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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 REPLY BRIEF FOR PETITIONER COMCAST CABLE COMMUNICATIONS, LLC

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## GLOSSARY

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| Cable Act | Cable Television Consumer and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 |
| Commission or FCC | Federal Communications Commission |
| 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 AND SUMMARY OF ARGUMENT

The FCC's unprecedented Order dictates the content of protected speech and rewrites a private contract purportedly to combat discrimination and promote competition. But in reality, it nullifies statutory requirements in order to insulate government-chosen speakers from competition. The sole basis of the Order's discrimination finding is Comcast's decision, based on objective cost-benefit analysis, to continue carrying Tennis Channel less broadly than Golf and Versus—which the Order deems discriminatory based on an overt comparison of the three networks' content. But it is undisputed that *every major MVPD*, *including two MVPDs that have a substantial ownership position in Tennis Channel*, made the same decision. If *that* is intentional discrimination, no carriage decision by a vertically integrated MVPD is safe.

The Order's flawed analysis not only eviscerates Section 616's essential elements, but it dooms the FCC's effort to justify the Order as a speech-neutral market regulation akin to must-carry and similar regimes. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (per curiam), upheld restrictions on MVPDs' protected speech only because of a unique, severe economic concern: bottleneck power that (Congress believed) threatened the viability of speakers—indeed, an entire medium—that Congress thought worth preserving. But the FCC's

abandonment of bottleneck power as a justification for overriding MVPDs' editorial discretion here means that the Order cannot be sustained on the same basis.

Stripped of any requirement that the complainant prove a severe impediment to competition—beyond harms that every dissatisfied network claims to suffer—the Order is revealed for what it truly is: state action singling out speakers for special treatment based on the content of their speech, like the right-of-reply rules that the Supreme Court has long condemned, *e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247-58 (1974). The Order, in short, is not a market regulation that levels the playing field and burdens protected speech only *en passant*. It is just the opposite: a deliberate intrusion on private speech that makes the field *uneven* by elevating one speaker over another.

The FCC and Tennis Channel have no real answers to these problems. They vainly implore the Court to stray from Supreme Court precedent regarding both content-based speech restrictions and interpretation of statutes that evoke established legal principles. And they unpersuasively urge the Court to consider snippets of evidence out of context—from the record here to Section 616's legislative history—hoping that, with enough squinting, it will appear plausible that Congress actually authorized the FCC to intrude on MVPDs' editorial discretion based on detailed, program-by-program content comparisons as the

Order did here. Indeed, they cannot even convincingly explain why the FCC could entertain Tennis Channel's time-barred claim at all.

In the end, the FCC cannot show that the law the Order applied was the one Congress enacted—or one that the First Amendment would have allowed. The Order should be vacated and remanded with clear directions to take Congress's and the Constitution's commands seriously.

## ARGUMENT

### I. THE FCC'S ORDER VIOLATES SECTION 616.

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

**1.** The FCC's interpretation of Section 616's "unreasonabl[e] restrain[t]" requirement distorts the language Congress enacted, and its application of that standard here reads it out of the statute entirely.[1] The Cable Act, its legislative history, and Supreme Court precedent confirm that Congress's concern in enacting Section 616 was the bottleneck power cable operators then possessed and its effect on the video-programming market. Comcast Br. 20-22. This Court and others have developed various foreclosure doctrines to address concerns about bottleneck power and refusals to deal, including the essential-facilities doctrine, requiring one seeking access to a competitor's facility to prove a "severe handicap" it would

[1] All pertinent statutes and regulations are reproduced in the Addendum to Comcast's opening brief.

suffer without that access. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977); *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

Read in context, Section 616's "unreasonably restrain" language, a familiar phrase with deep antitrust-law roots, refers to the same set of problems and incorporates those established principles designed to deal with them. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Section 616 thus must be read to require proof of a severe handicap stemming from bottleneck power.

The FCC and Tennis Channel urge the Court to construe Section 616 disconnected from those doctrines, but their reasons are unavailing. They claim that when Congress intends to incorporate antitrust doctrine it does so explicitly, but Section 616's use of a phrase straight from hornbook antitrust law is no less explicit than the references to "market structure" and "market power" in 47 U.S.C. § 533(f)(2)(C), which the FCC cites. FCC Br. 43 n.9; TC Br. 23. They also claim that Section 616's legislative history points away from bottlenecks and toward concerns of vertical integration generally, quoting certain committee reports out of context. FCC Br. 3-4, 44; TC Br. 24. But those reports *confirm* that Congress was concerned about bottleneck constraints that antitrust doctrine addresses, and they

show that Congress heard testimony describing vertical integration's *benefits*. *See* S. Rep. No. 102-92, at 8 (1991); H.R. Rep. No. 102-628, at 27, 41 (1992). The FCC points out that Congress's aim in enacting Section 616 was to "'provide[] *new* FCC remedies.'" Br. 44. But the aim of authorizing an additional agency to address bottleneck power through new remedies does not affect Section 616's substantive scope.[2]

The FCC's and Tennis Channel's arguments ultimately do not matter, however, because the Order reads the unreasonable-restraint requirement out of the statute altogether. It begins by misreading the statutory text to require that "the *discrimination* must be unreasonable," as opposed to the *restraint*. JA__(Order¶43) (emphasis added); JA__(Order¶86). And it ends by rendering the requirement superfluous by finding it satisfied by garden-variety "injuries" that will exist in every case. The harm the Order purports to redress is not any barrier preventing Tennis Channel from participating in the market—as the statute's text, in context, requires—but merely its unmet desire to reach *more* subscribers than its programming merited. Every program-carriage plaintiff seeking broader distribution will have the same grievance; such claims are not the result of market failure, but requests for special protection from market forces. Comcast Br. 26-27.

