No. 09-901

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
600 New Hampshire Avenue, NW
Washington, D.C. 20037
(202) 556-2000

HENK BRANDS
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

Counsel for Petitioner

(Additional Counsel Listed on Inside Cover)

HOWARD J. SYMONS
TARA M. CORVO
MINTZ, LEVIN, COHN,
FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 434-7300

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INTRODUCTION

In opposing review, the government seeks to continue a statutory intrusion on First Amendment rights long after the facts justifying it have evaporated. The government does not seriously dispute that dramatic industry changes have wiped out the linchpin of this Court's *Turner* decisions. The "bottleneck" that this Court previously concluded cable companies occupied has now disappeared in most locations (and everywhere Cablevision serves). Consumers can now choose among cable and two different satellite providers and often a local telephone company as well. "[T]he entry of direct broadcast satellite (DBS) providers (and more recently the local telephone companies)," the government agrees, has subjected cable companies "to greater competition." Br. 18. Indeed, as long as four years ago, "approximately 29.2% of all United States video subscribers" received their video service from cable's satellite competitors. *Id.* That fundamental change guts *Turner's* rationale for upholding the compelled speech contemplated by the must-carry regime.

The government nonetheless seeks to avoid review by raising a series of procedural objections. But those objections are meritless. Moreover, the FCC's specific application of must-carry in this case — to require Cablevision to displace quality channels of its choosing in favor of a home-shopping station with no over-the-air viewers — is incapable of coherent defense. And that application illustrates precisely why this Court must again consider the constitutionality of must-carry, this time in the favored as-applied context.

I. RESPONDENTS' PROCEDURAL OBJECTIONS LACK MERIT.

The government begins by claiming (at 15-16) that Cablevision's principal constitutional challenge is not properly before this Court — supposedly because it constitutes a "facial challenge." According to the government, Cablevision advanced only an "as applied" challenge below and is therefore not allowed to make "facial" arguments here. That argument is utterly confused.

Respondent WRNN initiated this case by asking the FCC to compel Cablevision to carry WRNN's signal. Cablevision defended itself by arguing that granting WRNN's request would infringe Cablevision's First Amendment rights. In support, Cablevision advanced some arguments that are relatively specific to the circumstances of Cablevision and WRNN (*e.g.*, that compelled carriage of WRNN is unlawful when WRNN has no over-the-air viewers), and other arguments based on facts that affect many other stations and systems as well (*e.g.*, that compelled carriage of WRNN is unlawful when the systems at issue are subject to competition from two satellite providers). But the sole relief Cablevision sought was that it not be required to carry WRNN.

The government now urges (at 15-16) that Cablevision's broader arguments must be deemed "facial challenges" because they imply that it is impermissible to impose must-carry obligations on *any* U.S. cable system. But a facial challenge asks a court to enjoin a measure's enforcement across-the-board not only as applied to the plaintiff but also as applied to absent third parties. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality); *id.*

at 80 n.3 (Scalia, J., dissenting); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *id.* at 328 (White, J., dissenting). By contrast, Cablevision seeks only to stave off application of must-carry obligations *to it* in this particular case; Cablevision does not seek relief with respect to the statute's application to other cable systems.[1]

The government cites no authority for the strange notion that, where a defendant resists a statute's *actual application* to it, that "as applied" challenge somehow transmogrifies into a "facial" challenge when the precedential consequences of success become sufficiently far-reaching. The government likewise cites no precedent for the notion that an as-applied challenger's argument with broad precedential implications is somehow forfeited if it is not accompanied by magic "facial challenge" words. And any such notion is absurd. As the Chief Justice recently explained, an as-applied litigant naturally is entitled to make arguments that, if accepted, "would mean that any other [person] raising the same challenge would also win." *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring).

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[1] Besides, because Cablevision's arguments would not necessarily invalidate the statute as applied to *all* cable systems, this is not a facial challenge even under the government's (mistaken) theory. For example, the FCC has posited that there are pockets where satellite cannot compete. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 70 n.236 (2008) ("In northern latitudes, as well as highly urbanized or forested locations, it may not be possible to receive a DBS signal . . . ."), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

The government also urges (at 15) that Cablevision's broader arguments are barred by 47 U.S.C. § 555(c)(1), which provides that, "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of [the must-carry statute] shall be heard by a district court of three judges convened pursuant to" 28 U.S.C. § 2284.

That argument, which was not raised below, is entirely baseless. It is well settled that three-judge-court statutes do not create district-court jurisdiction — they signify only that, if district-court jurisdiction otherwise exists, the case is to be "heard" by not one but three judges. *See, e.g.*, *Ex parte Poresky*, 290 U.S. 30, 31 (1933) *(per curiam)*; *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737 (9th Cir. 1954). Cablevision here makes its constitutional arguments in the course of an appeal from an order of the FCC. District courts lack jurisdiction over such an appeal: "exclusive jurisdiction" lies in the courts of appeals. 28 U.S.C. § 2342(1); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Section 555(c)(1) has accordingly been interpreted to allow litigants like Cablevision to attack must-carry's constitutionality in a court of appeals.[2] In any event, even under the government's (mistaken) analysis, Section 555(c)(1) bars only "facial" challenges in a court of appeals. *Compare* Br. at 15 *with id.* at 8-9. As explained above, this is an as-applied challenge.[3]

