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ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMCAST CABLE COMMUNICATIONS, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition For Review Of An Order
Of The Federal Communications Commission

PROOF OPENING BRIEF FOR PETITIONER COMCAST CABLE COMMUNICATIONS, LLC

Lynn R. Charytan*
Vice President, Legal Regulatory Affairs, and Senior Deputy General Counsel
COMCAST CORPORATION
300 New Jersey Avenue, Suite 700
Washington, D.C. 20001
(202) 379-7134
Lynn_Charytan@comcast.com

Miguel A. Estrada
Counsel of Record
Cynthia E. Richman
Erik R. Zimmerman
Jonathan C. Bond
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Petitioner Comcast Cable Communications, LLC

* Lynn Charytan has reviewed only the public copy of this brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI CURIAE

The parties to this petition for review are petitioner Comcast Cable Communications, LLC ("Comcast"), respondents Federal Communications Commission ("FCC") and United States of America, and intervenor for respondents Tennis Channel, Inc. ("Tennis Channel"). The National Cable & Telecommunications Association has filed a notice of its intent to participate as *amicus curiae* in support of Comcast.

Comcast, which provides cable and related services, is a Delaware limited liability company wholly owned by Comcast Holdings Corporation, a Pennsylvania corporation and wholly owned subsidiary of Comcast Corporation, a publicly traded Pennsylvania corporation. Comcast Corporation is not a subsidiary of any other corporation, nor does any publicly held corporation own 10% or more of its stock.

II. RULINGS UNDER REVIEW

The ruling under review is an order of the FCC captioned *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (July 24, 2012), JA__. No Federal Register citation exists for this order, but it is available electronically at 2012 WL 3039209.

III. RELATED CASES

This case was not previously before this Court or any other court. Although Comcast is not aware of any case pending in any other court that involves exactly the same issues as this case, consolidated petitions for review are pending in the U.S. Court of Appeals for the Second Circuit that raise First Amendment issues substantially similar to the First Amendment issues in this case. The petitioners in those cases, captioned *Time Warner Cable Inc. v. FCC*, No. 11-4138 (2d Cir.), and *National Cable & Telecommunications Association v. FCC*, No. 11-5152 (2d Cir.), are challenging an order of the FCC, released on August 1, 2011, that revised and expanded the agency's rules pursuant to Section 616 of the Communications Act of 1934, 47 U.S.C. § 536.

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GLOSSARY

14th Video Competition Report	*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, 27 FCC Rcd. 8610 (2012)
Cable Act	Cable Television Consumer and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460
Commission or FCC	Federal Communications Commission
Communications Act	Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064
Initial Decision	*Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P (Dec. 20, 2011) (JA__)
MASN	*Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099 (2010), *petition for review denied*, *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012)
MVPD	Multichannel Video Programming Distributor
Order	*Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Mem. Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (July 24, 2012) (JA__)

INTRODUCTION

The FCC Order under review is an unconstitutional, content-based regulation of speech. It compels Comcast to carry Tennis Channel more broadly than Comcast (or any other major distributor) would have chosen because Tennis Channel's content is "similar" to the speech of two Comcast-affiliated sports networks, Golf Channel and Versus (now NBC Sports Network), that Comcast distributes more broadly. Comcast is not alone in distributing Tennis Channel less broadly than Golf Channel and Versus; in 2010, when the complaint was brought, *every* major multichannel video programming distributor ("MVPD")—including Tennis Channel's own partial owners, DirecTV and Dish Network—distributed Tennis Channel less broadly than these Comcast affiliates. The Order thus compels Comcast (and only Comcast) to afford Tennis Channel a benefit—*i.e.*, penetration parity with Golf Channel and Versus—that *no major distributor in the marketplace* believed Tennis Channel had earned. And it imposes this compelled speech based primarily on its application of malleable and easily manipulated content-based standards.

What is worse, the obvious conflict between the Order and the Constitution is one that the Commission easily could have avoided by faithfully complying with the pertinent statute, Section 616 of the Communications Act of 1934, and its own regulations. Section 616 forbids only conduct that severely restricts a network's

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ability to compete, and then only if that conduct is intentionally discriminatory. 47 U.S.C. § 536(a)(3). Section 616 does not remotely authorize the type of amorphous and indeterminate content review that the FCC employed here. For good measure, any claim by Tennis Channel under that statute is demonstrably time-barred under any rational reading of the Commission's own regulations. This Court has already stayed the Order pending judicial review. It should now vacate the Order in its entirety.

In 2005, Comcast and Tennis Channel entered a contract that allowed Comcast to carry Tennis Channel's programming on any of its "tiers" of service. Comcast opted to carry Tennis Channel on its "sports tier"—a package of sports programming available to subscribers for a fee. Comcast continues to carry Tennis Channel on its sports tier today, where it reaches approximately [redacted] subscribers. In 2010, however, Tennis Channel attempted to secure broader distribution from Comcast than it had bargained for—or obtained elsewhere in the market—under the guise of a discrimination claim under Section 616. A bare majority of the FCC affirmed the ruling of an Administrative Law Judge that Comcast violated Section 616 by carrying Tennis Channel on its sports tier, and mandated that Comcast carry Tennis Channel at the same level of distribution as Comcast's affiliated networks, Golf Channel and Versus. That ruling is irredeemably flawed in three respects.

First, the Order severely misinterprets Section 616. It replaces the statutory requirement of an *unreasonable* restraint on fair competition with a standard that could be easily satisfied by a *reasonable* restraint. And it replaces the statute's *intentional* discrimination requirement with a disparate-*impact* analysis that turns on content-based comparisons of speech. Indeed, the Order concludes that Comcast "discriminatorily" favored its affiliates when it concluded, exactly as *every other major MVPD in the marketplace did*, that Tennis Channel did not warrant the same broad distribution as Golf Channel and Versus. Far from remedying any substantial threat to fair competition caused by intentional discrimination, the Order transforms Section 616 into a weapon that networks can use to extort broader, but undeserved, carriage, and that the FCC can use to compel speech without justification. And, as the dissent recognizes, the order ultimately would harm consumers, who are likely to share the costs associated with broader distribution of networks, like Tennis Channel, that they do not want.

Second, the Order needlessly brings Section 616 into conflict with the First Amendment. It imposes nakedly content-based restrictions on Comcast's speech—requiring Comcast to distribute Tennis Channel more broadly based not on evidence of intentional discrimination, but on a comparison of programming content—and is thus presumptively invalid. Indeed, the type of right-of-reply rule that the Order embraces has long been irreconcilable with First Amendment

freedoms. *E.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). Under core First Amendment principles, this case does not even present a close question.

Finally, the Order easily could have avoided these statutory and constitutional violations because Tennis Channel's complaint is time-barred. Tennis Channel was required to file suit within one year after entering its contract with Comcast in 2005, but strategically chose to sit on its alleged rights until 2010. The Order nevertheless deems the complaint timely by adopting an absurd approach that allows a party to revive stale claims at *any* time, simply by asking to reopen a settled contract and providing notice of its intent to sue. That theory eliminates the limiting principle from the statute of limitations, and violates the FCC's own regulations and the Administrative Procedure Act ("APA").

JURISDICTIONAL STATEMENT

This case is before the Court on Comcast's petition for review of a final Order of the FCC, released on July 24, 2012, in an adjudication under 47 U.S.C. § 536 and 47 C.F.R. §§ 76.1301-1302. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (July 24, 2012). Comcast timely filed its petition for review on August 1, 2012, within 60 days of the release of the Order. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

STATEMENT OF ISSUES

I. Whether the FCC's finding that Comcast's distribution of Tennis Channel was unlawful, and the remedy its Order imposes, exceed the FCC's authority under Section 616 of the Communications Act and the APA.

II. Whether the FCC's Order violates Comcast's freedom of speech and freedom of the press under the First Amendment.

III. Whether the FCC's ruling that Tennis Channel's complaint against Comcast is not time-barred violates the FCC's regulations and the APA.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act. Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act"). As relevant here, the Cable Act added Section 616 to the Communications Act of 1934, which requires the FCC to issue regulations that

> prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or

> conditions for carriage of video programming provided by such vendors.

47 U.S.C. § 536(a)(3). In this context, an MVPD and a television network are "affiliate[d]" if the MVPD has an "attributable interest" in the network. 47 C.F.R. § 76.1300(a)-(b).

In 1993, the FCC issued 47 C.F.R. § 76.1301(c), which tracks the language of Section 616. The FCC also issued procedural regulations in 47 C.F.R. § 76.1302, which provide that a Section 616 case is initiated by filing a carriage complaint with the FCC, subject to a one-year statute of limitations. The FCC's staff reviews the complaint to determine whether it establishes a *prima facie* case of a Section 616 violation. If so determined, the staff generally refers the case to an ALJ for a hearing and initial decision, which is appealable to the full FCC. The available remedies for a Section 616 violation include mandating carriage of a network. *See* 47 C.F.R. § 76.1302.

In the twenty years since Section 616 was enacted, this case is the *first* in which the FCC has ordered an MVPD to modify its speech by carrying a complainant network on terms mandated by the FCC. *See* JA__(5.14.2012_Order¶5).

II. FACTUAL BACKGROUND

Golf Channel and Versus are cable sports networks that launched in 1995. JA__(Order¶¶10-11).[1] Golf Channel provides coverage of golf tournaments and other golf-related programming, and Versus provides coverage of numerous sports, including hockey, college football and basketball, lacrosse, hunting, and fishing. *Id.* Both networks paid substantial sums beginning in 1995 to induce MVPDs, including Comcast, to distribute them on broad levels of service, JA__(Tr.1962-64, 2494-96; Comcast_Exh.75¶29; Comcast_Exh.76¶18), and today both networks offer extensive exclusive programming and remain broadly distributed. *See* JA__(Comcast_Exh.77¶¶40-41, 61; Comcast_Exhs.1102, 1103). Comcast's parent company, Comcast Corporation, owned a minority interest in Golf Channel and Versus when they launched in 1995, and subsequently became the controlling owner of both networks. JA__(TC_Exh.126,pp.15-16; Order¶9).