[2] Equally irrelevant is Tennis Channel's claim (at 22-23) that the FCC's jurisdiction extends beyond antitrust-law violations. The question here is not the agency's regulatory jurisdiction in general but its substantive authority under *this* provision.

The FCC and Tennis Channel try but fail to explain why the purported harms here are unique. Neither can articulate any coherent principle—let alone one adopted in the Order, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)—that sets this case apart. FCC Br. 46-51; TC Br. 26-28. In short, as the FCC interprets it, not only does Section 616 require no showing of bottleneck or market power, but a complainant also need not show any out-of-the-ordinary harm at all.

Even *Chevron* deference cannot save that strained reading of Section 616. *Chevron* does not apply where an agency's interpretation rewrites a statute or "raises a serious constitutional difficulty." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012). The Order does both.[3] *Chevron* also does not apply because the Order did not purport to interpret any ambiguity in the statutory text. Although the FCC now says that Section 616 is "inherently ambiguous," Br. 22, the Order asserted that its "straightforward and textual reading" followed directly from the statute's plain language. JA__(Order¶86); *see also* JA__(Order¶40). *Chevron* applies only where agencies recognize and resolve ambiguities, not where they claim (wrongly) that the text is clear. *See Peter Pan Bus Lines, Inc. v. FMCSA*, 471 F.3d 1350, 1354 (D.C. Cir. 2006).

[3] Contrary to the FCC's suggestion, Br. 42 n.8, Comcast need only show that the FCC's reading "would raise serious constitutional questions." *Jones v. United States*, 526 U.S. 227, 251 (1999). If the avoidance canon required the Court to conclude that one interpretation was *actually* unconstitutional, it would not avoid constitutional questions at all. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005).

**2.** Under the correct standard, the evidence does not come close to establishing that Comcast unreasonably restrained Tennis Channel's ability to compete. The FCC falsely claims Comcast harms Tennis Channel by making it "available to only approximately [redacted] of Comcast's subscribers" and "foreclosing [it] from nearly 25 percent of the entire MVPD market." Br. 8, 51. Comcast, however, makes Tennis Channel available to nearly *all* of its subscribers—they need only pay a modest fee to access it, and almost [redacted] do. Indeed, Comcast is Tennis Channel's [redacted] source of subscribers.

Tennis Channel also can reach the vast majority of subscribers through other MVPDs—including satellite services that "'pass every home in the country.'" *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (citation omitted). Tennis Channel argues that, if consumers' ability to switch to other MVPDs is considered, "then no distributor would be subject to Section 616, and the law would be a nullity." Br. 28. However, that far fewer instances arise today that trigger Section 616 than when it was enacted—due to continually increasing competition—does not render it meaningless. Indeed, Tennis Channel ignores the possibility of *local* bottlenecks that might cause unreasonable restraints.

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

**1.** The FCC's Order also eviscerates Section 616's intentional-discrimination requirement. To be sure, the FCC and Tennis Channel do not

dispute that Section 616 requires a showing of *intentional*, disparate-*treatment* discrimination. They nevertheless argue that the Order properly relies on evidence of disparate *impact—i.e.*, that Comcast treated "similarly situated" networks differently—to find intentional discrimination because such evidence can show disparate treatment. FCC Br. 37-38; TC Br. 14-15. That is incorrect.

The FCC and Tennis Channel rely on several employment-discrimination cases that applied a burden-shifting framework. Under that framework, once the employee establishes a prima facie case, the burden shifts to the employer to provide a legitimate, non-discriminatory justification; if it does so, the burden shifts back to the employee to show the stated justification is pretextual. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1246 (D.C. Cir. 2011). It is at that final, *third* step that courts examine whether the employer treated "similarly situated" persons differently—to test the proffered justification that the *employer* had the burden to prove. *See Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008); *see also, e.g.*, *Vatel*, 627 F.3d at 1247.

