BRIEF FOR RESPONDENTS

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

NO. 12-1337

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for Bloomberg, L.P., which has filed a notice of its intent to participate as *amicus curiae*, all parties, intervenors, and *amici* appearing in this court are listed in the Brief for Comcast Cable Communications, LLC.

B. Ruling Under Review

The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC, 27 FCC Rcd 8508 (2012) (J.A.1385).

C. Related Cases

The order on review has not been before this Court previously. Some of the issues in this case are similar to those before the United States Court of Appeals for the Second Circuit in *Time Warner Cable Inc., et. al. v. FCC*, Nos. 11-4138 & 11-5152.

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GLOSSARY

ALJ	Administrative Law Judge
Comcast	Comcast Cable Communications, LLC
FCC	Federal Communications Commission
HDO	Hearing Designation Order
ID	*The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 26 FCC Rcd 17160 (2011)
MVPD	Multichannel Video Programming Distributor
NTCA	National Cable & Telecommunications Association
Order	*The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 8508 (2012)
Sports Tier	Sports and Entertainment Package

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BRIEF FOR RESPONDENTS

INTRODUCTION AND STATEMENT OF ISSUES PRESENTED

Animated by concerns that vertically integrated cable operators have the incentive and ability to favor their affiliated programmers, Congress enacted section 616 of the Communications Act of 1934, *see* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §12, 106 Stat. 1460 ("1992 Cable Act"), to promote competition and diversity among programming networks in the pay-TV market. Section 616 prohibits any multichannel video programming distributor ("MVPD") from "discriminating . . . on the basis of affiliation or nonaffiliation of [video

programming] vendors in the selection, terms, or conditions for carriage of video programming" if the effect of such discrimination "is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. §536(a)(3). The statute directs the FCC to "provide for appropriate penalties and remedies" for such discrimination, "including carriage." *Id.*, §536(a)(5).

This case involves a section 616 discrimination complaint that Tennis Channel, a sports programming network, filed with the Federal Communications Commission against Comcast Cable Communications, LLC ("Comcast"), the nation's largest cable operator. An FCC Administrative Law Judge ("ALJ") conducted a six-day hearing featuring live testimony and reviewed a voluminous evidentiary record. The ALJ then concluded that Comcast had discriminated on the basis of affiliation by giving substantially broader carriage to its affiliated sports networks—Golf Channel and Versus (now NBC Sports)—than it gave to Tennis Channel. The FCC subsequently affirmed the ALJ's finding that Comcast violated section 616, and ordered Comcast to cease its discriminatory carriage by providing Tennis Channel with the same level of distribution as Golf Channel and Versus. *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 8508 (2012) ("*Order*") (J.A.1385).

The issues on review are as follows:

(1) Whether the FCC's order was based on a permissible reading of the Communications Act and was supported by substantial evidence.

(2) Whether the FCC's order comports with the First Amendment.

(3) Whether the FCC acted within its discretion in construing its own statute of limitations rule.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to Comcast's brief.

COUNTERSTATEMENT OF THE CASE

I. BACKGROUND

A. Statutory And Regulatory Background

By the early 1990s, the cable television industry had grown "highly concentrated." 1992 Cable Act, §2(a)(4). Congress became concerned that "such concentration" could reduce "the number of media voices available to consumers" by creating "barriers to entry for new programmers." *Id.*

This threat to competition in the video programming and distribution markets was "exacerbated by the increased vertical integration" of producers and distributors of cable programming. S. Rep. No. 102-92, at 24 (1991) ("Senate Report"). Simply put, cable operators were increasingly controlling the programming channels they distributed, which allowed them to promote

those channels over the channels operated by their competitors. As Congress found, vertical integration gives cable operators "the incentive and ability to favor their affiliated programmers" and "[to] make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, §2(a)(5). For example, a vertically integrated cable operator may "give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers." Senate Report at 25. By engaging in that type of discrimination, a cable operator could give an affiliated programmer an unfair advantage in terms of attracting viewers and competing for advertising revenues and programming rights.