Tennis Channel, a network that provides tennis-related programming, launched in 2003. JA__(Order¶8). At that time, it was more difficult for new networks to obtain broad distribution than in 1995 because the associated costs for cable operators had increased and because competition from satellite and telephone providers had reduced cable operators' ability to absorb those costs.

[1] Versus was known as the Outdoor Life Network when it launched in 1995, and is now known as NBC Sports Network. For consistency with the FCC's Order, this brief refers to the network as Versus.

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JA__(Comcast_Exh.77¶¶12-15; Comcast_Exh.80¶¶41-44). Tennis Channel sought carriage on Comcast's "[s]ports [t]ier," a package of 10 to 15 sports networks that Comcast's subscribers can access for a fee of $5 to $8 per month. JA__(Order¶12). Tennis Channel claimed that carriage on Comcast's sports tier would yield Comcast [redacted] JA__(Comcast_Exh.52). In 2005, Tennis Channel and Comcast entered a [redacted] contract that allows Comcast to distribute Tennis Channel on any tier. JA__(Comcast_Exh.84,pp.9-10). Comcast chose to carry, and still carries, Tennis Channel on its sports tier. JA__(Order¶12). Tennis Channel negotiated agreements with other MVPDs that granted similar discretion as to the network's level of carriage, both before and after its agreement with Comcast. JA__(Comcast_Exhs.120, 165, 235).

Tennis Channel subsequently changed its distribution strategy and, in 2006 and 2007, offered Comcast and other MVPDs equity in exchange for broader carriage. Two satellite companies—DirecTV and Dish Network—accepted that offer, became partial owners of Tennis Channel, and increased their distribution of the network. JA__(Tr.407-15, 419-20; Comcast_Exhs.503, 701, 703, 704). But Comcast declined the offer—[redacted]—based on cost-benefit analyses that showed it would lose money if it accepted. JA__(Comcast_Exh.75¶¶25-27; Comcast_Exh.112).

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Tennis Channel then conceived a plan to rewrite its contract with Comcast through litigation. In January 2007, it prepared a [redacted] JA__(Comcast_Exh.24). In 2009, after hiring a consultant to prepare for litigation, Tennis Channel presented Comcast with two proposals for broader distribution—one on Comcast's most widely distributed digital tier (Digital Starter), and the other on Comcast's second most widely distributed digital tier (Digital Preferred). JA__(Tr.663; Comcast_Exh.190; Initial_Decision¶19).

Comcast again conducted a cost-benefit analysis and concluded that it would lose money under either proposal. Because Comcast pays Tennis Channel fees on a per-subscriber basis, distributing the network more broadly would have increased Comcast's aggregate payments to Tennis Channel by either [redacted]—even accounting for the fact that Tennis Channel's proposal offered [redacted]. There also was no indication that broader distribution would attract subscribers or yield Comcast any other offsetting benefit. JA__(Tr.2121-25; Comcast_Exh.75¶¶16-18; Comcast_Exh.78¶¶14-16; Comcast_Exh.467; Comcast_Exh.588; Initial_Decision¶19). Although Comcast offered to assist Tennis Channel in identifying specific markets where broader

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distribution could be warranted, Tennis Channel dismissed the idea as a "waste of time" and broke off negotiations. JA__(Tr.2128-29). Comcast thus elected to stand on its contract rights.

Other MVPDs also rejected Tennis Channel's requests for broader carriage. In 2009 and 2010, for example, [redacted] declined similar proposals from Tennis Channel. JA__(Comcast_Exhs.31-32, 201, 529, 534, 545, 632, 1103). In 2010, all major MVPDs—including Tennis Channel's partial owners, DirecTV and Dish Network—distributed Tennis Channel less broadly than Golf Channel and Versus. JA__(Comcast_Exhs.1102-1103).

III. PROCEDURAL HISTORY

In January 2010, Tennis Channel filed a carriage complaint under Section 616, claiming that Comcast discriminated against it on the basis of affiliation by distributing it more narrowly than Golf Channel and Versus. JA__(TC_Compl.). The FCC's Media Bureau rejected Comcast's statute-of-limitations defense on the pleadings and set the remainder of the matter for a *de novo* hearing before an ALJ. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 25 FCC Rcd. 14149 (MB 2010), JA__. The ALJ conducted a six-day hearing, during which the parties introduced testimony and exhibits. JA__(Order¶15). On December 20, 2011, the ALJ released an Initial Decision finding that Comcast violated Section 616,

requiring Comcast to carry Tennis Channel "at the same level of distribution" as Golf Channel and Versus, and imposing a forfeiture. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, ¶ 119 (Dec. 20, 2011) ("Initial Decision"), JA__.[2]

Comcast appealed, and on July 24, by a 3-2 vote, the FCC issued an Order affirming the Media Bureau's denial of Comcast's statute-of-limitations defense and largely affirming the ruling of the ALJ. JA__(Order). Although Tennis Channel filed its complaint several years after the parties entered their carriage agreement, the Order rules that the complaint was timely because Tennis Channel provided Comcast with notice of its intent to sue less than one year before filing its complaint. JA__(Order¶¶28-34). The Order also rules that Comcast violated Section 616 because Tennis Channel's programming is "[s]imilar" to that of Golf Channel and Versus, because Comcast distributes the networks differently, and because this difference in carriage "affected [Tennis Channel's] ability to compete." JA__(Order¶¶51-52, 68, 84). Based on those findings, the Order affirms the ALJ's remedy requiring Comcast to carry Tennis Channel at the same level as Golf Channel and Versus and pay a forfeiture. JA__(Order¶¶111-112). The Order also states that Comcast must "pay Tennis Channel any additional

[2] The Initial Decision also ordered Comcast to provide "equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement." JA__(Initial_Decision¶120). The FCC vacated this channel-placement remedy, JA__(Order¶91), and it is not at issue here.

compensation for broader carriage that the parties have already negotiated." JA__(Order¶92). Finally, the Order rules that the carriage remedy it imposes is consistent with the First Amendment because it satisfies intermediate scrutiny. JA__(Order¶103).

Commissioners McDowell and Pai dissented, explaining that the Order's finding of affiliation-based discrimination "founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream." JA__(Order_p.45). The dissent also explains that the Order violates the First Amendment because requiring Comcast "to favor one particular competitor in the marketplace" does not serve any legitimate interest in "promot[ing] fair competition." JA__(Order_p.46 n.337). And the dissent concludes that the Order will harm the public interest because it imposes costs that ultimately will "come out of the pockets of consumers." JA__(Order_p.48).

On August 8, after filing a petition for review, Comcast moved to stay the Order pending this Court's review on the merits. On August 24, this Court granted a stay, concluding that Comcast had "satisfied the requirements for a stay pending court review," which include a likelihood of success on the merits. JA__(Stay_Order) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

SUMMARY OF ARGUMENT

I. The Order fundamentally misconstrues and misapplies Section 616, which prohibits "unreasonabl[e] restrain[ts]" on a programmer's ability to compete that result from discrimination "on the basis of affiliation." 47 U.S.C. § 536(a)(3). That provision invokes—and must be interpreted in light of—settled background legal principles, including antitrust principles that limit the circumstances in which a duty to deal may be imposed, and federal statutes requiring a showing of intentional discrimination. The Order ignores these principles and effectively reads the two key elements of Section 616 out of the statute altogether. And the Order ultimately requires Comcast to carry Tennis Channel more broadly than even the network's partial owners, DirecTV and Dish Network, carried it—a patently absurd result.

The Order disregards the evidence demonstrating that Comcast did not unreasonably restrain Tennis Channel's ability to compete for viewers and carriage—including that Comcast already makes Tennis Channel available to nearly all of its subscribers who want it, and that Tennis Channel remains free to reach more than three-quarters of the market through MVPDs other than Comcast. The Order, however, finds an unreasonable restraint because Tennis Channel presumably could secure *more* viewers and advertising revenue via broader carriage. But that will be true in every discrimination case under Section 616, and

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thus cannot constitute an *unreasonable* restraint without rendering that requirement a nullity.

The Order also ignores the evidence that Comcast did not discriminate based on affiliation—including that Tennis Channel's proposal for broader carriage would have increased Comcast's costs by [redacted], with no offsetting benefits, and that the decisions of other market participants were entirely consistent with that of Comcast. Indeed, [redacted], and *every* major MVPD—including Tennis Channel's partial owners—carried Golf Channel and Versus more broadly than Tennis Channel in 2010. The Order nevertheless finds unlawful discrimination based on a standard that has no support in the statutory text and violates the First Amendment—that Tennis Channel is "similarly situated" to Golf Channel and Versus, yet distributed differently by Comcast—and that the Order arbitrarily misapplies on its own terms in any event.

The portion of the Order that purports to require Comcast to pay an increased aggregate fee to Tennis Channel for broader carriage is particularly indefensible. That requirement would do nothing to remedy Tennis Channel's supposed competitive injury—the failure to gain broader exposure to subscribers—and thus has no basis in Section 616.

II. The Order's rewriting of Section 616 also violates the First Amendment. Its "similarly situated" standard is necessarily content-based in that it involves a comparison of the programming of Golf Channel, Versus, and Tennis Channel, including their "genre" (*i.e.*, sports) and "image." JA__(Order¶¶51-52, 65-66). The Order is therefore subject to strict scrutiny—a standard that it does not even purport to meet. Instead, the Order asserts that *intermediate* scrutiny applies because its goal is not to suppress speech conveying a particular message. But that confuses content-neutrality with viewpoint discrimination, and ignores that the Supreme Court has found even viewpoint-neutral laws to be content-based. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000).

In any event, the Order fails even intermediate scrutiny. Due to changes in market conditions, the interests that Section 616 was designed to serve—promoting competition and diversity in programming—are now being served by the marketplace itself, and thus do not justify the Order's intrusion on Comcast's speech. Indeed, the importance of those interests was premised on cable operators' then-perceived "bottleneck" power over access to consumers, but now-robust competition from satellite and telephone companies has eliminated any such bottleneck power. Moreover, the Order is not narrowly tailored because it is poorly designed to advance the government's purported interests, and instead simply singles out Comcast and requires it to provide preferential terms of carriage

to Tennis Channel. And to the extent that the Order requires Comcast to pay Tennis Channel an increased aggregate fee, it also fails the narrow tailoring requirement because enriching Tennis Channel does not further *any* alleged government interest.