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[2] *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

[3] If the Court nonetheless concludes that Section 555(c) divested the court of appeals of jurisdiction, it should grant, vacate, and remand so the court of appeals can consider whether it should transfer the case to district court pursuant to 28

Finally, the government relies on the state of the record below. It claims, for example, that Cablevision did not warn the FCC that its order would be subjected to "strict scrutiny," Br. 13; *see also id.* at 11 (same about argument that WRNN does not need must-carry). But the government confuses claims with arguments. As we explained below, this Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." C.A. Br. 16 n.21 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (reproduced at Reply App. 34a). Presumably for that reason, the Second Circuit saw no waiver, thereby putting the matter to rest. *See* Pet. App. 22a-23a; *see also Lebron*, 513 U.S. at 379 (issue properly before this Court if it was "passed upon" by court below).

The government also claims (at 16-18) that the administrative record is too thin to permit review. This Court recently heard an as-applied challenge over precisely the same objection. *Compare Citizens United*, 130 S. Ct. at 894 *with id.* at 933 (Stevens, J., dissenting in part). The grounds for rejecting the objection are even stronger here. Cablevision's filing before the FCC made a comprehensive constitutional showing. *See* Reply App. 1a-20a. To be sure, the FCC and WRNN then largely ignored the constitutional arguments. But the FCC cannot ignore its burden of justifying an intrusion on speech rights,[4]

U.S.C. § 1631. *See, e.g., Pacyna v. Marsh*, 474 U.S. 1078 (1986).

[4] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"); *Century Communications Corp. v. FCC*,

and then, having done so, avoid review by complaining that the record is insufficient. Besides, quite apart from Cablevision's showing, the relevant facts are uncontested matters of public record. For example, the FCC conceded in 2006 — and again concedes here (Br. 18) — that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers," and can in many areas also choose among "emerging (*e.g.*, use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies." Reply App. 5a.

II. RESPONDENTS' SUBSTANTIVE DEFENSES LACK MERIT.

Respondents' merits arguments are largely unresponsive. As the petition demonstrated (at 18-19), *Turner*'s cornerstone was that, at the time, cable systems — as the only act in town — constituted a sufficient "bottleneck" to justify an intrusion on their editorial discretion. The core request here is that this Court decide whether must-carry obligations remain consistent with the Constitution now that consumers have a choice among video providers. The government does not dispute the factual predicate: it agrees (at 18) that "the cable industry is now subject to greater competition than at the time of this Court's decisions in *Turner I* and *Turner II*." That underscores the need for immediate review.

1. Nonetheless, the government urges (at 18-19), that "cable still controls two thirds of the market

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835 F.2d 292, 300 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985).

nationally" and that the "market penetration of [competitors]" may be "even lower" in certain regions. That misses the point. A high market share may have consequences for regulatory analysis.[5] But the First Amendment issue here turns on the existence of a bottleneck that supposedly would have allowed cable operators with anticompetitive motives costlessly to refuse to carry desirable over-the-air programming. Now that consumers can switch to competing sources, that "bottleneck" is gone. Perhaps the government would prefer to postpone review until cable's market share dips even further. But that lack of urgency is misplaced where "our most cherished liberties" are at stake. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973).

The government also suggests (at 19) that the emergence of competition is irrelevant because must-carry remains necessary to ensure that over-the-air viewers continue to have over-the-air choices. But that argument goes well beyond *Turner*'s rationale, which crucially depended on the absence of competition. Pet. 6-7, 8-9, 17-18. The government's alternate rationale is not only untested but also plainly wrong. Simply put, "when a

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[5] *But see Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009). The government relies on *Cablevision Systems Corp. v. FCC*, No. 07-1425, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010), but that divided decision underscores the need for review here. The majority there noted that "the MVPD market has transformed substantially since the Cable Act was enacted in 1992." *Id.* at *7. A dissenting judge would have held that, in light of the "radically changed and highly competitive marketplace," the challenged cable regulation violated the First Amendment. *See id.* at *17 (Kavanaugh, J., dissenting).

market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate." *Cablevision Sys. Corp.*, 2010 WL 841203, at *20 (Kavanaugh, J., dissenting). At a minimum, whether the government's alternate rationale can withstand scrutiny is a question worthy of this Court's attention.

Finally, WRNN (but not the government) argues that our core argument is unworthy of review absent a direct circuit conflict. WRNN Br. 16. But the petition explains (at 23) why such a conflict is unlikely to develop. And our core argument raises precisely the kind of important constitutional issue that this Court addresses even absent a conflict.