To redress this problem, Congress crafted a statute that targets discrimination against unaffiliated programmers where that discrimination is motivated by considerations of affiliation and harms the ability of rival programmers to compete. The 1992 Cable Act added a new section 616 to the Communications Act, which (*inter alia*) directs the FCC to adopt rules to prevent any MVPD from (a) "discriminating" in the selection, terms, or conditions of carriage "on the basis of affiliation or non-affiliation" of programming vendors where (b) the effect of such discrimination is "to unreasonably restrain" the ability of an unaffiliated vendor to "compete fairly." 47 U.S.C. §536(a)(3); *see also* 47 C.F.R. §76.1301(c) (corresponding

FCC rule). The legislative history makes clear that section 616 was intended to supplement—rather than duplicate—the antitrust laws. As the House Report explains, "[t]his legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section." H.R. Rep. No. 102-628, at 111 (1992) ("*House Report*").

Under the FCC's rules implementing section 616, the complainant bears the burden to make a *prima facie* showing that the MVPD has engaged in behavior that violates section 616. *Implementation of Sections 12 and 19,* 9 FCC Rcd 2642, 2654 (1993) (¶29) ("*1993 Order*"). If the complainant satisfies that burden, the FCC's Media Bureau must determine whether it can grant relief on the basis of the existing written record or must refer the matter to an ALJ for an evidentiary hearing. *Id.* at 2656 (¶34). If such a hearing is required, the ALJ issues an initial decision on the merits. Any appeal of that decision is brought "directly to the Commission"—*i.e.*, to the Commissioners rather than to the FCC's Media Bureau staff. *Id.*

Section 616 directs the FCC to "provide for appropriate penalties and remedies for violations of this subsection, including carriage." 47 U.S.C. §536(a)(5). The agency "determine[s] the appropriate relief for program

carriage violations on a case-by-case basis." *1993 Order*, 9 FCC Rcd at 2653 (¶26).

B. Factual Background

1. Launched in May 2003, Tennis Channel is a national cable sports network that airs tennis-related programming. Tennis Channel is distributed by 130 different MVPDs to approximately [redacted] subscribers. *Order*, ¶8 (J.A.1388).

Comcast is the largest MVPD in the United States. *Id.*, ¶9 (J.A.1389). With 23 million subscribers, it accounts for 24 percent of all pay-TV subscribers in the nation. *Id.*, ¶¶9, 87 & n.330 (J.A.1389, 1419, 1427). Comcast offers cable television programming to its subscribers in several different "tiers" (*i.e.*, packages of programming services) at different prices. Core programming is contained in Comcast's "Expanded Basic" tier, or its digital counterpart, the "Digital Starter" tier. Together, these tiers are received by approximately [redacted] of Comcast customers, or [redacted] viewers. The more expensive "Digital Preferred" tier, subscribed to by [redacted] of Comcast's customers—about [redacted] viewers—provides the customer with access to additional networks. Lastly, Comcast's "Sports and Entertainment Package" ("Sports Tier") consists of a package of sports-related networks available to Comcast subscribers for an additional fee

of about $5-8 per month. Only about [redacted] of Comcast's customers—approximately [redacted] viewers—subscribe to the Sports Tier. *Order*, ¶¶12, 47 (J.A.1390, 1403); *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 26 FCC Rcd 17160, ¶¶11-14 (2011) (ALJ's Initial Decision) ("*ID*") (J.A.1323).

Tennis Channel is not affiliated with Comcast. *Order*, ¶1 (J.A.1386). However, Comcast owns controlling interests in two national sports networks, Golf Channel and Versus,[1] and minority equity interests in a number of others. Golf Channel airs programming that is devoted to golf; Versus carries programs involving a wide variety of sports. *Id.*, ¶¶9-11 (J.A.1389). Comcast places every one of its affiliated sports networks on a programming tier that reaches a broader audience than the Sports Tier. *See id.*, ¶47 (J.A.1403).

2. Comcast began carrying Tennis Channel in 2005 pursuant to a 15-year carriage agreement. *Order*, ¶12 (J.A.1390). Although the parties' carriage agreement generally recognizes Comcast's discretion to determine the tier (or tiers) upon which it will carry Tennis Channel, *see ID*, ¶16

[1] Consistent with the Commission's *Order*, we refer to the network (now known as NBC Sports Network) as Versus.

(J.A.1325), Comcast has never disputed that it must exercise that discretion in accordance with section 616's nondiscrimination rule.