III. The Order need not even have *reached* the statutory and constitutional questions in this case because Tennis Channel's complaint was filed years too late. Tennis Channel had a one-year window to file suit, which opened in 2005 when it entered its contract with Comcast—the contract that allows the very terms of carriage Tennis Channel now assails as discriminatory. The Order deems Tennis Channel's 2010 complaint timely because Tennis Channel had, less than one year earlier, notified Comcast of its intent to file a complaint. But that implausible reading rewrites the FCC's regulations and creates a meaningless, unlimited limitations period that a party can reopen at will.

STANDING

The Order substantially injures Comcast because it requires Comcast to modify its speech by increasing its distribution of Tennis Channel, and to pay a forfeiture.

STANDARD OF REVIEW

I. This Court reviews *de novo* "whether Congress has directly spoken to the precise question at issue," and it "must give effect to the unambiguously

expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The agency's interpretation is entitled to deference only if, after "employing traditional tools of statutory construction," the statute is ambiguous and the agency's interpretation is reasonable. *Id.* at 842-43 & n.9. This Court also "will not accept the Commission's interpretation of an ambiguous statutory phrase if that interpretation raises a serious constitutional difficulty." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012).

This Court will vacate agency action as arbitrary and capricious under the APA if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency's decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Fox v. Clinton*, 684 F.3d 67, 74-75 (D.C. Cir. 2012). An agency's factual findings must be supported by "substantial evidence," and the Court "may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Morall v. DEA*, 412 F.3d 165, 176-77 (D.C. Cir. 2005) (internal quotation marks omitted).

II. This Court reviews *de novo* an agency's rulings on constitutional issues. *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-08 (1984).

III. An agency's interpretation of its own regulation is not entitled to deference if it has, "under the guise of interpreting a regulation, [created] *de facto* a new regulation," *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), or subjected a party to "unfair surprise," *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-70 (2012); *see also, e.g.*, *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (no deference if interpretation "is plainly erroneous or inconsistent with" the regulations).

ARGUMENT

I. THE FCC'S ORDER VIOLATES SECTION 616.

The Order distorts beyond recognition Section 616, which prohibits MVPDs from (1) "unreasonably restrain[ing]" the ability of unaffiliated networks to "compete fairly," (2) where such restraint results from discrimination "on the basis of affiliation." 47 U.S.C. § 536(a)(3). In crafting that language, Congress drew on established bodies of law to ensure that Section 616 would protect competition, but would not intrude unnecessarily on protected speech or the marketplace. The requirement of an *unreasonable* restraint on the ability to compete invokes

principles from antitrust law, which imposes a duty to deal with one's competitors only in extraordinary circumstances. The requirement of discrimination "on the basis of affiliation," in turn, adopts the well-established standard for *intentional* discrimination found in numerous federal statutes.

Under basic canons of interpretation, Section 616 must be construed to incorporate those background doctrines. Indeed, Congress is presumed to legislate with knowledge of "existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *see also Abuelhawa v. United States*, 556 U.S. 816, 821 (2009), and "statutory interpretation proceeds on the assumption that Congress's choice of words reflects a familiarity with judicial treatment of comparable language." *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 824 (D.C. Cir. 2001); *see also Traynor v. Turnage*, 485 U.S. 535, 545-46 (1988).

The Order, however, rejects these background principles and effectively *eliminates* the key textual limitations in Section 616—replacing the statutory scheme with a regime that finds an "unreasonable restraint" *whenever* the FCC finds that networks are "similarly situated" but treated differently. Indeed, contrary to Congress's instruction to "rely on the marketplace, to the maximum extent feasible," in implementing Section 616 (Cable Act, § 2(b)(2)), the Order uses Section 616 to provide Tennis Channel broader distribution from Comcast

than it obtained from *any other major MVPD*. That sweeping interpretation of Section 616 should be rejected, not only because it conflicts with the statute, but also because it creates an unnecessary clash with the First Amendment. *See Rural Cellular Ass'n*, 685 F.3d at 1090.

A. Comcast Did Not Unreasonably Restrain Tennis Channel's Ability To Compete.

1. Congress enacted Section 616 in 1992 to address what it viewed as a particularly severe threat to competition in the video-programming marketplace—the potential that cable operators could exclude unaffiliated programmers from the market by exercising "bottleneck, or gatekeeper, control" over access to consumers. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994). Indeed, Congress made clear that it was addressing the perceived "monopoly status of cable systems" in many communities at the time. S. Rep. No. 102-92, at 8 (1991); *see also* H.R. Rep. No. 102-628, at 27 (1992) ("principal goal" of Cable Act was "to encourage competition from alternative and new technologies").

This Court should interpret Section 616 to incorporate long-standing legal principles aimed at addressing similar concerns—namely, antitrust law that addresses analogous threats to competition. Indeed, the language that Congress adopted in Section 616—prohibiting "unreasonabl[e] restrain[ts]" on the ability to compete fairly (47 U.S.C. § 536(a)(3))—directly invokes antitrust principles. *See, e.g.*, *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (Section 1

of the Sherman Act prohibits "unreasonable restraints of trade"); *cf. Qwest Corp. v. FCC*, 689 F.3d 1214, 1221 (10th Cir. 2012) (explaining that the FCC relies on antitrust principles in interpreting Section 10 of the Telecommunications Act of 1996). In particular, long before 1992, courts had addressed the bottleneck controls that concerned Congress through a body of antitrust law known as the essential-facilities doctrine. *See, e.g.*, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) ("The essential facility doctrine, also called the 'bottleneck principle,' states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'" (citation omitted)); *see also MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

Under the essential-facilities doctrine, imposing a duty to deal has historically been appropriate only when one firm controls a service or facility, and denying a competitor access to that facility would impose a "severe handicap" on the competitor's ability to compete. *Hecht*, 570 F.2d at 992; *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991). For example, a professional football stadium may be an essential facility in the market for exhibiting professional football games, *Hecht*, 570 F.2d at 993, and access to local telephone connections has been deemed an essential service for a long-distance telephone company, *MCI*, 708 F.2d at 1132-33. Because these standards were

well-established when Congress enacted Section 616,[3] and because they addressed bottleneck constraints analogous to those that Congress targeted in Section 616, the unreasonable-restraint requirement should similarly be interpreted to require proof of a *severe* handicap to a network's ability to compete fairly with efficiency-enhancing, vertically integrated MVPDs in the content market.

Tennis Channel offered no such proof here. In fact, the overwhelming evidence establishes that Comcast, far from imposing a severe competitive restraint, affirmatively *aided* Tennis Channel's ability to compete. Comcast was among the first MVPDs to agree to carry the fledgling network, and it makes Tennis Channel available to nearly all of its customers, who need only pay a fee if they want to receive the network—as [redacted] already do (in addition to the approximately [redacted] Comcast subscribers who receive the network on broadly penetrated tiers of service). JA__(Order¶12; Initial_Decision¶17 & n.60). Moreover, Comcast customers account for less than 24% of MVPD subscribers. JA__(TC_Exh.308,p.13). Tennis Channel is free to reach more than three-quarters of the market through other MVPDs, and to entice even Comcast's current subscribers to switch to those other MVPDs—including satellite companies that serve every community in America. Tennis Channel can also compete by

[3] Since 1992, the Supreme Court has further emphasized the emphatically narrow reach of the essential-facilities doctrine. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009).

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distributing its content online. Ultimately, the allegation that Comcast's sports-tier carriage severely restrains Tennis Channel's ability to compete is foreclosed by the evidence that DirecTV and Dish Network (Tennis Channel's partial owners) alone could have provided it with [redacted] more subscribers, but apparently did not see a need to do so. JA__(Comcast_Exh.201).

2. The Order erroneously ignores the settled background principles on which Congress drew in Section 616. It asserts that interpreting the unreasonable-restraint requirement to incorporate antitrust principles and the essential-facilities doctrine would make Section 616 a "redundant analogue to antitrust law" and "frustrate Congress's clear purpose to grant the Commission new authority to address concerns specific to MPVDs and affiliated programming." JA__(Order¶41). But that turns Section 616 on its head. Congress not only invoked antitrust principles in Section 616 by requiring a showing of an "unreasonable restraint" on competition, but *further narrowed* the application of those principles by requiring the additional showing of intentional discrimination "on the basis of affiliation." Thus, the purpose of Section 616 was to create a carefully targeted remedy that permits the FCC to impose a duty to deal only in limited circumstances—not to create an intrusive new remedy that embraces a duty to deal even absent proof of a serious competitive harm. This narrowing of antitrust principles is perfectly sensible because, as Congress presumably

understood, requiring MVPDs to deal with unaffiliated networks implicates special First Amendment concerns not present in other industries. *See, e.g.*, *Traynor*, 485 U.S. at 546; *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984) (Stevens, J., concurring in the judgment in part and dissenting in part) (presumption is "that Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties").

The Order also asserts that the essential-facilities doctrine is inapposite because Section 616 was intended, not to address bottleneck power, but to impose a general limitation on the vertical integration of MVPDs and networks. JA__(Order¶¶40, 42). But that theory fails because Section 616 is addressed only to "unreasonable restraints" on fair competition. If MVPDs do not have bottleneck power, vertical integration between MVPDs and networks is not inherently an "unreasonable restraint." *See, e.g.*, 3B P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 755c (3d ed. 2008) ("[m]onopoly is a necessary but not a sufficient condition for competitive harm from vertical integration"). Vertical integration, after all, is often *pro*-competitive and can *enhance* efficiency.[4] As the FCC acknowledged in

[4] *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("vertical integration creates efficiencies for consumers"); Agriculture & Antitrust Enforcement Issues in Our 21st Century Economy, 74 Fed. Reg. 43,725, 43,726 (Aug. 27, 2009) ("In many instances, vertical integration may be procompetitive, allowing firms to reduce their costs."); Christine A. Varney, Comm'r, Fed. Trade Comm'n, *Vertical Merger Enforcement Challenges at the FTC*, Address at PLI 36th Annual Antitrust Institute (July 17, 1995), *available at*

implementing the Cable Act, Congress "recognized that vertical integration of cable systems and programming vendors . . . can provide certain benefits to the public" and "has contributed to enhancing development of innovative programming ventures through efficiencies in financing and by compensating cable systems for assuming the risk associated with launching new programming services."[5] The Order does not explain why Congress would set out to restrict vertical integration in the video-programming market across the board, without regard to its practical effects. And Congress's choice of terminology demonstrates that it rejected such an approach.