That case law cannot save the Order's "similarly situated" analysis. The Order expressly *disclaims* any reliance on the burden-shifting framework from the employment-discrimination context. JA__(Order¶38). And it does *not* use its "similarly situated" analysis to show that Comcast's legitimate justification for

rejecting Tennis Channel's 2009 proposal—its cost-benefit analysis—was pretextual, but rather as the primary *affirmative* evidence of discrimination. JA__(Order¶50).[4]

**2.** There is no direct evidence here that Comcast engaged in intentional, affiliation-based discrimination by declining to grant Tennis Channel the same carriage as Golf and Versus, and the circumstantial evidence does not remotely support that allegation. Indeed, the evidence proves the opposite. *Every* major MVPD (including two with substantial equity stakes in Tennis Channel) carried Golf and Versus more broadly than Tennis Channel, and [redacted] In other words, *no* major MVPD did what the Order finds that Comcast was legally *compelled* to do.

The FCC's only answer to this evidence is that Comcast's decision to carry Tennis Channel less broadly than Golf and Versus *caused* every other major MVPD to do the same. Br. 35; *see also* TC Br. 21. This so-called "ripple effect" theory is simply irrational: If the benefits of carrying Tennis Channel broadly exceeded the costs, other major MVPDs would have done so. Comcast Br. 35-36. The FCC claims that Comcast executives "acknowledged" the ripple effect's

[4] At minimum, the Court should reject the FCC's content-driven "similarly situated" analysis to avoid "serious constitutional questions." *Jones*, 526 U.S. at 251. Even if Section 616 could be read to allow such analysis, it certainly does not clearly compel it.

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existence. Br. 36. But the only evidence it cites is speculation that [redacted]. *See* JA__(TC_Exh.38,p.8; Tr.1901-04); FCC Br. 35-36. That speculation fails to support the FCC's absurd explanation for the market evidence here: that *every* other major MVPD, including Tennis Channel's partial owners, ignored the costs and benefits of carrying Tennis Channel and blindly followed Comcast's lead.[5]

The FCC also contends that "Comcast carries Tennis Channel at [redacted] the average 'penetration rate' … of other MVPDs." Br. 32; *see also* TC Br. 20. But, as the dissent explained, that statistic artificially inflates Tennis Channel's average penetration rate by including Tennis Channel's distribution by its partial owners, DirecTV and Dish Network. Comcast Br. 34-35; JA__(Order_p.45). When those MVPDs are excluded, there is only a "miniscule variance" between Comcast's carriage of Tennis Channel and that of other major MVPDs. JA__(Order_p.46).

The FCC responds that including DirecTV and Dish Network in the calculation is proper because their equity interests in Tennis Channel "played no role in the level of carriage they gave" to the network. Br. 34. But, as the dissent

[5] To be sure, if one of several MVPDs serving one market began offering a popular channel more broadly, others might follow suit—but only *because* they determined that the benefits of broader carriage outweighed the costs, not in spite of their own cost-benefit calculus. That did not happen here; every major MVPD—*including* the two that can reach nearly every local market, Dish and DirecTV—carried Tennis Channel less broadly than Golf and Versus.

explains, "[t]his assertion cannot be squared with the facts." JA__(Order_p.46). Tennis Channel's own CEO testified that DirecTV and Dish Network agreed to provide Tennis Channel with broader carriage in exchange for equity in the network (an offer Comcast twice declined). JA__(Tr.408-09, 419-20); Comcast Br. 8. And market data demonstrate that "[i]t was DIRECTV's distribution of Tennis Channel that was clearly an outlier, not Comcast's": DirecTV's penetration rate "was an eye-popping [redacted] in 2010, almost [redacted] the unaffiliated industry average." JA__(Order_p.46). "No other MVPD came close" to DirecTV, whereas "Comcast … was in the middle of the pack." *Id.*

Contrary to the FCC's claim (at 34), the Order's assertion that it would have reached the same result even *excluding* Tennis Channel's partial owners from the analysis, JA__(¶75), makes its conclusion *more* arbitrary, not less. The agency's admission that it would have found deliberate discrimination despite clear evidence that Comcast's decision aligned with all other relevant major MVPDs' actions is a dead giveaway that the deck was stacked. In any event, "even accepting the Commission's statistical method," the numbers *still* undermine the Order's conclusion: "MVPDs still distributed Golf Channel ([redacted]) and Versus ([redacted]) *much* more widely than Tennis Channel ([redacted])." JA__(Order_p.46).

**3.** Entirely apart from other MVPDs' actions, the evidence demonstrates that Comcast declined Tennis Channel's 2009 broader-carriage proposal not based

on affiliation, but because Comcast determined that the proposal would cost an additional [redacted] but yield no offsetting benefits. JA__(Tr.2121-27). The FCC and Tennis Channel try but fail to refute that evidence.

