Comments of the International Center for Law & Economics

In the Matter of Leased Commercial Access, Modernization of Media Initiative, MB 07-42, MB 17-105, FCC 19-52, Report and Second Further Notice of Proposed Rulemaking

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Authored by:

Ben Sperry (Associate Director for Legal Research, International Center for Law & Economics)

ICLE | 2117 NE Oregon St. Suite 501 | Portland, OR 97232 | 503.770.0076
icle@laweconcenter.org | @laweconcenter | www.laweconcenter.org

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20230

In the Matter of	**)**	**MB 07-42**
Leased Commercial Access;	**)**	**MB 17-705**
Modernization of Media	**)**	**FCC 19-52**
Regulation Initiative	**)**	

COMMENTS OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS

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Introduction

In its June 20, 2019 Second Further Notice of Proposed Rulemaking, the FCC asked for comments on whether leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.[1] This comment analyzes the leased access rules under the First Amendment and finds that changed economic circumstances undermine the initial justification for their creation. Thus, it is highly likely that courts would no longer hold that cable operators have bottleneck power, and the compelled speech inherent in the leased access rules would not be permissible under the First Amendment.

Historically, the legal battle over the constitutionality of leased access and similar rules has largely been over the proper level of First Amendment scrutiny — strict or intermediate — that should be applied by reviewing courts. The current FNPRM needs to be understood in this context.

Under strict scrutiny, a regulation that compels speech must be narrowly tailored to a compelling governmental interest.[2] This is the most exacting form of scrutiny in constitutional law. By contrast, under intermediate scrutiny — the standard that has been applied to leased access rules, to date — a regulation must further an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction speech must be no greater than is essential to the furtherance of that interest.[3] This level of scrutiny is relatively easier for government to satisfy.

Prior cases found it permissible for the government to compel cable operators to share access to the networks on intermediate scrutiny–like grounds, premised largely on the grounds that those operators were in bottleneck positions and not facing significant competition. This premise does not hold in the modern video marketplace, which suggests that these rules are more likely to be subject to strict scrutiny — and that they are unlikely to survive that level of scrutiny.

This comment will proceed in two parts. Part I will analyze the bottleneck power justification relied upon in *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994) ("*Turner*") and *Time Warner v.*

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[1] *In the Matter of Leased Commercial Access, Modernization of Media Initiative*, FCC 19-52, Report and Second Further Notice of Proposed Rulemaking, at para. 47 ("We also seek comment today on whether the First Amendment concerns identified above in paragraphs 39 and 40 apply to the Commission's rules and statutory provisions concerning full-time leased access requirements. In this regard, one commenter opines that "[t]hese matters have already been addressed by the courts and they have upheld the leased access provisions enacted by Congress. Only the courts and Congress can change these provisions. In the meantime, the Commission is obligated to carry out the directions given to them by Congress." On the other hand, we note that the D.C. Circuit decision upholding the constitutionality of the statutory leased-access provisions largely antedates the market developments described in this order and arguably turned on the facts that existed at that time. We seek comment on this analysis. Can the statutory leased access requirements or the Commission's other leased-access rules continue to withstand First Amendment scrutiny in light of the market changes discussed in this order? If not, what discretion does the Commission have to reduce the burdens that those provisions impose on protected speech?") [hereinafter "Second FNPRM"].

[2] *See* Part II.B and cited cases therein.

[3] *See* Part I.A and cited cases therein.

FCC, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner*") and show the dramatic marketplace changes recognized by the FCC, undercutting the justification for applying the intermediate scrutiny standard instead of strict scrutiny. Part II will then analyze the leased access rules under the strict scrutiny standard and show they are not narrowly tailored to a compelling governmental interest.

I. The "Bottleneck Power" of Cable that was the Basis of *Time Warner*'s Application of Intermediate Scrutiny No Longer Exists

If leased access rules were challenged, the FCC's best argument in favor of their constitutionality would be that the DC Circuit Court of Appeals has already found that they do not violate the First Amendment. Part I.A reviews the *Time Warner* decision and its ultimate reliance on *Turner*'s bottleneck power theory of cable in order to apply intermediate scrutiny to the leased access rules. Part II.B then describes the changed market circumstances as recognized by the FCC and argues the bottleneck power theory is no longer accurate.