3. At the very least, it is clear that Section 616 prohibits only "*unreasonabl[e]* restrain[ts]" on fair competition—not every restraint that may arise even from unlawful discrimination by an MVPD.[6] The Order nevertheless interprets Section 616 to provide that "the discrimination must be unreasonable and

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http://www.ftc.gov/speeches/varney/varta.shtm (vertical integration can "lower transaction costs" and "enhance competition").

[5] *Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd. 194, ¶ 5 (1993) (citing H.R. Rep. No. 102-628, at 41); *see also* S. Rep. No. 102-92, at 27 ("[Vertical integration has] stimulated the development of programming that was necessary to flesh out the promise of cable." (internal quotation marks omitted)).

[6] Again, this limitation is consistent with long-standing antitrust law. "Every agreement concerning trade, every regulation of trade, restrains," and Section 1 of the Sherman Act therefore has long been interpreted to prohibit only *unreasonable* restraints on trade. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

have a restraining effect on the programmer's ability to compete fairly." JA__(Order¶43). Although the Order describes this as a "straightforward and textual reading" of Section 616 (JA__(Order¶86)), it in fact rewrites the statute by requiring that the alleged *discrimination*, not the restraint on competition, be unreasonable. Thus, the Order erroneously permits Section 616 to be satisfied by *any* "restraining effect" on competition—whether reasonable or not. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (rejecting the FCC's interpretation of Section 251(d)(2) of the Telecommunications Act of 1996 because the statutory language "require[d] the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it ha[d] simply failed to do").

The Order's application of its supposedly "textual" reading confirms that, as a practical matter, the FCC will find even a *reasonable* restraint on competition sufficient to satisfy Section 616. The Order finds that Comcast's carriage of Tennis Channel on the sports tier had a restraining effect because broader carriage would permit Tennis Channel to secure more viewers, programming rights, and advertising revenue, either in absolute terms or relative to Golf Channel and Versus. JA__(Order¶¶84-85). But those will *always* be the effects of anything less than the broadest possible carriage, and the supposed harms found by the Order will therefore be present in *every* discrimination case brought by a network under

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Section 616. Thus, the Order's approach, far from being a "textual" one, renders the unreasonable-restraint element superfluous.

The Order asserts that the alleged harms here will not be present in every case because "Comcast is the nation's largest MVPD." JA__(Order¶¶86-87). However, just as the FCC cannot nullify the unreasonable-restraint requirement *in toto*, it also cannot nullify that element selectively, whenever Comcast is the defendant. Indeed, because Comcast's subscribers make up less than one-quarter of the market—and because, in almost all areas, consumers can vote with their feet by switching to other MVPDs—Comcast's size cannot unreasonably restrain Tennis Channel's ability to compete. If anything, Comcast's size *benefits* Tennis Channel because Comcast provides the network with its [redacted] largest source of subscribers, after only [redacted]. Thus, as the dissent recognizes, "[t]o the extent that the Commission uses Comcast's size as a justification for ordering the company to assist non-affiliated programmers, it strains the legal underpinning of Section 616." JA__(Order_p.47 n.341).

* * *

A network must prove *both* an unreasonable restraint on fair competition *and* unlawful discrimination on the basis of affiliation to satisfy Section 616. *See* 47 U.S.C. § 536(a)(3); JA__(Order¶42). Because Tennis Channel failed to satisfy the first element, the Order should be overturned.

B. Comcast Did Not Intentionally Discriminate On The Basis Of Affiliation.

1. The Order also should be vacated on the independent ground that it effectively nullifies the statutory element of discrimination "on the basis of affiliation." As the FCC has previously held, the "relevant inquiry" under this provision is whether an MVPD "acted upon" a motive to discriminate "in reaching its carriage decision." *Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 22 (2010) ("*MASN*"), *petition for review denied*, *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012). Thus, consistent with a host of federal statutes prohibiting intentional discrimination, Section 616 requires a showing that an MVPD deliberately discriminated against a network based on affiliation.

Indeed, Section 621 of the Communications Act provides that cable operators are not subject to the standard applied to common carriers under Section 202(a). 47 U.S.C. § 541(c); *see also* H.R. Rep. No. 102-628, at 110. A claim under Section 202 "entails a three-step inquiry: (1) whether the services are 'like'; (2) if they are 'like,' whether there is a price difference; and (3) if there is a difference, whether it is reasonable." *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *see* 47 U.S.C. § 202(a). In Section 616, Congress rejected that disparate-impact approach, and instead targeted only intentional, disparate-treatment discrimination. Congress undoubtedly did so because it intended to

preserve the benefits of vertical integration, rather than grant the FCC sweeping authority to second-guess the carriage decisions of vertically integrated MVPDs.

Although the Order purports to agree that Section 616 requires a showing of intentional discrimination, JA__(Order¶45 n.138), it ultimately abandons that requirement by finding that Comcast engaged in unlawful discrimination simply because Tennis Channel is "similarly situated" to Golf Channel and Versus, and because Comcast distributes Tennis Channel less broadly than those networks. JA__(Order¶51). That "similarly situated" standard has no support in the statutory text, and is entirely divorced from Congress's decision to prohibit only intentional discrimination. Indeed, this "similarly situated" analysis is no different from the disparate-*impact* standard for common-carrier discrimination that Congress *rejected* in Section 616.

The Order's "similarly situated" approach also renders its own analysis internally inconsistent. The Order finds an unreasonable restraint because, by declining broader carriage, Comcast purportedly suppressed Tennis Channel's growth, made it "difficult for the network to acquire programming rights," and "discouraged advertisers from placing advertisements on the network." JA__(Order¶84). But the Order finds unlawful discrimination based on the opposite premise: that Tennis Channel is "similarly situated" to Golf Channel and Versus because—as Tennis Channel itself claims (JA__(TC_Compl.,pp.5, 16-

19))—it has *succeeded* in the marketplace, acquiring distribution rights to major sporting events and achieving elevated ratings and a "remarkable overlap in advertisers" with Comcast's affiliated networks. JA__(Order¶¶54-55, 59).

The Order asserts that, in pointing out this inconsistency, Comcast is attempting to "create a Catch-22" that would "deprive Section 616 of its force." JA__(Order¶67). Not so. This inconsistency arises only because the Order goes seriously awry in adopting a "similarly situated" standard in place of the statutory requirement of intentional discrimination on the basis of affiliation.

Moreover, as explained below, *infra* pp.43-45, the Order's "similarly situated" standard violates the First Amendment because it involves an openly content-based regulation of speech. In concluding that Tennis Channel, Golf Channel, and Versus are "similarly situated," the Order finds, for example, that all three networks "provide sports programming" and "broadcast sporting events and other types of similar non-event sports-related content." JA__(Order¶¶51-52). The Order is therefore subject to strict scrutiny, *see, e.g.*, *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32, 234 (1987), a standard that it does not even attempt to meet. At a minimum, the Order's content-based "similarly situated" standard raises grave First Amendment doubts. Because statutes must be read where possible to avoid such First Amendment problems, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-77

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(1988); *Rural Cellular Ass'n*, 685 F.3d at 1090, the Order's interpretation of Section 616 should be rejected.

2. Applying the proper, statutory standard of intentional discrimination based on affiliation, it is clear that Comcast did not violate Section 616 when it declined Tennis Channel's request for broader carriage in 2009. Comcast made a "straight up financial" decision that Tennis Channel's proposal would cost an additional [redacted]—through both increased subscriber fees and potentially reduced revenue from the sports tier—with no offsetting benefits. JA__(Tr.2127); *see also* JA__(Tr.2110-12, 2121-26). The FCC itself has previously held that such a cost-benefit analysis provides a "legitimate and non-discriminatory" basis to decline a network's request for broader distribution. *MASN*, 25 FCC Rcd. 18099, ¶¶ 13, 19.

The Order asserts that Comcast did not weigh the benefits of Tennis Channel's proposal for broader carriage. JA__(Order¶77). But neither the Order nor Tennis Channel shows that *any* offsetting benefits existed, much less that they outweighed the costs. Comcast cannot be faulted for failing to weigh benefits that, so far as the record shows, do not exist—particularly against costs that indisputably do. In any event, Comcast *did* consider whether there were any potential benefits from distributing Tennis Channel more broadly, and found that there were none. For example, Comcast polled its regional executives, who reported that they had

seen no indication that subscribers were interested in broader carriage of Tennis Channel. JA__(Tr.2110-12; Comcast_Exh.75¶16; Comcast_Exh.78¶¶15-16; Comcast_Exh.130). Similarly, previous Comcast customer surveys showed "no consumer demand for" Tennis Channel. JA__(Tr.1881-82; Comcast_Exh.78¶¶9-10; Comcast_Exh.130). In the face of this evidence—and its own recognition that Comcast "polled its regional executives regarding interest in Tennis Channel" (JA__(Order¶80))—the Order inexplicably declares that "Comcast made no attempt to analyze benefits at all." JA__(Order¶79); *cf. Bose*, 466 U.S. at 499 (because this case "rais[es] First Amendment issues," the Court must "make an independent examination of the entire record").

The Order also asserts that Comcast's cost-benefit analysis was a "strategy designed to insulate Comcast in litigation." JA__(Order¶82). But there is nothing wrong with an MVPD considering the ramifications of its conduct in litigation, especially when, as here, it is dealing with a party manifestly engaged in pre-litigation activity. The FCC itself has encouraged MVPDs to "contemporaneously memorialize the reasons underlying their program carriage denials" when litigation is "reasonably foreseeable." *MASN*, 25 FCC Rcd. 18099, ¶ 21 & n.118. In any event, the Order does not come close to establishing that the *results* of Comcast's cost-benefit analysis were incorrect.