2. Respondents' attempted defense of the particular application of must-carry here cannot be reconciled with the First Amendment. As the petition explained (at 25), the purpose of must-carry was to ensure that over-the-air broadcast stations would remain available for over-the-air viewers. That rationale cannot justify a must-carry preference for a station that, like WRNN, has *no over-the-air viewers at all.*

WRNN previously conceded that it has no over-the-air viewers, Pet. 25-26, and makes no effort to retract that concession here. The government, by contrast, obfuscates by insisting that WRNN "has an audience in [Long Island] communities." Br. 10. But WRNN is carried by *satellite* operators, WRNN Br. 7-8, and the source on which the government relies (Pet. App. 45a) states that WRNN has *viewers*, not that it has *over-the-air* viewers. On that topic, WRNN's own concession is dispositive. That WRNN

is carried by Cablevision's competitors, moreover, underscores the absence of any justification for forcing Cablevision to displace its chosen programming. Consumers who want WRNN can switch providers. Such competitive pressures may cause cable operators to carry WRNN. Where competition gives viewers choices, the First Amendment does not allow the government to override editorial discretion.

Applying must-carry here is particularly absurd given that WRNN is seeking to extend its coverage far beyond its traditional over-the-air service area. Pet. 25-26. Must-carry thus has been transformed from a device to protect broadcasters' ability to reach existing viewers into a tool for cracking open entirely new markets. The government responds (at 8, 10) that WRNN is simply seeking the default carriage to which the must-carry statute entitles it. But the First Amendment does not allow intrusion on speech based on default rules that do not serve the statute's purpose. For that reason, the statute contains a market-modification safety valve intended to *prevent* stations from using must-carry to expand into new markets. 47 U.S.C. § 534(h)(1)(C).

Perhaps recognizing as much, the government urges (at 9) that facts relating to the particular broadcast station at issue are irrelevant to the constitutionality of applying must-carry. Under intermediate scrutiny, the government urges, any measure must be evaluated in terms of its "general effect," even in as-applied challenges. But that argument wrongly collapses the distinction between as-applied and facial challenges. This Court routinely sustains as-applied arguments just like the one ad-

vanced here.[6] The government commits the same error when attempting to address (at 10-12) the problem that financially secure WRNN does not need carriage on Long Island to remain on the air. Perhaps the Court did not require an individualized showing of need in *Turner*. But *Turner* involved a facial challenge — unlike the as-applied challenge here.

Besides, WRNN's lack of an over-the-air audience points to a broader problem. Since the 1990s, the number of over-the-air households has plummeted. Pet. 20. The FCC concedes that, four years ago, only 14% of households still relied on over-the-air broadcasting. *See* Br. 19-20. The government's interest in preserving over-the-air broadcasting dwindles with the over-the-air audience. The government contends that dwindling over-the-air viewership "makes carriage on cable systems even more critical to . . . ensur[e] that a 'multiplicity of broadcasters' are financially able to provide an alternative source of programming to the American public." But it cannot be that must-carry remains constitutionally unimpeachable so long as even a single over-the-air viewer remains. The dramatic decline in over-the-air viewership underscores the need for this Court to determine whether this intrusion on

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[6] *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("Even under . . . intermediate standard of review, however, Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's cannot be sustained *as applied to Fane's proposed speech.*") (emphasis added); *United States v. Grace*, 461 U.S. 171, 183 (1983) (statute prohibiting carrying of banners was unconstitutional "as applied to . . . sidewalks" surrounding Supreme Court building).

First Amendment rights may continue.

The government argues (at 20), however, that, as must-carry has become less needed, it has also grown less burdensome — in that cable operators have found ways of transmitting more video signals through the same wires. But, in assessing a burden on editorial discretion, the amount of cable spectrum occupied by a must-carry station is no more dispositive than the column space allocated to a required newspaper article. Besides, the existence of countervailing developments (like bandwidth-intensive high-definition programming) make this case particularly worthy of the Court's attention.

Finally, the FCC disputes neither that it weighed WRNN's speech content when considering whether to impose must-carry here nor that content-discrimination would render the FCC's order subject to strict scrutiny. Instead, the government argues that the FCC "did not consider WRNN's programming to determine whether it agreed or disagreed with the ideas or views expressed." Br. 14 (quotation marks omitted). But "[r]egulation of the *subject matter* of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (emphasis added).

In closing, a word about WRNN's submission. Despite its unsubstantiated accusations,[7] WRNN

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[7] For example, WRNN urges (at 21, 32) that Cablevision declined to carry WRNN in an effort to protect its own News12 and Newsday from competition. Suffice it to say that WRNN flatters itself when it suggests that its home-shopping fare competes with News12's news programming and that Cablevi-

confirms (at 7-8) that it moved its transmitter and added Long Island-targeted programming in an effort to gain must-carry rights. This is what must-carry has come to: a home-shopping station's tool to manufacture cable carriage in far-away markets at C-SPAN's expense. Unless this Court intervenes, WRNN's effort will bear fruit in just a matter of weeks. The Court should prevent that First Amendment monstrosity by agreeing to consider the constitutionality of must-carry in this case.

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sion did not even acquire Newsday until long after the issuance of the order under review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
600 New Hampshire
Avenue, NW
Washington, D.C. 20037
(202) 556-2000

HOWARD J. SYMONS
TARA M. CORVO
MINTZ, LEVIN, COHN,
FERRIS, GLOVSKY AND
POPEO, P.C.
701 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 434-7300

HENK BRANDS
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

Counsel for Petitioner

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