A. *Time Warner*'s Reliance on *Turner*'s Bottleneck Power Theory

In *Time Warner*, the DC Circuit Court of Appeals found leased access provisions did not violate the First Amendment. To get there, the DC Circuit relied on three main justifications.

First, the court pointed to the Supreme Court's decision in *Turner* for the proposition that content-neutral economic regulation that impacts the speech of cable operators who are forced to carry certain channels is subject to intermediate scrutiny. *Time Warner* relied explicitly on *Turner*'s finding that "[s]trict scrutiny of laws directed only at one element of the media is unwarranted if the difference in treatment is 'justified by some special characteristic' of the medium" and "[t]hat cable rate regulation [was] so justified … [because] most cable television subscribers have no opportunity to select between competing cable systems."[4]

Second, the *Turner* decision determined that "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" are important governmental objectives unrelated to the suppression of speech.[5]

[4] *Time Warner*, 93 F.3d at 967 (internal citations omitted).

[5] *Time Warner*, 93 F.3d at 969.

Third, Time Warner and the FCC agreed that there was little harm to cable operators because very little leased access capacity was being used by unaffiliated programmers.[6] Thus, the court found that no more speech was being burdened than necessary.[7]

In sum, *Time Warner* accepted that the Supreme Court's decision in *Turner* was dispositive of the level of scrutiny, and that the objectives put forth by the FCC for the leased access provisions were content-neutral important governmental objectives unrelated to the suppression of speech. All this left was a factual question of whether the rules suppressed more speech than was necessary, which the particular facts on the record did not allow the court to find.

In *Turner*, the Supreme Court's finding relevant to leased access was that must-carry provisions of the Cable Act of 1992 were subject to intermediate scrutiny, relying primarily on cable's bottleneck or gatekeeper power:

> The provisions do not intrude on the editorial control of cable operators. They are content neutral in application, and they do not force cable operators to alter their own messages to respond to the broadcast programming they must carry. In addition, the physical connection between the television set and the cable network gives cable operators bottleneck, or gatekeeper, control over most programming delivered into subscribers' homes.[8]

The Court rejected the FCC's argument that the must-carry regulations should only be subject to rational basis scrutiny and Turner Broadcasting System's argument that the regulations should be subject to strict scrutiny. This middle ground approach reflected the Court's belief that speech was clearly implicated[9] but the regulation was content-neutral and not primarily related to speech.[10]

Importantly, the Court found strict scrutiny was not applicable because of the special nature of cable in the marketplace:

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[6] *Time Warner*, 93 F.3d at 969-71.

[7] *Time Warner*, 93 F.3d at 971 ("if unaffiliated programmers have not and, as Time Warner predicts, will not exploit the leased access provisions, then the provisions will have no effect on the speech of the cable operators... None of their programming would have to be dropped. The channels set aside for leasing will either be vacant or they will be occupied according to the wishes of the cable operators. The operators' editorial control will remain unimpaired and so will their First Amendment right to determine what will appear on their cable systems.").

[8] *Turner*, 512 U.S. at 623.

[9] *Turner*, 512 U.S. at 637-38 ("[b]y requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules 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.").

[10] *Turner*, 512 U.S. at 652 ("this burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers. In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.").