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In fact, the legitimacy and accuracy of Comcast's cost-benefit analysis are fully corroborated by the similar carriage decisions of other MVPDs. Under FCC precedent, such decisions constitute "independent evidence" that an MVPD "did not engage in discrimination." *MASN*, 25 FCC Rcd. 18099, ¶ 18. Here, [redacted]. In July 2009, Tennis Channel sought broad carriage from [redacted], which rejected the proposal as [redacted] JA__(Comcast_Exhs.529, 534). In July 2010, [redacted] also rejected Tennis Channel's proposal [redacted] JA__(Comcast_Exhs.31, 201). Charter similarly rejected Tennis Channel's proposal for broader carriage because of lack of subscriber demand. JA__(Tr.1798-99, 1806; Comcast_Exh.545). [redacted] rejected similar proposals, and its distribution of Tennis Channel [redacted] from 2009 to 2010. JA__(Comcast_Exhs.632, 1103).

Furthermore, *every* major MVPD carried both Golf Channel and Versus more broadly than Tennis Channel when it filed its complaint in 2010. JA__(Comcast_Exhs.1102-1103). Thus, even Tennis Channel's partial owners, DirecTV and Dish Network, did not carry the network as broadly as the Order compels Comcast to carry it. The specifics of Comcast's carriage of Tennis Channel, Golf Channel, and Versus in 2010 were also entirely consistent with

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those of other major cable operators. Comcast carried Golf Channel and Versus to approximately [redacted] of its subscribers, and carried Tennis Channel to [redacted]. Similarly, Time Warner Cable, the second largest cable operator in the country, carried Golf Channel and Versus to [redacted] and [redacted] of its subscribers, respectively, and carried Tennis Channel to only [redacted]. Charter and Cablevision likewise carried both Golf Channel and Versus to approximately [redacted] of their subscribers, and carried Tennis Channel to less than [redacted]. In fact, Comcast carried Tennis Channel [redacted] than any other large cable company except Cox, and more broadly than the average for all other cable companies (large and small). JA__(Comcast_Exhs.1102-1103). Thus, as the dissent recognizes, the proposition that Comcast discriminated on the basis of affiliation "founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream." JA__(Order_p.45).

The Order asserts that Comcast carries Tennis Channel to fewer subscribers than the industry average. JA__(Order¶71). As the dissent explains, however, the Order erroneously "compar[es] apples to oranges" by including Tennis Channel's distribution by its partial owners, DirecTV and Dish Network. JA__(Order_p.45). "When one compares apples to apples—that is, by comparing Comcast's distribution of Tennis Channel to that of other major MVPDs *with no ownership interest in Tennis Channel*—there is no meaningful difference" because "[a]bout

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[redacted] of the other major MVPDs' subscribers received Tennis Channel in 2010, versus [redacted] of Comcast's subscribers." JA__(Order_pp.45-46). This "miniscule variance" provides no basis for overriding the parties' contract and Comcast's editorial discretion. JA__(Order_p.46).

The Order also discounts the decisions of other market participants based on an entirely speculative "ripple effect," which irrationally presumes that Comcast's decisions, even if economically unsound, drove the conduct of other MVPDs. JA__(Order¶73). But no evidence remotely supports this "lemming" theory of causation, which ignores experience and human nature: Market players, after all, do not forgo valuable business opportunities simply because *others* have not seized them. As the dissent put it, "any waves the ripple effect creates surely are counteracted by the straightforward effect of competition." JA__(Order_p.47). The Order's contrary view—that other MVPDs blindly follow Comcast's carriage decisions as if it were the Pied Piper of the video-programming market—is absurd.

The Order's "ripple effect" theory also cannot be squared with the evidence that several MVPDs, including Time Warner and Cox, entered carriage agreements with Tennis Channel in 2002 and 2003, respectively—years *before* Comcast did—and that those MVPDs carried Tennis Channel less broadly than Golf Channel and Versus. JA__(Tr.1964-65; Comcast_Exhs.75¶4, 165, 235, 1103). Comcast's

subsequent carriage decision could not conceivably have affected those determinations.

If anything, the Order's "ripple effect" theory *undermines* its conclusion that Comcast discriminated on the basis of affiliation. The premise of this theory is that, unless Tennis Channel is carried broadly by one major MVPD, it is not sufficiently attractive to warrant broader carriage by other MVPDs. But that reaffirms that Comcast had a legitimate business reason for declining broader carriage of Tennis Channel—it was not carried broadly by any other major cable company. The Order, however, erroneously places a special burden on Comcast to be the "first mover," even though Comcast's only "obligation under [Section 616] is to provide unaffiliated networks with non-discriminatory—not preferential—treatment." JA__(Order_p.47).

3. The only purported evidence on which the Order relies to find deliberate discrimination by Comcast is irrelevant and insubstantial. The Order cites testimony by a Comcast executive in another case that its affiliated networks are "'treated like siblings as opposed to like strangers'" and "'get a different level of scrutiny'" than unaffiliated networks. JA__(Order¶46). But there is nothing nefarious about that statement: Affiliates are, *by definition*, corporate "siblings." In any event, this snippet of ambiguous testimony has nothing to do with Comcast's carriage decisions. Read in context, it reflects only that Comcast—

quite naturally—has a higher level of familiarity with its affiliates. JA__(TC_Exh.19-2¶¶3-5). Indeed, the FCC itself ruled in another Section 616 case against Comcast that this *same testimony* was properly excluded because there was "no evidence" it "had any bearing on [the] specific complaint against Comcast." *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 26 FCC Rcd. 8971, ¶ 35 (2011), *petition for review docketed*, No. 11-73134 (9th Cir.). It is irrelevant here for the same reason.[7]

The Order also relies on even less relevant evidence that Comcast did not carry *other* affiliated sports networks on its sports tier. JA__(Order¶¶47-48). Unrebutted evidence establishes that Comcast's distribution of these other networks was explained by factors other than affiliation. For example, Comcast provided NHL Network with broad distribution pursuant to a most-favored-nation offer initiated by its agreement with another distributor, and broader carriage of the network required no material cost increase. JA__(Tr.2148-49; Comcast_Exh.75¶24). And Comcast carried MLB Network and NBA TV broadly because Major League Baseball and the National Basketball Association required Comcast to do so as a condition for licensing their valuable out-of-market

[7] The Order similarly errs in relying on testimony by another executive that Comcast has a "'sibling' relationship" with its affiliated networks that affords them "'greater access to some degree' to Comcast decision-makers." JA__(Order¶46). That testimony too is irrelevant. In fact, the executive in question specifically testified that, although this "'sibling' relationship" exists, Comcast does not discriminate on the basis of affiliation. JA__(Tr.2249).

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packages. JA__(Tr.2138-47; Comcast_Exh.75¶¶22-23). Although the Order acknowledges these "nondiscriminatory reasons" for Comcast's carriage of these networks, it does not even attempt to rebut them. JA__(Order¶49).

4. The Order's "similarly situated" analysis is also flawed, even on its own terms, in numerous respects. For example, the content-based conclusion that Tennis Channel's speech is similar to that of Golf Channel and Versus conflicts with the evidence establishing significant differences between the networks' programming. Virtually all of the coverage on Golf Channel and Versus is exclusive to those networks, and most of it is current, whereas Tennis Channel's content consists mostly of repeats and non-exclusive programming. JA__(Comcast_Exh.77¶¶40-43, 49-50, 61-64). For example, the Order relies on evidence that Tennis Channel "covers all four Tennis Grand Slams," JA__(Order¶59), but most of that coverage is not exclusive—it is either telecast first on another network, streamed live on the Internet, or both. JA__(Comcast_Exh.77¶¶42-44). Indeed, Tennis Channel has acknowledged that the widespread availability of its content elsewhere [redacted] JA__(Comcast_Exh.177). Moreover, [redacted] of the matches shown on Tennis Channel concluded more than [redacted] earlier, and [redacted] were repeats. JA__(Comcast_Exh.77¶¶22-23, 47).

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The networks' differences are also reflected in the amounts they pay for their programming: In 2010, while Golf Channel spent [redacted] and Versus spent [redacted], Tennis Channel spent just [redacted]—less than almost any other national sports network. JA__(Comcast_Exh.1101). Moreover, the networks have widely contrasting abilities to attract and retain subscribers. For example, the evidence showed that Comcast suffered no loss of subscribers when it shifted Tennis Channel to the sports tier in some systems it had acquired. JA__(Tr.2365-66; Comcast_Exh.130). In contrast, when Charter considered carrying Golf Channel and Versus less broadly, a critical mass of Charter subscribers responded with calls and e-mails that persuaded Charter to maintain the networks on a broadly distributed tier. JA__(Tr.1905-09, 1918-20); *see also* JA__(Comcast_Exh.78¶26).

The Order acknowledges that this evidence of differing programming costs and value to subscribers may have "significance," but asserts that its probative value is outweighed by evidence that Tennis Channel has similar ratings to Golf Channel and Versus. JA__(Order¶60). But the Order fails to rebut the evidence that ratings are of minimal importance to MVPDs, whose principal business is selling subscriptions—not advertising, for which ratings matter more. *See* JA__(Tr.1768-70, 1806; Comcast_Exh.75¶32; Comcast_Exh.77¶8; Comcast_Exh.80¶¶26, 72-73).

Moreover, even assuming that the networks here are "similarly situated," Comcast's broader carriage of Golf Channel and Versus is explained by changes in market conditions over time, not affiliation-based discrimination. Golf Channel and Versus achieved broad carriage in the 1990s, when MVPDs were actively seeking new programming. Due to increased costs and competition, it was more difficult for new programmers to obtain broad carriage when Tennis Channel launched in 2003, which still is true today. JA__(Comcast_Exh.77¶¶12-15; Comcast_Exh.80¶¶41-44). The Order responds that Comcast recently repositioned MLB Network and NHL Network to more broadly distributed tiers, JA__(Order¶57), but again fails to address the evidence that these distribution changes had substantial, nondiscriminatory motivations. *Supra* pp.37-38.