Starting in 2005 (and continuing to the present), Comcast has placed Tennis Channel on its premium Sports Tier on the overwhelming majority of its cable systems. *Order*, ¶¶12, 68 (J.A.1390, 1411); *see also ID*, ¶14 (J.A.1323). As a result, Tennis Channel is available to only approximately [redacted] of Comcast's subscribers, while Comcast's affiliates (Golf Channel and Versus) are offered on Comcast's Expanded Basic and Digital Starter tiers, and therefore reach [redacted] of Comcast customers. *Id.*

In early 2009, citing recent viewership growth and programming improvements, Tennis Channel asked Comcast to increase its distribution by moving it to a tier with broader distribution than the Sports Tier. At that time (as now), Comcast carried Golf Channel and Versus on its broadly distributed Expanded Basic and Digital Starter tiers. Tennis Channel's Chairman and CEO (Ken Solomon) informed Comcast that, since Tennis Channel's launch in 2003, the network had added the capacity to broadcast in High Definition, obtained rights to broadcast a number of important tennis tournaments, including significant portions of all four Grand Slam tournaments, and signed celebrity on-air commentators, such as Jimmy Connors and John McEnroe. With these improvements, Mr. Solomon explained that Tennis Channel's

ratings and distribution had increased significantly; indeed, he noted more than two-thirds of Tennis Channel's distributors offer the network on a non-premium tier. *ID*, ¶19 & n.65 (J.A.1326); TC Exh. 14 (Solomon) at 3, 6-9 (J.A.1028, 1031-34).

Comcast Vice-President Madison Bond told Mr. Solomon that Comcast would broaden Tennis Channel's distribution only if Tennis Channel offered Comcast a financial "incentive." TC Exh. 14 (Solomon) at 9-10 (J.A.1034-35). In response, Tennis Channel made two alternative proposals: it would accept (1) a [redacted] reduction in the per-subscriber fees it receives under the parties' carriage agreement if Comcast carried the network on its Digital Preferred tier; or (2) a [redacted] reduction in its per-subscriber fees if carried on Comcast's Digital Starter tier. *ID*, ¶19 (J.A.1326).

Concerned that Tennis Channel might invoke its legal rights under section 616 (*ID*, ¶22 (J.A.1328)), Mr. Bond directed Comcast Vice-President Jennifer Gaiski (1) to prepare a written analysis of the additional costs to Comcast of accepting Tennis Channel's proposals, and (2) to ask Comcast's regional representatives whether there was interest in increasing Tennis Channel's distribution. *Id.*, ¶20 (J.A.1326-27).

Ms. Gaiski's analysis compared the future license fees that Comcast would pay under the parties' carriage agreement with the higher license fees Comcast would pay under each of Tennis Channel's proposals. Comcast Exh. 588 (J.A.713). By her own account, however, Ms. Gaiski did not consider, let alone attempt to quantify, any benefits to Comcast of moving Tennis Channel to more widely distributed tiers. Tr. 2437-39 (Gaiski) (J.A.360-62); *Order*, ¶77 (J.A.1415). Nor did she attempt to compare the cost of Tennis Channel's proposals with the significant costs Comcast incurs in broadly distributing Golf Channel and Versus. Tr. 2432-33 (Gaiski) (J.A.358-59).

On June 8, 2009, Ms. Gaiski convened a teleconference with a Comcast attorney and four regional executives. She asked the regional representatives—who were already informed of her cost analysis—whether Comcast subscribers or local cable systems personnel had any interest in distributing Tennis Channel on a more broadly distributed tier. After receiving initial negative responses, Ms. Gaiski asked them to consult with local system personnel to ascertain whether Tennis Channel's proposals had generated any interest and report back in "a day or two." *ID*, ¶21 (quoting Comcast Exh. 130 (J.A.1328)); Tr. 2367 (Gaiski) (J.A.354). Rather than

waiting for any such report, Comcast rejected Tennis Channel's proposals the next day. *Order*, ¶77 (J.A.1415).

II. THIS PROCEEDING

A. The Initial Administrative Proceedings

On January 5, 2010, after providing prior notice to Comcast, Tennis Channel filed a complaint with the FCC alleging that Comcast had violated section 616 of the Act and the agency's implementing rules by granting preferential treatment to its similarly situated affiliates while continuing to relegate Tennis Channel to the narrowly distributed Sports Tier. Tennis Channel Compl. (J.A.15).

In October 2010, the FCC's Media Bureau determined that the complaint was timely filed (*HDO*, ¶¶28-33 (J.A.1308)), and designated the case for a hearing before an ALJ. *Id*., ¶¶2, 9, 10 (J.A.1300, 1302). Following the completion of discovery, the ALJ conducted a six-day hearing at which the parties presented fact and expert witnesses, and submitted thousands of documents into evidence. *ID*, ¶3 (J.A.1320).