The FCC argues that Comcast's cost-benefit analysis is incomplete because it considered only costs and not benefits. Br. 31; *see also* TC Br. 19. That is untrue. The Comcast executive who conducted the analysis "talked to the field" about the prospect of broader carriage, JA__(Tr.2438-39), and its regional executives agreed that "there was little or no local system desire or customer interest in distributing Tennis Channel more broadly." JA__(Comcast_Exh.78¶16). The FCC dismisses this field survey because it claims Comcast declined Tennis Channel's offer before it received that feedback from the field. Br. 32; *see also* TC Br. 19. But the FCC ignores the facts: *Before* Comcast responded to Tennis Channel, the field reported that the costs of a wholesale increase in distribution "could not be justified by offsetting benefits to Comcast." JA__(Comcast_Exh.78¶16). Comcast then inquired whether there were *particular* local markets with interest in the network, in connection with its offer to help Tennis Channel expand its distribution in such markets—an offer Tennis Channel

abruptly rejected. JA__(Tr.2128-29, 2366-67). It would be perverse to penalize Comcast for taking *additional* steps to accommodate Tennis Channel.[6]

Moreover, the FCC and Tennis Channel still do not show that there *were* any overlooked benefits. Comcast cannot be faulted for supposedly failing to consider the benefits that no one has substantiated, or failing to weigh them against actual, enormous costs. The FCC suggests that the absence of evidence cuts against Comcast, but that is incorrect. That argument effectively shifts the burden of proof to Comcast, a view the Order here specifically rejected for purposes of this case, JA__(Order¶38); and Comcast *did* present evidence that no benefits existed, JA__(Comcast_Exh.78¶16), which went unrebutted.

The FCC's claim that Comcast did not evaluate the costs and benefits of distributing Golf and Versus more *narrowly* in 2010 is a makeweight. Br. 31-32; *see also* TC Br. 19. Comcast's contracts with Golf and Versus *prohibited* it from carrying them more narrowly. *See* JA__(Comcast_Exh.75¶31). And, despite its eagerness to assume benefits would flow from broader carriage of Tennis Channel, the FCC ignores the actual, substantial benefits of carrying Golf and Versus broadly—including their proven ability to attract and retain subscribers—and the

[6] The FCC and Tennis Channel argue, based on a single alleged incident in 2006, that "'Comcast had earlier overridden regional executives' decisions to carry Tennis Channel more broadly.'" FCC Br. 32 (quoting JA__(Order¶80)); *see also* TC Br. 19; JA_(Initial_Decision¶56 n.197). In 2009, however, Comcast's regional executives reported no subscriber interest in Tennis Channel, and Comcast therefore did not "override[]" anyone in making the carriage decision at issue here.

reality that reducing distribution of networks already carried broadly would upset subscribers' settled expectations and is generally not done even when MVPDs negotiate renewal of existing contracts, *see* JA__(Comcast_Exh.75¶31; Comcast_Exh.78¶26; Comcast_Exh.80¶42 n.59; TC_Exh.139, pp.219-20; Tr.2238-41).

**4.** Unable to demonstrate discrimination directly, the FCC and Tennis Channel fall back on Comcast's supposed "'general practice of favoring affiliates over non-affiliates.'" FCC Br. 26 (quoting JA__(Order¶45); TC Br. 17-18. As the Order admitted, that supposed practice standing alone is insufficient. JA__(Order¶¶49-50). In any event, it is not supported by the record.

- The FCC and Tennis Channel lean on two out-of-context sound bites from two Comcast executives, Stephen Burke and Madison Bond, that Comcast has a "sibling" relationship with its affiliated networks and that those networks receive "a different level of scrutiny." FCC Br. 26-27 (internal quotation marks omitted); TC Br. 17. But there is nothing untoward about those statements. Comcast and its affiliated networks *are* corporate "siblings," as they are "part of the same company." JA__(Tr.2249). Consequently, the executives explained, Comcast and its affiliates are "known to each other," sometimes are even located "in the same office building" (JA__(TC_Exh.19-2¶4)), and the affiliates' employees "would

have a chance to spend more time with the people who are on the cable side than a network that was not affiliated with our company," JA__(TC_Exh.7,p.3). Moreover, Burke and Bond testified that Comcast "makes carriage decisions based on the merits of each network and its potential value to [Comcast's] systems and subscribers," JA__(TC_Exh.19-2¶5), that it "treat[s its] affiliated networks as if they were at arms length" for purposes of carriage decisions, JA__(Tr.2248-49), and that Comcast denied Tennis Channel's 2009 proposal based on its analysis of costs and benefits, not affiliation, JA__(Tr.2121-25; Comcast_Exh.75¶¶16-18). It is *that* testimony—which the Order does not even address—that is dispositive in this case.

- The FCC and Tennis Channel assert that Comcast carried additional affiliated networks, such as NHL Network, MLB Network, and NBA TV, more broadly than Tennis Channel. FCC Br. 27-28; TC Br. 19-20. But they disregard the evidence that these carriage decisions were based on legitimate business judgments. Comcast Br. 37-38.
- The FCC contends that, in 2010, Comcast "planned" to launch the U.S. Olympic Network on its Digital Preferred Tier even though it had not secured rights to broadcast the Olympics. Br. 29. But Comcast did *not* launch the U.S. Olympic Network, which "never got off the ground."

JA__(Tr.2184). Comcast assuredly did not unlawfully discriminate by *contemplating* but ultimately forgoing broad distribution of a new network.