Ultimately, the Order's reliance on a grab bag of factors to determine whether networks are "similarly situated" is far too subjective and malleable to provide notice to MVPDs of when they may lawfully decline a proposal for broader carriage from a network. This failure to provide notice of prohibited conduct renders the "similarly situated" approach arbitrary and capricious and violates long-standing principles of administrative law. *See, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

C. The Order's Purported Mandate That Comcast Pay An Increased Fee To Tennis Channel Has No Basis In Section 616.

The remedy imposed by the Order is particularly unjustifiable to the extent that it requires Comcast to pay an increased aggregate fee to Tennis Channel for broader distribution. The Order provides that, if Comcast complies with the Order's carriage remedy by distributing Tennis Channel more broadly—which Comcast must do because it is contractually obligated to distribute Golf Channel and Versus broadly, *see* JA__(TC_Exhs.155, 164); *see also* JA__(Order_p.48 n.343)—"Comcast must pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated." JA__(Order¶92). But requiring Comcast to provide such "additional compensation" would do nothing to remedy Tennis Channel's supposed injury: reduced access to Comcast subscribers. JA__(Order¶83). Increased payments would be a pure windfall for Tennis Channel, and requiring such payments is entirely beyond the FCC's authority under Section 616.

The Order contends that its remedy is consistent with Section 616 because any increased payments would simply flow from the combination of broader carriage and the per-subscriber rates in the parties' 2005 contract. JA__(Order¶92). The obvious premise of that contract, however, was that Comcast would pay the scheduled rates for broader carriage *if it chose* to carry Tennis Channel more broadly, based on a determination that the benefits

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outweighed the costs. Comcast reached the opposite conclusion here, finding no benefits from broader carriage that would offset the immense costs. The parties have *not* agreed on any increased fees in these circumstances, in which broader carriage is *mandated* by government order. Thus, any such fees should be determined in future negotiations between the parties. Indeed, Tennis Channel's own conduct bears this out—its 2009 offer to Comcast included [redacted]. JA__(Initial_Decision¶19). Short-circuiting further negotiations—and requiring Comcast to pay *higher* rates than those offered by Tennis Channel in 2009—would serve no legitimate interest under Section 616.

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The common thread connecting all of the Order's statutory errors is its failure to follow Congress's directive to "rely on the marketplace, to the maximum extent feasible," in implementing Section 616. Cable Act, § 2(b)(2). The Order detaches Section 616 from market realities, allowing Tennis Channel to rewrite its market-based agreement and secure—at no additional cost to Tennis Channel, but at a significant additional cost to Comcast—much greater distribution from Comcast than it was able to secure from *any* major MVPD. Because that outcome grossly distorts Section 616, it should be rejected.

II. THE FCC'S ORDER VIOLATES THE FIRST AMENDMENT.

Even if the Order could be squared with Section 616, its analysis and remedy cannot stand because they brazenly infringe Comcast's freedom of speech. The Order interferes with Comcast's editorial discretion and penalizes Comcast's speech (by compelling additional speech) based on its content, and is therefore subject to the most exacting scrutiny—which it cannot survive. The Order also fails even intermediate scrutiny because its overbroad remedy does not advance any important government interest, and because it burdens Comcast's speech to a much greater extent than is plausibly necessary to achieve even its purported ends.

A. The Order Regulates Comcast's Speech Based On Its Content And Is Subject To Strict Scrutiny.

1. The Order is a paradigmatic violation of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ark. Writers' Project, Inc.*, 481 U.S. at 229 (internal quotation marks omitted). A speech restriction falls within this forbidden category if its application depends on the speech's content. *Id.* For example, a tax that applies to magazines but exempts those that are devoted to particular subjects, such as "religion or sports," is "content-based" because applying it requires "enforcement authorities . . . [to] examine the content of the message that is conveyed" by a magazine to determine whether it is subject to the tax. *Id.* at 230 (internal quotation marks

omitted). Such content-based restrictions are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and cannot stand unless they survive strict scrutiny, *see Ark. Writers' Project*, 481 U.S. at 231-32, 234; *see also, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2543-44, 2548 (2012) (plurality opinion) (holding federal statute prohibiting false statements about the receipt of military medals was content-based); *id.* at 2552 (Breyer, J., concurring in the judgment) (noting that content-based regulations face "near-automatic condemnation"); *Playboy Entm't*, 529 U.S. at 813. The same is true of state action compelling speakers to engage in particular speech against their will. *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977); *Tornillo*, 418 U.S. at 258; *cf. R.J. Reynolds Tobacco Co. v. FDA*, _ F.3d _, 2012 WL 3632003, at *3 (D.C. Cir. Aug. 24, 2012). The state, in short, can neither burden speech based on its content nor amplify specific speech by commanding private speakers to repeat it.

The Order does both. Its conclusion that Comcast discriminated against Tennis Channel is based explicitly on the FCC's comparison of the *content* of Golf Channel's, Versus's, and Tennis Channel's programming. JA__(Order¶52). According to the agency, the three networks are sufficiently similar—and Comcast was obligated to treat them equally—because each one "broadcast[s] sporting events and other types of similar non-event sports-related content, such as lifestyle and instructional sports programming." *Id.* The Order also concludes that Tennis

Channel's programming resembles Golf Channel's because both are "devoted to a single sport with high levels of audience participation," and that Tennis Channel and Versus had, in the past, sought "rights to the same sporting events." *Id.*

The Order's remedy interferes further with Comcast's editorial discretion by compelling Comcast, as a penalty for its existing speech, to engage in specific *additional* speech. It commands Comcast to carry Tennis Channel as broadly as Golf Channel and Versus. JA__(Order¶¶89-90, 112). And because Comcast is contractually prohibited from reducing its existing carriage of Golf Channel and Versus, JA__(TC_Exhs.155, 164), the Order requires Comcast to carry particular content to a particular audience—precisely the kind of content-based intrusion the First Amendment forbids absent a compelling justification.

2. Notwithstanding its explicit reliance on programming content, the Order claims that its "similarly situated" analysis and the sanction based upon it are content-neutral because they do not single out speech "because of agreement or disagreement with the message it conveys." JA__(Order¶100) (internal quotation marks and brackets omitted). But that reasoning contradicts Supreme Court precedent by conflating *content*-based rules with *viewpoint*-based restrictions. The Court has made clear that the "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" and other restrictions based on

subject matter. *Ark. Writers' Project*, 481 U.S. at 230 (internal quotation marks omitted; alteration in original). That a speech restriction does not target specific messages does not save it from strict scrutiny; so long as the restriction's application turns on content, it is content-based. *See id.*; *see also, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1584, 1587-92 (2010) (holding content-based a federal statute that banned depictions of the intentional wounding or killing of animals, without regard to viewpoint); *Playboy Entm't*, 529 U.S. at 811-12 (statute requiring cable operators to limit access to "channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent,'" regardless of viewpoint, was "the essence of content-based regulation").

The Order's contrary theory would erase the "distinction" the Supreme Court has drawn between content-based and viewpoint-based rules in other contexts. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995). In a limited public forum, for example, the state may impose reasonable content-based restrictions that advance the forum's purposes, but viewpoint-based burdens remain presumptively invalid. *See id.*; *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 n.11, 2988-95 (2010). Likewise, while the government may curtail certain categories of unprotected speech—restrictions that are necessarily content-based—it may not regulate subcategories of unprotected speech based on the views expressed. *See R.A.V.*, 505 U.S. at 383-92. If it were true, as the Order

reasons, that viewpoint-neutral speech restrictions are *ipso facto* content-neutral, then this settled precedent distinguishing the two concepts would make no sense.

A similar error underlies the Order's assertion that its discrimination analysis and remedy are content-neutral because their *purpose* is unrelated to content. JA__(Order¶100 & n.318). Indeed, the Order's own principal authorities—*Turner*, 512 U.S. 622, and *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (per curiam)—refute its reasoning. Both cases addressed Congress's purpose in enacting restrictions on private speech only *after*, and in addition to, determining that the provisions were content-neutral on their face. The Supreme Court held that most of the "must carry" provisions at issue in *Turner* "impose[d] burdens and confer[red] benefits without reference to the content of speech," 512 U.S. at 643, and it expressly reserved judgment on the few provisions that arguably *did* impose burdens based on programming content, *id.* at 643 n.6. Only then did the Court consider whether the "purpose" of the must-carry provisions was to target particular messages, which would render them content-based. *Id.* at 645. The same was true in *Time Warner*. This Court analyzed the "statutory objective" of the leased-access and other provisions only after holding that they were content-neutral on their face. 93 F.3d at 969, 977-78.

Both *Turner* and *Time Warner* illustrate that even a facially content-neutral restriction can be subject to strict scrutiny if the government's purpose in

restricting speech is content-based. But neither suggests, much less holds, that a content-neutral purpose allows a nakedly content-based restriction to escape strict scrutiny. Indeed, if a content-neutral purpose sufficed to save a facially content-based restriction, neither the Supreme Court in *Turner* nor this Court in *Time Warner* would have had any reason to analyze whether the statutory provisions by their terms distinguished speech based on its content.

The Order further errs in asserting that its analysis and remedy, like the statutory provisions at issue in *Time Warner*, do not regulate speech "on the basis of content, but rather on the basis of affiliation." JA__(Order¶99). The Order's analogy to *Time Warner* disregards the critical difference between the provisions at issue there and the Order here: None of the provisions in *Time Warner* depended on the content of either MVPDs' or networks' programming. As this Court explained, in applying the leased-access provisions—which required cable operators to make a certain number of channels available to unaffiliated programmers, 47 U.S.C. § 532(b)-(d)—neither the "programs [that] appear on the operator's other channels" nor "the content of th[e] speech" of "those who use the leased access channels" "matter[ed] . . . in the least." 93 F.3d at 969. A cable operator's duty to offer, and a network's right to use, the leased channels depended solely on the user's affiliation status and willingness to *compensate* the cable operator for such use (the opposite of a program-carriage arrangement). *See id.*

Similarly, the sections banning exclusive contracts between MVPDs and vertically integrated networks, and forbidding networks from discriminating among MVPDs in selling their programs, 47 U.S.C. § 548(c)(2)(B)-(D), were "content-neutral on their face," and depended only on the "economics of ownership." 93 F.3d at 977.[8] The Order, in contrast, relies explicitly on the content of Comcast's programming.