B. The ALJ's Initial Decision

After weighing the evidence and evaluating the credibility of the witnesses, the ALJ upheld Tennis Channel's complaint on December 20, 2011.

The ALJ found, among other things, significant circumstantial evidence that Comcast had engaged in intentional affiliation-based discrimination. *ID*, ¶122 (J.A.1370). Relying on precedent applying a similar analysis, the ALJ concluded that Tennis Channel, Golf Channel, and Versus are similarly situated because each of the three networks provides year-round sports programming, has similar ratings, attracts similar types of viewers, and targets the same advertisers. *Id.*, ¶¶24-49 (J.A.1328-41). The ALJ also found that, despite these close similarities, Comcast treats Golf Channel and Versus more favorably than Tennis Channel. Indeed, it was undisputed that Comcast provides its own affiliates with dramatically wider distribution—reaching [redacted] of Comcast subscribers, while Tennis Channel is relegated to a programming tier that reaches only about [redacted] of subscribers. *Id.*, ¶¶53-54, 60 (J.A.1343, 1346).

The ALJ also found that Comcast's differential treatment was impermissibly based upon affiliation. He pointed out that Comcast's President Stephen Burke admitted that Comcast treats its affiliated networks "like siblings as opposed to like strangers" and that affiliates receive a "different level of scrutiny" from unaffiliated providers. *ID*, ¶55 (J.A.1344); TC Exh. 7 at 3 (J.A.743). He noted further that the testimony of Comcast Vice-President Bond—the Comcast official responsible for determining

Tennis Channel's level of distribution—corroborated Comcast's "sibling relationship" with network affiliates. *ID*, ¶55 (J.A.1344); Tr. 2249 (Bond) (J.A.332).

Additional record evidence supported the conclusion that Comcast's rejection of Tennis Channel's carriage request in this case was consistent with a policy of favoring the cable company's own affiliates. The ALJ found, for example, that "affiliation by itself generally is sufficient to ensure that a sports network is widely distributed on Comcast systems," and that Comcast places only unaffiliated networks exclusively on its Sports Tier. *ID*, ¶58 (J.A.1345). By contrast, it was undisputed that "[e]very one of [Comcast's] affiliated networks is carried on more widely distributed tiers." *Id.* ¶57 (J.A.1345).

The ALJ next determined that Comcast's "unequal treatment of Tennis Channel *vis-à-vis* its sports affiliates has adversely affected the ability of Tennis Channel to compete fairly in the video programming marketplace." *Id.*, ¶81 (J.A.1356). By greatly reducing the network's distribution, Comcast's actions substantially impeded Tennis Channel's ability to compete for valuable programming rights, made it more difficult for the network to sell advertising, and reduced the prices that Tennis Channel is able to charge its advertisers. *Id.*, ¶¶86-89 (J.A.1357-58).

To remedy Comcast's violation of section 616, the ALJ ordered Comcast to (1) pay a $375,000 forfeiture, (2) provide Tennis Channel with equitable treatment vis-à-vis Golf Channel and Versus as to channel placement, and (3) give Tennis Channel "the same treatment in the terms and conditions of video program distribution" that it provides to Golf Channel and Versus. *ID*, ¶¶117-120 (J.A.1367-69). In imposing this equal-carriage remedy, the ALJ made clear that Comcast was free to determine "the level of penetration it chooses to carry the three channels." *Id*.

C. The Commission's *Order*

In July 2012, based on its independent review of the extensive evidentiary record, the Commission substantially affirmed the ALJ's decision.

After determining that the complaint was filed within the applicable statute of limitations (*Order*, ¶¶28-34 (J.A.1396-99)), the Commission concluded that the record evidence supported the ALJ's finding that Comcast had violated section 616 and the agency's implementing rule (*id.*, ¶¶39-87 (J.A.1400-19)).