- The FCC cites a 2006 email from a Comcast executive stating that Versus was once a "crappy channel that was dead in the water." Br. 28 (internal quotation marks omitted). But in context, the executive's point was that Versus had become a first-rate sports network by obtaining rights to broadcast National Hockey League games. JA__(TC_Exh.26). Comcast, like most other large MVPDs, had long distributed Versus broadly because of market conditions when Versus launched and substantial launch-support payments Versus made. Comcast Br. 7.
- The FCC's *amicus*, Bloomberg, observes that the staff's Technical Appendix to the FCC's order approving Comcast's merger with NBC Universal states that Comcast's carriage decisions "'stem[] from anticompetitive motives.'" Bloomberg Br. 18. But the *Commission's order* finds only that Comcast "may have" acted based on such motives, and states explicitly that the FCC did "not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past." *Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, Mem. Op. & Order, 26 FCC Rcd. 4238, ¶ 117 & n.276 (2011).

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

The FCC and Tennis Channel also can muster no persuasive justification for attempting to require Comcast to pay Tennis Channel an increased aggregate fee for broader distribution. Their assertions that requiring Comcast to pay for additional, unwanted carriage is necessary to avoid a windfall to *Comcast*, and that it is only fair to hold *Comcast* to its contractual commitments, FCC Br. 61-62; TC Br. 39-40, are ironic in the extreme. The remedy the Order adopts deprives Comcast of the very contractual right for which it bargained: discretion to carry Tennis Channel on its sports tier. And it yields Tennis Channel the benefit of a vastly better deal than it struck with Comcast—giving it even broader carriage than any other major MVPD, including its partial owners, agreed to provide—a result wholly divorced from the language and purpose of Section 616.

Attempting to sidestep this issue, the FCC claims (at 61) that it is "unripe" because it remains unclear what level of carriage Comcast would provide Tennis Channel, Golf, and Versus if forced to comply with the Order. That argument ignores not only Comcast's contractual obligations to carry Golf and Versus broadly, but also that Comcast cannot realistically make carriage decisions *before* it learns the financial consequences.

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

The Order's overbroad reading of Section 616 not only distorts the statute and the evidence, but also *creates* a constitutional problem that the agency should have avoided. Neither the FCC nor Tennis Channel show that the Order's naked intrusion into the substance of Comcast's speech is content-neutral, or is narrowly tailored to achieve any important government interest.

### A. The Order Is Subject To Strict Scrutiny.

**1.** After repeatedly defending its "similarly situated" analysis exclusively on its merits, the FCC now contends, for the first time, that Comcast has waived its challenge to the content-based character of that analysis. FCC Br. 52-53. Judicial review of agency action, however, is "confin[ed]" to determining the "validity of the grounds upon which the [agency] itself based its action." *Chenery*, 318 U.S. at 88. This Court thus cannot "avoid the constitutional question" that Comcast has raised "by affirming the [FCC's] action on grounds never addressed by the Commission." *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 804 n.7 (D.C. Cir. 1988).

Yet that is precisely what the FCC urges the Court to do. Comcast expressly argued before the FCC that the "similarly situated" analysis the ALJ employed (and the FCC adopted) was content-based and therefore subject to strict scrutiny. JA__(Order¶93). The Order addressed that argument at length on its merits—

without suggesting that Comcast had somehow waived it. JA__(Order¶¶98-102). Even in this Court, in unsuccessfully opposing Comcast's stay motion, the FCC addressed that argument head-on, without any hint that it was procedurally barred. *See* FCC Stay Opp. 14-17. The FCC cannot switch strategies now and defend its speech-compelling remedy on grounds that it never discussed below and on which there is no agency ruling to review.

Indeed, the FCC "now has no legitimate reason to complain about a judicial decision on the merits" of Comcast's argument. *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997). The primary purpose of requiring parties to present their arguments to the agency is to enable the agency to consider the issue and "correct [its] errors before an appeal." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 655 (D.C. Cir. 2011) (internal quotation marks omitted). That purpose was fully served here—the FCC not only had ample opportunity to consider Comcast's arguments, but explicitly did so. JA__(Order¶¶93-102); *cf. Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (excusing noncompliance with exhaustion requirement for same reason).

Contrary to the FCC's claim, *New Radio Corp. v. FCC*, 804 F.2d 756 (D.C. Cir. 1986), lends no support to its late-raised waiver argument. In *New Radio* the FCC's order *did* conclude that the party seeking review had failed to preserve its argument. *See id.* at 760 n.15. Moreover, because the FCC elected nonetheless to

address the merits of that argument (albeit in a footnote), this Court reached the merits as well. *Id.*

In any event, the FCC's newfound waiver theory is baseless. Comcast's answer to Tennis Channel's complaint specifically asserted that an order requiring Comcast to carry specific content would be subject to strict scrutiny. JA__(Answer ¶49). Comcast hardly waived that argument by *also* refuting the "similarly situated" allegations in Tennis Channel's complaint. The FCC cites no authority for the proposition that a party waives a constitutional challenge to an agency's mode of analysis by arguing that the analysis fails even on its own terms.