In a final attempt to save its transparently content-based analysis from strict scrutiny, the Order downplays the importance of programming content in that analysis, characterizing it as only one factor in the assessment of whether Tennis Channel, Golf Channel, and Versus are similarly situated. *See* JA__(Order¶100). But simply combining overt examination of content with other, purportedly content-neutral considerations cannot save the Order from strict scrutiny. Otherwise, the government could regulate the content of private speech with abandon so long as it claims to have considered other factors as well.[9] If anything, the Order's assertion that it does not ascribe dispositive (or indeed any specific)

[8] Any superficial resemblance the discrimination provision bears to the program-access rules is illusory; deciding whether a *network* has treated *MVPDs* unevenly does not depend on the content of either's programming.

[9] Additionally, some (if not all) of the other factors the Order (adopting the ALJ's analysis) considered are themselves closely related to programming content. The Order highlights the "overlap" in advertisers, for example, JA__(Order¶54), but as the ALJ noted, advertisers "allocate advertising dollars into different budgets that are based upon different types of program content, *e.g.*, sports, general lifestyle, and news"; moreover, the three networks at issue in this case "directly compete against each other for advertising specifically funded from budgets allocated to sports programming." JA__(Initial_Decision¶47).

weight to programming content or other factors only makes matters worse; this purportedly flexible standard would make it exceedingly difficult for MVPDs to predict when the FCC will decree that they have unlawfully discriminated by carrying one network differently than another.

B. The FCC's Order Cannot Survive Even Intermediate Scrutiny.

Because the Order is subject to strict scrutiny, it must be invalidated. Indeed, the Order does not even assert that its intrusive remedy can survive strict scrutiny. Nor does it attempt to identify, much less substantiate, any compelling interest that rewriting Comcast's contract with Tennis Channel and requiring Comcast to engage in additional, unwanted speech would advance.

In any event, the Order also cannot meet the even less demanding requirements of intermediate scrutiny. It does not come close to carrying its burden of proving that its intrusion on Comcast's editorial discretion advances any important government interest, and it burdens far more speech than necessary to further even the interests it purports to serve. *See Turner*, 512 U.S. at 662-63; *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-20 (2011).

1. The Order's Speech-Compelling Remedy Does Not Actually Advance Any Important Government Interest.

To survive intermediate scrutiny, the Order must demonstrate both that an important government interest is actually threatened by "real," concrete harms, and

that its remedy "will in fact alleviate" those harms "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *see Turner*, 512 U.S. at 664 (plurality opinion); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 711 (D.C. Cir. 2011). The Order fails to satisfy either requirement. It does not show that any substantial government interest is threatened by Comcast's decision to carry Tennis Channel at a level expressly permitted under the parties' contract. Although the Order points to two interests that the Supreme Court in *Turner* and this Court in *Time Warner* previously recognized as important—competition and diversity in the video-programming market (JA__(Order¶104))—it ignores that both cases accepted those interests as necessary for the FCC to advance through regulation based on the "bottleneck" power that Congress believed that cable operators possessed in 1992. *Turner*, 512 U.S. at 656. *Turner*'s conclusion that competition and diversity in the video-programming market were jeopardized was premised on cable's perceived "bottleneck, or gatekeeper, control" over access to the audience broadcasters sought to reach. *Id.*; *see id.* at 662-63. *Time Warner*, in turn, accepted those interests as important based on *Turner*. *See* 93 F.3d at 969.

Neither interest can justify the Order's intrusion on Comcast's protected speech today because the bottleneck-power premise has disappeared. As this Court has held, "[c]able operators . . . *no longer have* the bottleneck power over programming that concerned the Congress in 1992" when it enacted the program-

carriage provisions the Order purports to implement. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added). The FCC's own data show that consumers' choices among MVPDs have increased since the FCC began consistently studying the market; the number of consumers with access to only two or three MVPDs has declined, while the number with access to four or more MVPDs has increased seven-fold. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, 27 FCC Rcd. 8610, ¶¶ 40-41 (2012) ("*14th Video Competition Report*"). Satellite services have "pass[ed] [*i.e.*, been available to subscribers in] every home in the country" for more than a decade. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (internal quotation marks omitted). Satellite companies are now the second and third largest MVPDs—DirecTV and Dish Network together serve more than one-third of the MVPD-subscriber market—and their market share is still increasing. *See 14th Video Competition Report*, ¶¶ 4, 31. Competition from telephone companies offering video services, such as AT&T and Verizon, has also intensified. *See id.* ¶ 5.

The Order does not attempt to refute these realities and demonstrate that bottleneck power of the type and on the scale that Congress perceived two decades ago still exists. Instead, it seeks to redefine Congress's concern to encompass vertical integration of MVPDs and networks in general, whether or not MVPDs

possess gatekeeper control. JA__(Order¶¶104-105 & n.330). As explained above, *supra* pp.24-25, that understanding of Congress's aims is erroneous. And, in any event, even if Congress was concerned about vertical integration simpliciter, the Order fails to demonstrate why *that* concern is substantial or important. It cites no precedent holding that possible harms from vertical integration standing alone satisfy intermediate scrutiny; the precedents it does invoke, *Turner* and *Time Warner*, *see* JA__(Order¶104 & n.326), upheld competition and diversity as important interests based on bottleneck power. Nor does the Order attempt to establish independently that vertical integration by itself threatens substantial state interests. Thus, in trying to lighten its evidentiary burden of proving that the problem Congress perceived still exists, the Order abandons the premise that led the Supreme Court to deem that problem important in the first place.

Unable to identify any market-wide problem that could justify interfering with Comcast's protected speech, the Order contends that the FCC's "case-by-case" assessment ensures that speech is restricted only where necessary to advance important interests. JA__(Order¶105) (internal quotation marks omitted). So long as the *statutory* "unreasonable restraint" standard is met, it contends, the government's asserted interests in competition and diversity will be implicated. But that claim begs the question because the very issue before this Court is

whether the Order's diluted definition of "unreasonable restraint" led it to impose a penalty that fails to advance any established substantial interest.

The Order's reliance on this Court's decision in *Cablevision* fails for a similar reason. Contrary to the Order's suggestion (JA__(Order¶105 n.330)), *Cablevision* did not purport to overrule this Court's express recognition in *Comcast Corp.*, 579 F.3d at 8, that cable operators "no longer have" the bottleneck power that troubled Congress in 1992. In *Cablevision*, this Court rejected a *facial* First Amendment challenge to other FCC regulations because it concluded that cable operators "remain[ed] dominant in *some* video distribution markets," and thus the government's asserted interests would be implicated in some cases. 649 F.3d at 712. But even if it were true that *some* applications of the FCC's program-carriage rules were similarly justified because of conditions in particular markets, it does not follow that *every* application complies with the First Amendment. In this as-applied challenge, the FCC must show that its asserted interests are actually implicated, and that the penalty its Order imposes "will in fact advance" those interests. *Id.* at 711 (internal quotation marks omitted).

The FCC cannot make that showing. As explained above, *supra* pp.22-23, the Order fails to establish that Comcast's carriage of Tennis Channel under the terms of the parties' contract poses any unreasonable threat to fair competition or diversity in the programming market. Tennis Channel already is available to

virtually any Comcast subscriber who wishes to obtain it—to say nothing of other MVPDs' subscribers. And by its own account, Tennis Channel has managed to thrive despite its allegedly discriminatory carriage by Comcast. The mere fact that Comcast does not carry Tennis Channel as broadly as Golf Channel and Versus hardly amounts to a severe impediment to competition; even Tennis Channel's partial owners did the same. Comcast's carriage of Tennis Channel thus does not endanger competition or diversity, and forcing Comcast to alter its carriage therefore will do nothing to further either aim.

2. The Order Is Not Narrowly Tailored To The Interests It Purports To Advance.

The Order's interference with Comcast's speech also fails intermediate scrutiny because it burdens "substantially more speech than is necessary to further" its stated aims of fostering competition and diversity in the programming market. *Turner*, 512 U.S. at 665 (plurality opinion) (internal quotation marks omitted). As the dissent explains, despite purporting to promote "fair competition," JA__(Order¶104), the Order requires "Comcast to treat Tennis Channel *more favorably* than all other major MVPDs," JA__(Order_p.46 n.337) (emphasis added). Far from leveling the playing field, the Order gives Tennis Channel a privileged position on Comcast's (and *only* Comcast's) systems—at the expense of Comcast's First Amendment rights. *See id.*

The Order also needlessly bypasses a less intrusive remedy that it acknowledges might alleviate Tennis Channel's alleged injury. As the dissent explains, instead of requiring Comcast to carry Tennis Channel on its Digital Basic Tier, where Golf Channel and Versus are carried, it could have mandated carriage only on Comcast's narrower Digital Preferred Tier. JA__(Order¶87 n.290, p.48). Carriage on that tier could have achieved the Order's purported end of increasing Tennis Channel's subscriber count without compelling Comcast alone to carry the network more broadly than any major MVPD.

On top of compelling Comcast to provide broader carriage than necessary to mitigate Tennis Channel's supposed harms, the Order may require Comcast to pay for the privilege. As explained above, *supra* pp.41-42, the Order's purported requirement that Comcast "pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated" (JA__(Order¶92)) does nothing to remedy Tennis Channel's supposed competitive harm. Instead, this attempt to require increased payments would impose an arbitrary tax on Comcast's protected speech, and thus renders the FCC's remedy substantially overbroad.

III. TENNIS CHANNEL'S COMPLAINT IS TIME-BARRED.

Even if there were any arguable basis for adopting the Order's interpretation of Section 616, this case is the worst in which to do so because Tennis Channel filed its complaint years after the statute of limitations had expired. "Statutes of

limitations are not simply technicalities." *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system" because they serve the vital interest of upholding parties' "settled expectations." *Id.* That is equally true for statutes of limitations in the administrative context because, "[f]rom the potential defendant's point of view, lengthy delays upset 'settled expectations' to the same extent" whether the proceeding "started in a court or in an agency." *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). The Order here upsets settled expectations—and violates the FCC's own regulations and the APA—by adopting an irrational reading of the statute of limitations that permits a party to revive a stale Section 616 claim at *any* time.