> When an individual subscribes to cable, the physical connection between the television set and the cable network ***gives the cable operator bottleneck, or gatekeeper, control*** over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[11]
>
> The must-carry provisions, as we have explained above, are justified by special characteristics of the cable medium: ***the bottleneck monopoly power exercised by cable operators*** and the dangers this power poses to the viability of broadcast television.[12]

Crucial to the Court's decision were specific Congressional findings about the nature of the video marketplace at the time:

> In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, § 2(a)(3), and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming, § 2(a)(17). This is so, Congress found, because "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." Ibid. In addition, Congress concluded that due to "local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," the overwhelming majority of cable operators exercise a monopoly over cable service. § 2(a)(2). "The result," Congress determined, "is undue market power for the cable operator as compared to that of consumers and video programmers." Ibid.
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> According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator's ability, as owner of the transmission facility, to ""terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position." § 2(a)(15). The incentive derives from the economic reality that "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." § 2(a)(14). By refusing carriage of broadcasters' signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters' programming, and thereby capture advertising dollars that would otherwise go to broadcast stations. § 2(a)(15).

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[11] *Turner*, 512 U.S. at 656 (emphasis added).

[12] *Turner*, 512 U.S. at 661 (emphasis added).

> Congress found, in addition, that increased vertical integration in the cable industry is making it even harder for broadcasters to secure carriage on cable systems, because cable operators have a financial incentive to favor their affiliated programmers. § 2(a)(5). Congress also determined that the cable industry is characterized by horizontal concentration, with many cable operators sharing common ownership. This has resulted in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." § 2(a)(4).
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> In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, "[t]here is a substantial likelihood that ... additional local broadcast signals will be deleted, repositioned, or not carried," § 2(a)(15); the "marked shift in market share" from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§ 2(a)(13)-(14); and that, as a consequence, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," § 2(a)(16).[13]

As a result, the Court believed that intermediate scrutiny was applicable.[14]

Intermediate scrutiny is satisfied if a regulation

> furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[15]

The Court also credited Congress's finding that must-carry provisions... "promot[e] the widespread dissemination of information from a multiplicity of sources" and "promot[e] fair competition in the market for television programming"[16] both found to be the important governmental interests promoted by leased access provisions in *Time Warner*. [17]

The DC Circuit Court of Appeals upheld the leased access provisions in *Time Warner* because of the Supreme Court's findings in *Turner* about the nature of the video marketplace. The DC Circuit

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[13] *Turner*, 512 U.S. at 633-34.

[14] *Turner*, 512 U.S. at 661-62 ("the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny. We agree with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.").

[15] *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U. S. 367, 377 (1968)).

[16] *Turner*, 512 U.S. at 662.

[17] *Time Warner*, 93 F.3d at 969.

made no new findings in *Time Warner* about the state of competition, explicitly relying on the "bottleneck" theory from *Turner*.

B. Bottleneck Power of Cable No Longer Exists

If the bottleneck theory is the basis for subjecting leased access provisions to intermediate scrutiny, then it seems likely a court would find a different level of scrutiny is necessary if it is no longer the case that cable operators have this level of power in the marketplace. Changes in the marketplace since the *Time Warner* decision indicate that cable no longer has bottleneck power.

The Second FNPRM at this docket notes the changes in the marketplace implicate how the First Amendment applies to the leased access rules:

> We agree that dramatic changes in technology and the marketplace for the distribution of programming cast substantial doubt on the constitutional foundation for our leased access rules. We recognize that we rejected similar constitutional arguments in the 2008 Leased Access Order, which we vacate today. Our analysis has changed because the facts have changed: as explained above, the growth in alternative outlets for programmers—particularly on the Internet—has exploded in the decade since the adoption of the 2008 Leased Access Order. Given this proliferation of new distribution platforms, we now find that the First Amendment concerns raised by commenters provide additional reason to interpret the statutory obligations of section 612 in a manner that reduces burdens on the speech of cable operators. We do so here by, among other things, eliminating the Commission rule requiring that cable operators make leased access available on a part-time basis. While our rule changes are independently and sufficiently supported by the policy justifications above, we note that constitutional concerns rely on the same premise: that changes in the video marketplace have substantially weakened the justifications for leased access.[18]

Moreover, FCC data from its Video Marketplace Reports also provide ample evidence that cable is nowhere as dominant as it was 25 years ago.

As noted by the FCC on many occasions, the dramatic rise of the Internet has created an entirely different marketplace than Congress made fact-finding about in the Cable Act.