As a threshold matter, the FCC rejected Comcast's argument that it must construe section 616 to incorporate an "essential facilities" doctrine borrowed from antitrust law, thereby limiting the operative effect of the

statute to the redress of anticompetitive harms that would already be barred under the antitrust laws. *Id.*, ¶¶40-43 (J.A.1400-01). The agency explained that Comcast's argument was unsupported by the statutory text and that the legislative history made clear Congress's intent to "'provide[] *new* FCC remedies'" and "'not amend . . . existing antitrust laws.'" *Id.*, ¶41 (J.A.1401) (quoting House Report at 111) (emphasis added). Thus, the Commission observed, section 616 is not simply "a redundant analogue to antitrust law." *Id.*

Turning to the extensive evidentiary record, the Commission found that substantial evidence supported the ALJ's determination that Comcast had deliberately discriminated against Tennis Channel—while favoring Golf Channel and Versus—on the basis of affiliation. *Id.*, at ¶¶44-82 & n.138 (J.A.1402-17). The FCC first pointed to "significant circumstantial evidence that Comcast had engaged in a general practice of favoring affiliates over nonaffiliates." *Id.*, ¶45 (J.A.1402). Indeed, the testimony of Comcast's own witnesses supported this finding: as the ALJ noted, senior Comcast executives Stephen Burke and Madison Bond had acknowledged that the cable operator's programming affiliates—which are treated like "sibling[s]"—benefit from "a different level of scrutiny" that Comcast does not apply to unaffiliated networks like Tennis Channel. *Id.*, ¶46 (J.A.1402).

Moreover, the record evidence showed that "Comcast's carriage of sports networks tracks the significance of its equity stake." *Id.*, ¶47 (J.A.1403). For example, Comcast places *only* unaffiliated sports networks (including Tennis Channel) on the narrowly penetrated Sports Tier, while consistently affording broader carriage to its own affiliates. *Id.*

The FCC further found that the dramatically less favorable treatment of Tennis Channel—which reaches only about [redacted] of Comcast's subscribers, while Golf Channel and Versus reach [redacted]—supported a reasonable inference of intentional affiliation-based discrimination. That was so because, among other things, (1) the three networks are otherwise similarly situated, and (2) Comcast had failed to proffer a credible justification for this differential treatment based on legitimate reasons unrelated to affiliation. *Id.*, ¶¶68-72 (J.A.1411-12); *see also id.*, ¶¶51-66 (J.A.1404-09).

The FCC specifically found unpersuasive Comcast's assertion that its refusal of Tennis Channel's request for broader carriage was based on a good faith belief that subscribers lacked interest in the network. The record evidence showed that, although Comcast had purported to seek feedback from its regional executives concerning interest in Tennis Channel, it rejected Tennis Channel's proposal even before those executives had a reasonable opportunity to report on their findings. *Id.*, ¶80 (J.A.1416). Nor was

Comcast's claim to have undertaken a genuine cost-benefit analysis convincing; as the Commission explained, the record showed that Comcast in fact "made no attempt to analyze benefits" at all. *Id.*, ¶¶77, 79 (J.A.1415).

The FCC further concluded that Comcast's affiliation-based discrimination against Tennis Channel (and in favor of Golf Channel and Versus) unreasonably restrained Tennis Channel's ability to compete fairly in the video programming marketplace. *Order*, ¶¶83-88 (J.A.1417-20). The agency explained that, by depriving Tennis Channel of the same level of distribution that it accorded to its own affiliates (Golf Channel and Versus), Tennis Channel was foreclosed from access to approximately [redacted] additional subscribers on Comcast systems alone. *Id.*, ¶83 (J.A.1417); *ID*, ¶82 (J.A.1356). Comcast's discriminatory carriage of Tennis Channel sharply reduced Tennis Channel's largest source of revenues. *Order*, ¶84 (J.A.1417).

Furthermore, this competitive harm was magnified by the "ripple effect" —that is, the fact that "one MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution." *Order*, ¶73 & n.220 (J.A.1412) (citing record evidence, including, *inter alia*, testimony of a Comcast's executive who acknowledged this effect). As the FCC explained,

"[a] major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely." *Order*, ¶73 & n.221 (J.A.1412).[2] Thus, the record showed, broad carriage on a market leader like Comcast adds significant value to a network, enhances its brand, and, in turn, encourages other MVPDs to likewise distribute the network on a broadly distributed programming tier.

The FCC found that this severe reduction in audience size and revenues materially affected Tennis Channel's ability to compete for valuable programming rights and advertising dollars—while at the same time providing a competitive advantage to Comcast's own affiliates. As the FCC found, national advertisers, which seek the largest audience possible, generally will not purchase advertisements on networks with fewer than 40 million subscribers. Relegated to the Sports Tier, Tennis Channel's subscribership was below that threshold, and it therefore was unable to attract significant advertising from such advertisers. Indeed, national advertisers

[2] *See also* Tr. 722 (Brooks) (J.A.215) (testifying that "[w]ide distribution through a major distributor puts you in many major cities" and "gets you a lot of attention" and "publicity" that "puts pressure on" other distributors in that area to "carry you as well.").

such as [redacted] declined to purchase advertising from Tennis Channel due to its limited distribution. *Order*, ¶84 (J.A.1417).