The FCC's regulations impose a one-year limitations period for carriage complaints under Section 616. *See* 47 C.F.R. § 76.1302(f) (2010).[10] That period begins with one of three mutually exclusive events: (1) an MVPD and a network enter a carriage agreement that allegedly violates the FCC's program carriage rules; (2) an MVPD offers carriage that allegedly violates those rules; or (3) "[a] party has notified [an MVPD] that it intends to file a complaint . . . based on violations of one or more of [those] rules." *Id.*; *see also EchoStar Commc'ns*

[10] Section 76.1302 was amended in October 2011; the content of § 76.1302(f) is now found without change at § 76.1302(h). Like the Order, this brief refers to the rules in place when Tennis Channel filed its complaint in January 2010.

Corp. v. Fox/Liberty Networks LLC, 13 FCC Rcd. 21841, ¶ 18 (1998) (claim is untimely if brought more than one year after a triggering event, even if another triggering event might also apply).[11]

Under subsection (f)(1), the one-year period for Tennis Channel's complaint began in 2005, when Comcast and Tennis Channel entered their carriage contract. That contract permits Comcast to distribute Tennis Channel on its sports tier—even though Golf Channel and Versus were already more broadly distributed at the time—and thus allows the very carriage that Tennis Channel's complaint alleges is discriminatory. Tennis Channel was therefore required to bring suit by 2006, after which the parties would "operate under the terms" of their contract "free of the . . . specter" of a carriage complaint. *EchoStar Commc'ns Corp. v. Fox/Liberty Networks LLC*, 14 FCC Rcd. 10480, ¶ 14 (1999). Because Tennis Channel waited until 2010 to file suit, its complaint is barred.

The Order nevertheless rules that subsection (f)(1) is inapplicable in this case because Tennis Channel is supposedly challenging, not the parties' contract, but "Comcast's refusal in June 2009 to exercise its [contractual] discretion . . . to relocate Tennis Channel to a more widely distributed tier." JA__(Order¶29).

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[11] Although *EchoStar* involved the FCC's program access rules, the FCC has recognized that the limitations periods for program access and program carriage complaints should be read in harmony. *1998 Biennial Regulatory Review–Part 76–Cable Television Serv. Pleading & Complaint Rules*, Report & Order, 14 FCC Rcd. 418, ¶ 18 (1999).

Having dismissed subsection (f)(1) as irrelevant, the Order rules that the complaint is timely under subsection (f)(3) because "Tennis Channel filed its complaint within one year of notifying Comcast of its intent to do so." JA__(Order¶30).

This interpretation of the statute of limitations is deeply flawed. Courts refuse to allow an agency, "under the guise of interpreting a regulation, to create *de facto* a new regulation," *Christensen*, 529 U.S. at 588, and will not defer to an agency's unpersuasive interpretation of a regulation that would result in "unfair surprise" to regulated parties, *Christopher*, 132 S. Ct. at 2166-70. The Order's incongruous theory of the statute of limitations does both.

The Order rewrites the statute of limitations because it renders subsections (f)(1) and (f)(2) superfluous, permitting them to be overridden by subsection (f)(3) even when, as here, they are directly on point. *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (applying the "cardinal rule" that "effect shall be given to every clause and part of a statute" (internal quotation marks omitted)). Indeed, as a practical matter, the Order's approach not only rewrites the statute of limitations, but also *nullifies* it by allowing a party to a carriage contract to bring suit at any time. A network need only ask an MVPD to reopen long-settled negotiations, provide notice of an intent to sue, and—presto—its long-dead claim will live again.

That is precisely what Tennis Channel sought to do here, using its 2009 proposal as a ploy to revive its stale contractual claim. The parties' contract allows Comcast to carry Tennis Channel on any tier that Comcast chooses. By seeking an order that compels Comcast to carry it more broadly, Tennis Channel is attempting to rewrite the terms of the contract. Permitting Tennis Channel to reopen the limitations period for that contract-based claim at any time—simply by making a pretextual demand for broader carriage—would, as the FCC has recognized elsewhere, directly contradict the entire purpose of the statute of limitations: "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[12]

The Order also subjects Comcast to "unfair surprise" by radically departing from the historical understanding, reflected in orders and statements of the full FCC, that subsection (f)(3) applies only where an MVPD denies or refuses to acknowledge a request to negotiate for carriage. As originally issued, subsection (f)(3) was expressly limited to those circumstances. *See* 47 C.F.R. § 76.1302(r)(3) (1994). The FCC amended that language in 1994, but stated that the amendments were intended only to afford standing to MVPDs to file

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[12] *Revision of Comm'n's Program Carriage Rules; Leased Commercial Access; Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, Second Report & Order in MB Docket No. 07-42 & Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd. 11494, ¶ 38 (2011) (internal quotation marks omitted).

complaints.[13] The FCC did not suggest that these amendments were otherwise substantive, and has since reiterated that subsection (f)(3) applies when a "defendant unreasonably refuses to negotiate with [the] complainant." *1998 Biennial Regulatory Review–Part 76–Cable Television Serv. Pleading & Complaint Rules*, Order on Recon., 14 FCC Rcd. 16433, ¶ 5 (1999). Comcast had no notice that the FCC would abruptly change its view here.

The Order's only proposed solution to the inevitable unsettling of expectations produced by its new, hyper-literal reading of subsection (f)(3) is to superimpose a new, unwritten "laches" limitation onto the regulations, requiring claims to be brought within a "reasonable time period." JA__(Order¶30 n.105). But the Order provides no explanation of how this new rule will be applied. Thus, this *further* rewriting of the limitations regulation, to add a malleable exception whose scope is known only to the FCC, only compounds the uncertainty that its interpretation produces.

The Order also does not attempt to explain how Tennis Channel satisfied its new laches requirement here. Nor could it, given that Tennis Channel has known since 2005 that Comcast carried Golf Channel and Versus broadly, but did not file its complaint until 2010. Indeed, the evidence demonstrates that Tennis Channel

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[13] *Implementation of Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, Mem. Op. & Order, 9 FCC Rcd. 4415, ¶¶ 24-33 (1994).

Material Under Seal Deleted

[redacted]. JA__(Comcast_Exhs.24, 136, 137, 271, 522, 626). Internal correspondence shows that Tennis Channel [redacted] JA__(Comcast_Exhs.125, 126). Only after the NFL and Comcast settled their dispute in 2009 did Tennis Channel move forward, proposing increased distribution and, after breaking off negotiations, providing notice of its intent to sue. JA__(Tr.348-50, 2128-30; Comcast_Exh.579).

Under any reasonable application of laches, this deliberate, unexcused delay should have resulted in the dismissal of the complaint. The Order avoids that result only by characterizing the evidence of Tennis Channel's strategic conduct as irrelevant to the timeliness of its complaint. JA__(Order¶34). But it is arbitrary for the Order both to assert that its interpretation of the statute of limitations is backstopped by a "reasonable time" requirement, and to ignore the evidence that Tennis Channel, without basis, sat on its claim for years before bringing suit.

Finally, the Order asserts that enforcing subsection (f)(1) here would prevent "legitimate claims" from being filed more than one year after a carriage agreement is executed. JA__(Order¶31 n.108) (internal quotation marks omitted). The entire *purpose* of a statute of limitations, however, is to bar untimely suits so that

defendants need not litigate a claim's "legitima[cy]" years after the fact. Subsection (f)(1), as written, does just that, barring belated challenges to carriage agreements, "legitimate" or not. Allowing the FCC to blue-pencil that section at will and allow settled negotiations to be reopened because it deems a claim "legitimate" does the opposite and turns the statute of limitations into a dead letter.

CONCLUSION

For the foregoing reasons, the Court should grant Comcast's petition for review and vacate the FCC's Order.

Dated: October 4, 2012

Respectfully submitted,

/s/ Miguel A. Estrada

Lynn R. Charytan*
Vice President, Legal Regulatory Affairs, and Senior Deputy General Counsel
COMCAST CORPORATION
300 New Jersey Avenue, Suite 700
Washington, D.C. 20001
(202) 379-7134
Lynn_Charytan@comcast.com

Miguel A. Estrada
Counsel of Record
Cynthia E. Richman
Erik R. Zimmerman
Jonathan C. Bond
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Petitioner Comcast Cable Communications, LLC

* Lynn Charytan has reviewed only the public copy of this brief.

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Dated: October 4, 2012

/s/ Erik R. Zimmerman
Erik R. Zimmerman

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

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* * *

47 U.S.C. § 536

§ 536. Regulation of carriage agreements.

(a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall—

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the

selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(b) "Video programming vendor" defined

As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

47 C.F.R. § 76.1301

§ 76.1301 Prohibited practices.

(a) *Financial interest*. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) *Exclusive rights*. No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) *Discrimination*. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

47 C.F.R. § 76.1302 (2010)

§ 76.1302 Carriage agreement proceedings.

(a) *Complaints*. Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required*. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

. . . .

(f) *Time limit on filing of complaints*. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

CERTIFICATE OF SERVICE

I certify that on this 4th day of October, 2012, I caused the public version of the foregoing proof opening brief to be filed with the Clerk of the U.S. Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. I also certify that I caused five copies of the public version of the brief to be hand delivered to the Clerk's Office, and that I caused the original and five copies of the sealed version of the brief to be filed by hand-delivery to the Clerk's Office.

I further certify that I caused the public version of the foregoing brief to be served on counsel below by the appellate CM/ECF system and by UPS, and that I caused the sealed version of the brief to be served on counsel for the FCC and Tennis Channel by electronic mail and by UPS:

Jacob M. Lewis
Richard Kiser Welch
Laurel Bergold
James M. Carr
C. Grey Pash, Jr.
FEDERAL COMMUNICATIONS COMMISSION
Office of General Counsel
445 12th Street, S.W.
Washington, D.C. 20554

Catherine G. O'Sullivan
Robert J. Wiggers
UNITED STATES DEPARTMENT OF JUSTICE
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Stephen A. Weiswasser
Robert A. Long, Jr.
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

October 4, 2012

/s/ Erik R. Zimmerman
Erik R. Zimmerman