Most recently, the FCC's data in its first *Communications Marketplace Report*[19] "examine[d] participation and competition in today's video programming marketplace."[20] The FCC found

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[18] Second FNPRM, *supra* note 1, at para. 40.

[19] *In the Matter of Communications Marketplace Report, The State of Mobile Wireless Competition, Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Marketplace for Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, FCC 18-181, *available at* https://docs.fcc.gov/public/attachments/FCC-18-181A1.pdf [hereinafter "Communications Marketplace Report"].

[20] Communications Marketplace Report, *supra* note 19, at para. 47.

multichannel programming distributors (MVPDs) like cable and satellite have been losing subscribership since 2013, a trend that continued in 2018.[21] Online video distributors (OVDs) like Netflix, Hulu, and Amazon Prime (as well as many others)[22] have largely taken market share away from MVPDs by offering content consumers desire.[23] It is impossible to look at the FCC's data and come away with the conclusion that cable has a bottleneck control over programming at this point.

While it is true that the explosion of the Internet as an available option for content creators is enough to show cable operators no longer have bottleneck power, increased competition in the MVPD marketplace from satellite and fiber-optic operators has also led to a massive decline in the market share of cable. The second and fourth biggest MVPDs (by subscribers) are now satellite companies. *See* Table 1 below.[24] Cable no longer has 95% of the pay-TV subscribers like it did around the time of *Turner*.

[21] Communications Marketplace Report, *supra* note 19, at para. 53.

[22] Communications Marketplace Report, *supra* note 19, at para. 88.

[23] Communications Marketplace Report, *supra* note 19, at para. 77, 79.

[24] Data from *Major Pay-TV Providers Lost About 2,875,000 Subscribers in 2018*, Leichtman Research Group (Mar. 6, 2019), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-2875000-subscribers-in-2018/.

Rank	Service	Subscribers	Provider	Type	+/-
1.	Xfinity	21,986,000	Comcast	Cable	-371,000
2.	DirecTV	19,222,000	AT&T	Satellite	-1,236,000
3.	Spectrum	16,606,000	Charter	Cable	-244,000
4.	Dish	9,905,000	Dish Network	Satellite	-1,125,000
5.	Verizon Fios TV	4,451,000	Verizon	Fiber-Optic	-168,000
6.	Cox Cable TV	4,015,000	Cox Enterprises	Cable	-115,000
7.	U-Verse TV	3,704,000	AT&T	Fiber-Optic	+47,000
8.	Optimum/Suddenlink	3,307,500	Altice USA	Cable	-98,000
9.	Sling TV	2,417,000	Dish Network	Live Streaming	+205,000
10.	DirecTV Now	1,591,000	AT&T	Live Streaming	+436,000
11.	Frontier FiOS	838,000	Frontier	Fiber-Optic	-123,000
12.	Mediacom	776,000	Mediacom	Cable	-45,000
13.	CableOne Cable TV	326,423	Cable One	Cable	-37,465

There is no basis for concluding, as Congress did in the Cable Act, that cable has bottleneck power over programming. Thus, *Turner*'s and *Time Warner*'s reliance upon this justification to subject leased access rules to intermediate scrutiny is misplaced.

II. Leased Access Rules Fail Strict Scrutiny

Cable operators clearly do not have bottleneck power in the current marketplace. Thus, the courts will likely apply strict scrutiny to leased access provisions.

There are a number of things which do not appear to have changed since the *Time Warner* decision.