The FCC emphasized that, because Versus "competes directly with Tennis Channel for programming rights," it "directly benefits from the difficulties in acquiring programming rights that Tennis Channel faces as a consequence of more limited carriage, a detrimental effect that even Comcast executives have acknowledged." *Id.*, ¶85 & nn.271, 272 (J.A.1418). Thus, Tennis Channel's ability to "compete fairly" was restrained in an unreasonable manner.

The FCC upheld the remedies ordered by the ALJ, with the exception of the channel-placement remedy (which the agency found to be insufficiently supported by the record). *Id.*, ¶3 (J.A.1386). Following a careful analysis of Comcast's First Amendment arguments, the agency concluded that the equal-carriage requirement was appropriate and consistent with the Constitution. *Id.*, ¶¶88-106 (J.A.1420-27).

STANDARD OF REVIEW

1. Comcast bears a heavy burden to establish that the FCC's *Order* is "arbitrary [and] capricious." 5 U.S.C. §706(2)(A). "Under this highly deferential standard of review, the court presumes the validity of agency action . . . and must affirm unless the Commission failed to consider relevant

factors or made a clear error in judgment." *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotations omitted). The Court must accept the FCC's factual findings if they are supported by substantial evidence, even if "'a plausible alternative interpretation of the evidence would support a contrary view.'" *E.g.*, *Dickson v. Nat'l Trans. Safety Bd.*, 639 F.3d 539, 542 (D.C. Cir. 2011) (citation omitted). The Court "'will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (citation omitted).

2. Review of the Commission's interpretation of section 616 is governed by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*, if Congress has not "directly spoken to the precise question at issue," *id.* at 842, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. In such circumstances, "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

3. "Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of

ambiguous statutory terms." *Capital Network Sys. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994). "The Commission's interpretation of its own rules is 'entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Star Wireless LCC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (citation omitted).

4. The Court reviews the agency's disposition of constitutional issues *de novo*. *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

SUMMARY OF ARGUMENT

1. The record amply supports the FCC's conclusion that Comcast violated section 616 of the Communications Act by intentionally discriminating against Tennis Channel on the basis of affiliation. Comcast's senior officers acknowledged that its affiliated networks enjoy the benefits of a special "sibling" relationship that entails a "different level of scrutiny" with respect to carriage decisions, and the evidence disclosed a clear correlation between the equity interest Comcast holds in a network and the level of distribution that it provides.

Even more to the point, while Tennis Channel, Golf Channel, and Versus are similarly situated in all relevant respects (including programming, audience demographics, targeted advertisers, and ratings), Comcast gives Golf Channel and Versus dramatically broader distribution than it provides to

Tennis Channel. Moreover, Comcast's proffered justifications for its differential treatment of the networks—which, it maintained, had nothing to do with considerations of affiliation—were not credible, and were outweighed by the overwhelming evidence of intentional discrimination. Far from impermissibly converting section 616 into a "disparate impact" statute, the FCC properly examined circumstantial evidence of intentional discrimination, including, but not limited to, evidence of differential treatment of similarly situated persons.

2. Neither as a matter of statutory interpretation nor First Amendment principle is the FCC required to interpret section 616 in a manner that is cabined by doctrines borrowed from antitrust law, such as the "essential facilities" doctrine. The statutory text uses inherently ambiguous language—referring to conduct that "unreasonably restrains" an "unaffiliated . . . programming vendor['s]" ability to "compete fairly"—which invests the agency with substantial discretion to implement the statute it administers in a reasonable manner. The statute does not refer to "essential facilities," "bottleneck" power, or "market power," and Congress' decision to apply section 616 to *all* MVPDs (including satellite providers that never possessed bottleneck power) confirms that it did not intend to constrain 616 by the essential-facilities doctrine. Indeed, the legislative history strongly supports

the FCC's understanding of section 616. That understanding is consistent with the well-established proposition that, in applying the provisions of the Communications Act, the FCC is not bound by "the letter of the antitrust laws." *United States v. FCC*, 652 F.3d 72, 88 (D.C. Cir. 1980) (*en banc*).

