressure on cable operators. As the FCC found in its most recent video competition report, pay-TV operators “appear to see themselves increasingly as competing with OVDs [online video distributors like Netflix and Hulu] for viewers, subscription revenue, and advertising revenue.” See Federal Communications Commission, *Eighteenth Annual Assessment*, 25.

¹⁹ Matthew Ball, “The Digital Future of TV Networks & The Original Series Crunch,” *Redef*, February 5, 2015.

²⁰ Ball, “The Digital Future of TV Networks.”

²¹ Patrick Seitz, “TV Industry Tests Limits of Consumer Demand,” *Investor's Business Daily*, May 14, 2018.

There is evidence, including endorsement from the DC Circuit Court of Appeals, that cable operators no longer have the bottleneck monopoly power that the Supreme Court relied on in *Turner I* to justify FCC access regulations. In light of this, continued enforcement of the leased access regulations unconstitutionally infringes on cable operators' First Amendment rights.

UNDER THE PREVAILING *MARKS* TEST, LOWER COURTS WILL APPLY STRICT SCRUTINY TO THE LEASED ACCESS RULES IN LIGHT OF THE SUPREME COURT'S *DENVER* DECISION

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Supreme Court divided into concurrences as to the proper First Amendment category of cable operators, and whether intermediate or strict scrutiny should apply to the leased access laws at issue.²² The “*Marks* test” is the test lower courts use for determining the holding of a Supreme Court decision where there is no majority supporting the rationale of any opinion.²³ Viewed through the lens of the prevailing *Marks* test, cable operators are entitled to “bookstore owner” status for First Amendment purposes.

On the issue of the First Amendment status of cable operators, Justice Breyer's plurality opinion in *Denver*, joined by three other justices, expressly makes “no definitive choice” as to whether cable operators were analogous to “bookstore owners,” “common carriers,” or “broadcasters,” describing such a determination as unnecessary to answering the question at issue in *Denver*.²⁴ Three justices concurring in the Court's judgment assigned the bookstore owner designation to cable operators.²⁵

Over the subsequent years since the 1996 *Denver* decision, a converging interpretation of *Marks* has emerged across federal circuits to identify a “least far-reaching rule” or “common denominator” for deciding each issue across concurring opinions while ignoring any rationale introduced in dissent on that issue.²⁶ For example, if two concurring justices provide a three-prong rationale for resolving an issue and another four resolve that same issue with one of those three prongs, then the latter justification is deemed the precedential test for resolving the issue.²⁷ Given that four justices in *Denver* concur that one of the potential bases for deciding cable's First Amendment status is the classification of cable operators as bookstores and three justices concur that this classification is the definitive justification for the judgment, the narrowest grounds for resolving the issue is simply this latter justification.²⁸ Under the prevailing *Marks* test, then, lower courts will apply strict scrutiny to the leased access rules in light of the *Denver* decision.

²² *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

²³ *Marks v. United States*, 430 U.S. 188, 193 (1977).

²⁴ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996).

²⁵ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (see Justice Thomas's concurring opinion).

²⁶ *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012); *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *United States v. Cundiff*, 555 F.3d 200, 209 (3d Cir. 2009). Such converging interpretation has emerged, permitting that this rule supports the Court's ultimate judgment on the issue. See *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012); *Pedcor Mgmt. Co. Inc. Welfare Benefit Plan v. Nat'ns Personnel of Tex., Inc.*, 343 F.3d 355, 358 (5th Cir. 2003).

²⁷ *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

²⁸ *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). In fact, the Breyer plurality's analysis resembled strict scrutiny, which is why two justices dissented in part. Justice Kennedy's opinion noted, “The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide these cases without uttering some sort of standard; so it has settled for synonyms.” See

CONCLUSION

The Supreme Court has said that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²⁹ The leased access rules today represent a “wholly foreign” infringement on First Amendment interests. Good intentions cannot save unconstitutional media regulations. Cable operators no longer have bottleneck monopoly power over TV programming, and courts will likely examine the leased access regulations using strict scrutiny. To protect free speech interests and to conserve agency resources for more pressing regulatory issues, the FCC should decline to enforce the leased access regulations.

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 786 (1996) (see Justice Kennedy’s dissenting opinion).

²⁹ Buckley v. Valeo, 424 U.S. 1, 48–49, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976).