First, there is clearly a speech interest implicated by these regulations. The Supreme Court found in *Turner* that must-carry mandates implicated a speech interest "[b]y requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules 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."[25]

Second, the leased access provisions are content-neutral. In *Time Warner*, the DC Circuit Court of Appeals rejected an argument that the leased access provisions were content-based:

> There is nothing to this. The provisions are not content-based. They do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed. Whether, and how many, channels a cable operator must designate for public leasing depends entirely on the operator's channel capacity. What programs appear on the operator's other channels--that is, what speech the operator is promoting--matters not in the least. So too with respect to the speech of those who use the leased access channels. Their qualification to lease time on those channels depends not on the content of their speech, but on their lack of affiliation with the operator, a distinguishing characteristic stemming from considerations relating to the structure of cable television. The statutory objective, as well as the provisions carrying it forth, are framed in terms of the sources of information rather than the substance of the information. This is consistent with the First Amendment's "assumption that the widest possible dissemination of information from diverse and antagonistic sources" promotes a free society. The Supreme Court has determined that regulations along these lines are content-neutral.[26]

Third, it continues to be the case that the leased access rules do not implicate a large amount of capacity. As stated in the Second FNPRM:

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[25] *Turner*, 512 U.S. at 637-38.

[26] *Time Warner*, 93 F.3d at 969 (citations omitted).

> We find that eliminating part-time leased access is consistent with marketplace changes. Since the Commission adopted the rule governing part-time leased access in 1993, the available platforms to distribute programming have multiplied, including in particular Internet options***. At the same time, the part-time leased access requirement has continued to apply to cable operators, and the record indicates that those operators do not usually generate enough revenue from part-time leased access programming to cover the administrative costs of providing such programming.*** Even in the 1997 Leased Access Order, the Commission "recognize[d] that part-time leasing is not expressly required by the statute, that it may impose additional administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used."[27]

In other words, there is still little channel capacity effectively being dedicated to unaffiliated programming, which in *Time Warner* was the basis for finding the rules did not burden more speech than necessary.

These three things in combination would suggest that if leased access rules continued to receive intermediate scrutiny, they would likely be found in accord with the First Amendment.

The important marketplace changes since *Time Warner*, though, would suggest a change in the level of scrutiny is necessary. Part II.A will discuss why strict scrutiny should apply to the leased access rules. Part II.B will then apply strict scrutiny to the leased access rules.

A. Strict Scrutiny Should Apply to the Leased Access Rules

As noted above in Part I.B, the underlying bottleneck justification for intermediate scrutiny no longer exists for leased access rules.

Now-Justice Kavanaugh connected the dots between this changed circumstance and the First Amendment rights of cable operators in his concurrence in the *Tennis Channel* case while he was on the DC Circuit Court of Appeals:

> But in the 16 years since the last of those cases [*Time Warner*] was decided, the video programming distribution market has changed dramatically, especially with the rapid growth of satellite and Internet providers. This Court has previously described the massive transformation, explaining that cable operators "no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see also Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("This radically changed and highly competitive marketplace—where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market—completely eviscerates the justification we relied on in Time

[27] Second FNPRM, *supra* note 1, at para. 17 (emphasis added).

> Warner for the ban on exclusive contracts."); Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. On Reg. 171, 229 (2002) ("It thus appears that the national market for MVPDs is already too unconcentrated to support the conclusion that vertical integration could have any anti-competitive effects.").
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> In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market. To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First Amendment history, "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." *Buckley v. Valeo*, 424 U.S. 1, 48–49, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).[28]

As Justice Kavanaugh noted, this should mean that the leased access rules are subject to strict scrutiny. In our constitutional system, the First Amendment generally protects against governmental regulation on speech unless it is narrowly tailored to a compelling interest—it isn't a roving authority to regulate private entities and how they handle speech interests.[29]

The dissenting statements of Commissioners Rosenworcel and Starks take a fundamentally different view of the First Amendment than the balance of Supreme Court authority.

Commissioner Rosenworcel believes First Amendment values are often served by FCC regulations like the leased access rules:

> I think this decision fundamentally misinterprets the First Amendment values that support our leased access rules. In fact, I think the language in this order dismissing the constitutional foundation of our rules is overbroad and wrong—and I dissent in this respect.
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> The First Amendment does more than protect the interests of corporations. As courts have long recognized, it is a force to support individual interest in self-expression and the right of the public to receive information and ideas. As Justice Black so eloquently put it, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Our leased access rules provide opportunity for civic participation. They enhance the marketplace of ideas by increasing the number of speakers and the variety

[28] *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

[29] Ben Sperry, *There's nothing "conservative" about Trump's views on free speech and the regulation of social media*, TRUTH ON THE MARKET (Jul. 12, 2019), https://truthonthemarket.com/2019/07/12/theres-nothing-conservative-about-trumps-views-on-free-speech/. *See also* Geoffrey Manne, Ben Sperry, et. al, *A Conflict of Visions: How the "21st Century First Amendment" Violates the Constitution's First Amendment*, 13 FIRST AMEND. L. REV. 101 (2015).