In short, it is the FCC, not Comcast, that is engaged in improper "'gamesmanship.'" FCC Br. 53. The Court should not permit this bait-and-switch strategy, but should (like the Order) decide the merits.

**2.** On the merits, the FCC asserts (at 54) that requiring Comcast to carry particular content (Tennis Channel's programming) based on content Comcast already carries (Golf's and Versus's programming) is content-neutral because it does not single out speech based on the government's agreement or disagreement with the message it conveys. But, like the Order, this response conflates content-based and viewpoint-based discrimination. The Supreme Court has explicitly held that the universe of content-based restrictions encompasses *more* than viewpoint-based restrictions. *See Ark. Writers Project, Inc. v. Ragland*, 481 U.S. 221, 230

(1987). That is borne out both by the Court's cases holding that laws were content-based that regulated subject matter irrespective of viewpoint, and by its jurisprudence distinguishing content and viewpoint discrimination in other settings. Comcast Br. 45-47. The FCC's claim (at 56) that Comcast fails to identify any viewpoint discrimination in the Order simply repeats this error.

The FCC and Tennis Channel also echo the Order's claim that its remedy is content-neutral because its *purpose* is unrelated to content. FCC Br. 52, 54; TC Br. 29-30. But their leading authorities—*Turner*, 512 U.S. 622, and *Time Warner*, 93 F.3d 957—undercut that argument. Neither the FCC nor Tennis Channel can explain why both cases considered—*before* examining Congress's purpose—whether the statutory provisions drew distinctions based on subject matter. Comcast Br. 47-48. Properly read, both cases establish that a content-based purpose can provide an *additional*, *independent* reason for applying strict scrutiny, not a reason why naked content discrimination can *escape* such review.

The analogies that the FCC and Tennis Channel draw to the specific provisions considered in those cases fare no better. Although the must-carry rules in *Turner* obligated cable operators to carry certain channels (FCC Br. 56-57), the similarity ends there. Under must-carry, the channels' *content* made no difference; only the *medium* used to transmit them mattered. *See* 512 U.S. at 643, 645. The

Court explicitly reserved judgment regarding the few provisions that arguably *did* draw distinctions based on subject matter. *Id.* at 643 n.6.[7]

Nor does the Order resemble the program-*access* discrimination provision in *Time Warner*, 47 U.S.C. § 548(c)(2). *See* TC Br. 29. As this Court explained, that provision—unlike the Order here, which *explicitly* relies on content, JA__(Order¶52)—was "content-neutral on [its] face," 93 F.3d at 977. Indeed, because it targeted discrimination by *networks* allegedly offering programming on unequal terms, not discrimination by *MVPDs* in selecting which programming to distribute, *see* 47 U.S.C. § 548(c)(2), there was no need to compare content at all.

The FCC gains no more from its reliance on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). FCC Br. 52, 56. Like *Turner* and *Time Warner*, the law in *Ward*—guidelines requiring performers in a city bandshell to use city-provided amplifying equipment—was facially content-neutral. The guidelines applied across the board, irrespective of genre, style, or subject matter. 491 U.S. at 787 n.2. The Supreme Court's analysis undoubtedly would have differed if the guidelines applied only to Schubert but not Springsteen—let alone required a Beatles cover band to include one Herman's Hermits song in each set.

[7] Tennis Channel's claim (at 38) that the Order's remedy is less intrusive than the must-carry provisions similarly fails; unlike the Order, which requires Comcast to carry Tennis Channel broadly *because* it carries Golf and Versus broadly, the must-carry obligations did not depend on, and thus did not interfere with, cable operators' decisions regarding what *other* programming to carry.

The FCC and Tennis Channel likewise err in relying on *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998). *See* FCC Br. 55; TC Br. 31. *BellSouth* could not and did not abrogate the basic principle established by *Arkansas Writers' Project*, and applied in *Turner* and *Time Warner*, that a law is content-based if its application depends on the subject of speech.[8] Instead, like the authorities it invoked, *BellSouth* qualified its statements that a law justified by content-neutral ends ordinarily faces intermediate scrutiny. *See* 144 F.3d at 69 ("statutes lacking such a purpose are *likely* to be deemed content-neutral," laws "that confer benefits or impose burdens on speech without reference to the ideas or views expressed are *in most instances* content-neutral," and "*to a large extent* neutrality is now gauged by reference to a statute's justifications" (emphases added; internal quotation marks omitted)). It emphasized, moreover, that the tax exemption in *Arkansas Writers' Project* was "especially suspect" *because* it "facially excluded certain publications on the basis of their content." *Id.* at 69 n.12.

The statutory provision *BellSouth* addressed, 47 U.S.C. § 274(h), also bears no resemblance to the Order's "similarly situated" analysis here. That provision defined the regulated activity ("electronic publishing") to include a wide array of expansive and nearly all-encompassing categories of information, and carved out

[8] Such a broad holding also would not have survived the Supreme Court's later decisions deeming laws content-based because their application turned on speech's content. *E.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1584, 1587-92 (2010).

particular electronic services (such as 9-1-1, electronic billing, or caller identification) from the provision's broad reach. *See id.* That is far removed from the Order's detailed comparison of Comcast's and Tennis Channel's programming. *Compare id. with* JA__(Order¶52), __(Initial_Decision¶¶24-36).

Even further afield is Tennis Channel's claim (at 30-31) that the Order is content-neutral because courts in discrimination cases often consider defendants' speech as evidence of discriminatory motive. Unlike the Title VII cases Tennis Channel cites, the Order does not rely on the content of Comcast's programming because the programming *itself* betrays discriminatory animus. Instead, the Order burdens Comcast's speech because it concludes that that speech is sufficiently similar to Tennis Channel's. None of Tennis Channel's authorities hold that such direct intrusion into private expression is content-neutral.

**B. The Order Fails Even Intermediate Scrutiny.**

The FCC's and Tennis Channel's bid for intermediate scrutiny is ultimately futile because they cannot show that the Order actually advances any important interest, much less that it is narrowly tailored to that end.

**1.** The FCC contends that the Order's intrusion on Comcast's speech furthers the same competition and diversity interests addressed in *Turner* and *Time Warner*. Br. 57-60. Those cases, however, upheld other restrictions on cable operators' speech as market regulations only because of cable operators' perceived

"bottleneck, or gatekeeper, control." *Turner*, 512 U.S. at 656; *Time Warner*, 93 F.3d at 977. The FCC disclaims that premise as the basis for Section 616, Br. 58-59, but without it the Order's intrusion on Comcast's editorial discretion cannot be sustained as a speech-neutral market regulation. Comcast Br. 51-52.[9]

The FCC's only answer is to redefine Congress's core concern to encompass harms flowing from vertical integration in general. *See, e.g.*, Br. 1-4. Even if that account of Congress's interest were correct (and it is not, *supra* pp. 3-5; Comcast Br. 24-25), however, it cannot save the Order because the FCC fails to show that *that* interest is important enough to satisfy intermediate scrutiny. The FCC does not begin to explain what threat vertical integration could pose in the *absence* of bottleneck power that could justify interference with MVPDs' editorial discretion; indeed, vertical integration often *promotes* competition and efficiency. Comcast Br. 24-25. And it cites no case accepting its illogical theory.

Tennis Channel claims (at 34) that *Time Warner* itself deemed addressing the effects of vertical integration in the video-programming market an important state interest, but it misreads this Court's opinion. The interest *Time Warner* upheld was limiting the impact of vertical integration "*in the cable market*"—in which cable operators (Congress believed) wielded bottleneck power. 93 F.3d at

[9] Moreover, as explained above, *supra* pp. 5-7, the Order does not further competition or diversity because Comcast imposes no meaningful restraint on Tennis Channel's ability to compete.

978 (emphasis added). *Time Warner* thus held only that there is an important state interest in addressing the effects of vertical integration and bottleneck power *in combination*, not vertical integration standing alone.

Tellingly, even Tennis Channel abandons the pretense that the Order advances the same competition and diversity interests as the rules in *Turner* and *Time Warner*. Unlike the antitrust laws that protect "competition not competitors," it argues, Section 616's aim (and thus the Order's) *is* to shield "individual competitors." Br. 25 (internal quotation marks and emphases omitted). That admission dispels any illusion that the Order is a market regulation only incidentally concerned with speech or speakers' identities. On Tennis Channel's own theory, the Order elevates one speaker over another, *not* to address any market-wide problem unrelated to speech, but to shield speakers it favors from the realities of the marketplace. That is precisely the evil the First Amendment forbids.

**2.** The FCC and Tennis Channel also fail to demonstrate that the Order is narrowly tailored even to the interests it purportedly serves. At minimum, as explained above, *supra* p. 17, neither the FCC nor Tennis Channel can explain why forcing Comcast to "pay Tennis Channel for th[e] privilege" of carrying it more broadly (JA__(Order_p.48)) is necessary to achieve the Order's purported interests.

Both contend that the Order is narrowly drawn because Comcast can choose how broadly to carry Golf, Versus, and Tennis Channel. FCC Br. 60-61; TC Br. 38. That purported flexibility is an illusion, given Comcast's contractual obligations, Comcast Br. 41—to say nothing of market realities, JA__(Order_p.48 n.343).[10] More fundamentally, it is irrelevant. The FCC's and Tennis Channel's argument reflects the same flawed reasoning that the ALJ adopted (and the Order rejected) in concluding that Comcast's speech rights are not burdened at all given its supposed discretion in implementing the compelled-carriage remedy. JA__(Order¶97). The Supreme Court has made clear that the state cannot sidestep constitutional limitations by putting regulated parties to a choice between unconstitutional options. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-20 (2011); *New York v. United States*, 505 U.S. 144, 176 (1992). The government assuredly cannot evade the requirements of narrow tailoring by offering parties a choice between two overbroad alternatives.