> of viewpoints. They help preserve the possibility of a diverse, pluralistic medium—just as Congress called for the Cable Communications Policy Act.
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> The proper inquiry then, is not simply whether corporations providing channel capacity have First Amendment rights, but whether this law abridges expression that the First Amendment was meant to protect. Here, our leased access rules are not content-based and their purpose and effect is to promote free speech. Moreover, they accomplish this in a narrowly-tailored way that does not substantially burden more speech than is necessary to further important interests. In other words, they are not at odds with the First Amendment, but instead help effectuate its purpose for all of us.

However, *Turner*, by basing its analysis upon Congressional findings about the competitiveness of the marketplace, leaves open the possibility that changed economic circumstances would change the level of scrutiny. This has clearly occurred. Commissioner Rosenworcel's interpretation of the First Amendment's underlying purpose is inconsistent with the Court's long-standing compelled speech jurisprudence.[30] Decisions like *Turner* are best understood as exceptions from the normal strict scrutiny of the First Amendment due to specific market power concerns. When such concerns are no longer the case, the normal level of scrutiny should apply.

Commissioner Starks' concerns were twofold. First, he thought *Time Warner* already settled the question on the constitutionality of leased access rules. Second, he foresees a successful First Amendment challenge to these rules on the basis of changed economic circumstances leading to strict scrutiny as possibly impinging other regulations of cable.

> Specifically, I am concerned with language in the Report and Order opining on whether our leased access rules are consistent with the First Amendment. The majority here offers that there is "substantial doubt on the foundation for our leased access rules" for one reason: the explosion of the Internet has "changed" everything. I disagree. First, and most basically, it doesn't change our fundamental duty to act according to the directives of Congress wherever it has spoken on a matter in question. Indeed, leased access requirements have already withstood a facial First Amendment challenge with the court noting that rules requiring cable operators to carry leased access channels were supported by an important government interest in promoting diversity and competition in the video programming marketplace. The

[30] *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("[t]he licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech."); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988) ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (extending the protections against compelled speech to "business corporations generally . . . [and to] professional publishers"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding unconstitutional a Florida statute requiring newspaper to publish political candidate's reply to critical editorial); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 9 (1986) (holding electric utility could not be compelled to include in its billing envelope an advocacy group's flyer with which it disagreed). *See also* Part II.B and cases cited therein.

> fact that members of this Commission may disagree with a statute or judicial decision does not give us the authority to rewrite a statute or ignore the courts.
>
> Second, the constitutional reasoning and analysis advanced by the majority is not, in any way, limited to the rules at issue here today, and I believe will have a far-reaching impact. I would urge my colleagues to proceed with caution and take a closer look. That the internet provides an alternative outlet for some Americans to view content is undeniable. But that, alone, should not result in a re-interpretation of our First Amendment principles with respect to cable. If it does, it will have a sweeping impact that will upend long-standing programming that Americans have come to rely on: public, educational, and government (PEG) channels; "must carry" elections of local broadcasters; our program carriage regime; and, even, children's programming.

First, this not a mere disagreement with *Time Warner*'s holding. The justification undergirding the application of intermediate scrutiny is no longer the case. As noted in Part I.B above, the argument about changed economic circumstances encompasses far more than just the monumental growth of the Internet. The FCC's regulatory choices and even statutory obligations must give way to the First Amendment.[31]

Second, the possible far-reaching impact of applying strict scrutiny should not prevent the courts from re-analyzing the underlying justification for *Turner*'s departure from compelled speech jurisprudence. If changed marketplace circumstances mean that other regulations are found inconsistent with the First Amendment, then this is a strong reason for repeal of those regulations.