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

Section 76.1302(f) of the Commission's regulations requires a party challenging a carriage contract under Section 616 to bring suit "within one year" of

[10] That fact also dooms the FCC's claim (at 61) that carriage on Comcast's Digital Preferred Tier would be *more* intrusive than the Order's equal-carriage remedy. That Comcast did not specifically request this less-intrusive remedy does not excuse the FCC's refusal to consider it, as the dissent specifically addressed it. JA__(Order_p.48); *see Natural Res. Def. Council*, 824 F.2d at 1151.

entering into the contract. Here, the parties entered into a contract in 2005 that gave Comcast the right to carry Tennis Channel on a sports tier. *Five years later*, Tennis Channel filed its complaint. Because the complaint effectively seeks to rewrite the contract to eliminate Comcast's bargained-for right, it is manifestly untimely.

Tennis Channel insists that it is challenging, not the contract, but Comcast's exercise of discretion under the agreement. TC Br. 40. This is sophistry. A challenge to the "exercise" of Comcast's contractual right is, in reality, a challenge to the contractual right itself. If Tennis Channel succeeds, the provision giving Comcast discretion to carry Tennis Channel on its sports tier will be rewritten to mandate broad carriage.

Moreover, Comcast has carried Tennis Channel more narrowly than Golf and Versus *since 2005*, and Tennis Channel's belief that it merits broader carriage is nothing new. Indeed, [redacted] And by 2008, its CEO admitted, "it was pretty clear" to Tennis Channel "that the cake was fully baked," JA__(Tr.270)—yet it waited *two more years* to file its complaint.

To save Tennis Channel's hopelessly stale claim, the FCC strains to read Section 76.1302(f)(3) to deem a complaint timely if it is filed less than one year after the complainant gives notice that it intends to sue. FCC Br. 62-63. That

irrational interpretation would allow a complainant to sit on its hands for years (as Tennis Channel did) and then revive its time-barred claim at will. And it would impermissibly render subsection (f)(1) superfluous, as plaintiffs could always rely on subsection (f)(3). *See Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008).

The FCC acknowledges this problem, but its solution—creating out of whole cloth a new, unwritten laches limitation, Br. 66—takes it even *further* from the rule's text. An agency cannot "under the guise of interpreting a regulation … create *de facto* a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-69 (2012). And the FCC assuredly cannot claim deference for an interpretation that overtly abandons the regulation's language to prevent absurd consequences that a proper textual reading would have avoided. In any event, the FCC never explains how Tennis Channel's years-long delay in filing its complaint could possibly comport with *any* reasonable theory of laches. Instead, it leaves regulated entities to guess how its novel laches limitation will be enforced going forward.

The FCC suggests that the only alternative to its freestyle interpretive approach is to rely "on limiting language that was *deleted* from the rule 18 years ago." FCC Br. 63. But one need not consult regulatory history to see that, where a suit is time-barred by subsection (f)(1), it cannot be revived under subsection (f)(3) by a belated threat to sue. And it is surprising (to say the least) to hear the FCC

deride reliance on "historical understanding" (*id.*)—the importance of which the Supreme Court recently reiterated, *see Christopher*, 132 S. Ct. at 2168.

Moreover, the FCC fails to reckon with the fact that it interpreted subsection (f)(3), *after* it was amended, as applying only where a "defendant unreasonably refuses to negotiate with [a] complainant." *1998 Biennial Regulatory Review–Part 76–Cable Television Serv. Pleading & Complaint Rules*, Order on Recon., 14 FCC Rcd. 16433, ¶ 5 (1999). The FCC claims that its current interpretation aligns with a prior Media Bureau ruling, Br. 64-65, but that subordinate body's departure from settled agency precedent, in another proceeding, hardly justifies the agency's surprise abandonment of its established view here.

The FCC finally attempts its own absurd-results argument, claiming that under Comcast's textual, well-established approach, Tennis Channel would be "barred from complaining" about discrimination one year after entering into a contract. FCC Br. 66; *see also* TC Br. 40. But that is the whole purpose of limitations periods—to create a "bar" to litigation. And, as the FCC's Cable Services Bureau explained—in a decision endorsed by the full Commission—that is exactly what *should* happen: "[F]ollowing a reasonable period of time in which to raise allegations of discrimination or unfair practices, the parties to a programming agreement must operate under the terms thereof or negotiate amendments thereto free of the program access specter." *EchoStar Commc'ns*

*Corp. v. Fox/Liberty Networks LLC*, 14 FCC Rcd. 10480, ¶ 14 (1999); *1998 Biennial Regulatory Review–Part 76–Cable Television Serv. Pleading & Complaint Rules*, Report & Order, 14 FCC Rcd. 418, ¶ 18 (1999). The Commission fundamentally erred when it abandoned, without adequate explanation, that established and well-reasoned view.

## CONCLUSION

The Court should grant Comcast's petition for review and vacate the FCC's Order.

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Respectfully submitted,

/s/ Miguel A. Estrada

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Dated: November 20, 2012

/s/ Erik R. Zimmerman
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## CERTIFICATE OF SERVICE

I certify that on this 20th day of November, 2012, I caused the public version of the foregoing proof reply 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:

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