B. Leased Access Rules are not Narrowly Tailored to a Compelling Governmental Interest

The leased access rules are compelled speech.[32] As such, they are presumptively invalid and should receive strict scrutiny review from the courts.[33] Strict scrutiny requires the leased access rules to be narrowly tailored to a compelling governmental interest.[34] They cannot survive this level of scrutiny.

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[31] *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) ("'[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception… whether administered by judges, juries, or administrative officials").

[32] *Cf. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (holding signs mandated by California to be posted at unlicensed crisis pregnancy centers are compelled speech subject to strict scrutiny review).

[33] *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) ("[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[34] *See e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("The First Amendment… prohibits laws that abridge the freedom of speech…. As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) ("strict scrutiny… requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.").

The first question is whether the leased access rules fulfill a compelling governmental interest. In *Time Warner*, the DC Circuit Court of Appeals detailed this history and purpose of the leased access rules:

> In response to FCC v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), the 1984 Act compelled cable operators of systems with more than thirty-six channels to set aside between 10 [320 U.S.App.D.C. 305] and 15 percent of their channels for commercial use by persons unaffiliated with the operator. 47 U.S.C. § 532(b)(1). The larger the number of channels in the system, the greater the percentage of channels the operator must set aside. "Leased access" was originally aimed at bringing about "the widest possible diversity of information sources" for cable subscribers. Id.s 532(a). Congress thought cable operators might deny access to programmers if the operators disapproved the programmer's social or political viewpoint, or if the programmers' offerings competed with those the operators were providing. "Diversity," as the 1984 Act used the term, referred not to the substantive content of the program on a leased access channel, but to the entities--the "sources"--responsible for making it available.[35]

As detailed in Part I.A, the *Time Warner* court cited the *Turner* court for the proposition that "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" are important governmental objectives unrelated to the suppression of speech. But this does not in and of itself answer whether these would qualify as compelling governmental interests. In fact, no court case has found these interests to be compelling.

Assuming for the sake of argument that these are compelling government interests, the leased access rules are not narrowly tailored to that end. There are less restrictive means for fulfilling these interests.

For both of these interests, the underlying market competition suggests that any regulation of speech is unnecessary. "Widespread dissemination of information from a multiplicity of sources" has almost certainly been obtained in this Internet age. Further, the considerable competition between cable, satellite, fiber, and over-the-top services has brought more content to consumers than could have even been imagined when the leased access rules were first passed.

In the rare instances government regulation may be necessary for "promoting fair competition in the market for television programming," there is a more narrowly tailored regulatory regime that already exists. Antitrust law, a "law of general application" referenced in *Turner*,[36] uses a case-by-case

[35] *Time Warner*, 93 F.3d at 967-68.

[36] *Turner*, 512 U.S. at 640 ("By a related course of reasoning, the Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court's "precedents governing legislative efforts to correct market failure in a market whose

rule of reason approach to find if specific conduct is harming competition. In the case of restricting access to an audience, for instance, antitrust would deal with the issue by considering whether the cable operator has market power, i.e. the ability to restrict competition, to the detriment of consumers. Sector-specific regulation like leased access is more restrictive than necessary in mandating unaffiliated programmers access to cable channels even though the cable company may not hold market power. Therefore, it can safely be said that leased access rules are more restrictive (i.e. they mandate more speech) than necessary.

Conclusion

Repealing the part-time leased access rules due in part to First Amendment concerns was a step in the right direction by the FCC. Because the entirety of the leased access regime would be unconstitutional in the current competitive marketplace, the FCC should not enforce the rules.

commodity is speech," such as *Associated Press v. United States*, 326 U. S. 1 (1945), and *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951). *See* Brief for Federal Appellees 17. This contention is unavailing. *Associated Press* and *Lorain Journal* both involved actions against members of the press brought under the Sherman Antitrust Act, a law of general application.").