The FCC's conclusion that Comcast unreasonably restrained Tennis Channel's ability to compete fairly is also supported by substantial evidence. By depriving Tennis Channel of the broad distribution platform that Comcast's similarly situated affiliates enjoy, the cable operator foreclosed Tennis Channel from access to approximately [redacted] subscribers on Comcast systems alone. This drastic narrowing of Tennis Channel's audience (and its concomitant impact on the network's revenues) severely impeded Tennis Channel's ability to compete against Comcast's affiliates not only for the same viewers, but also for the same advertising accounts and rights to valuable programming.

3. The FCC's analysis and remedy fully comport with the First Amendment. The agency's purpose—to ensure that Comcast does not leverage its position in a way that unreasonably restrains Tennis Channel's ability to compete—is unrelated to the content of expression. The FCC considered the similarity of programming carried on the three networks only to determine whether there was circumstantial evidence of affiliation-based

discrimination (*i.e.*, whether the three networks compete for the same audiences, advertisers, and programming rights). There is no plausible suggestion that it did so to disfavor any messages or ideas. The order is therefore subject to intermediate—not strict—First Amendment scrutiny.

The Commission's equal-carriage remedy satisfies such scrutiny. By ordering Comcast to cease its affiliation-based discrimination against Tennis Channel, the remedy directly advances the same important governmental interests the Supreme Court and this Court have recognized in rejecting other First Amendment challenges to regulation of the cable industry: promoting fair competition and fostering diversity of information sources in the video programming marketplace. And the remedy is narrowly tailored so as to avoid burdening more speech than necessary: it leaves Comcast free to determine how it will comply with the equal-carriage requirement (for example, by carrying all three networks on an intermediate programming tier).

4. Finally, the FCC reasonably interpreted its own rule in determining that Tennis Channel's complaint was timely filed. It is undisputed that Tennis Channel filed its complaint within one year of both the date it notified Comcast of its intent to file a complaint and the date of the allegedly discriminatory conduct, *i.e.*, Comcast's refusal in June 2009 to give Tennis

Channel broader carriage. The FCC's ruling comports with both the text of the agency's statute of limitations rule and prior agency interpretations of that rule involving Comcast.

ARGUMENT

I. THE COMMISSION ACTED WELL WITHIN ITS DISCRETION IN CONCLUDING THAT COMCAST VIOLATED SECTION 616.

The Commission's conclusion that Comcast violated section 616 is based on a permissible reading of the Communications Act and is supported by substantial evidence.

A. The FCC Reasonably Determined That Comcast Discriminated Against Tennis Channel On The Basis Of Affiliation.

1. The FCC's Finding Of Affiliation-Based Discrimination Is Supported By Substantial Evidence.

It is undisputed that Comcast gives Tennis Channel dramatically narrower distribution than it provides to its own affiliates, Golf Channel and Versus: Comcast generally carries Tennis Channel on the Sports Tier, which is available to only the [redacted] of Comcast's customers willing to pay an extra fee. *Order*, ¶68 (J.A.1411). By contrast, Comcast carries Golf Channel and Versus on broadly distributed tiers available to [redacted] of Comcast customers for which no additional fee is required. *Id.* In determining that this difference in treatment was "on the basis of affiliation or

non-affiliation," 47 U.S.C. §536(a)(3), the FCC relied on, *inter alia*, evidence showing that (1) Comcast engaged in a general pattern of favoring affiliated networks over unaffiliated networks; (2) Comcast's dramatically less favorable carriage of Tennis Channel (compared with its own affiliates) was not attributable to any relevant differences between the three networks, which are similarly situated; and (3) Comcast's testimony offering purportedly legitimate reasons for this differential treatment was not credible. Each of these findings is supported by substantial record evidence, and each supports a reasonable inference of intentional discrimination on the basis of affiliation.

a. Comcast Engaged In A Pattern Of Favoring Its Affiliates.

Substantial record evidence shows that Comcast engaged in a "general practice of favoring affiliates over non-affiliates." *Order*, ¶45 (J.A.1402). Senior Comcast executives Stephen Burke and Madison Bond acknowledged the "sibling" relationship that Comcast gives to its affiliated networks—a special relationship that, as Mr. Burke conceded, entails "a different level of

scrutiny" from that provided to non-affiliates like Tennis Channel. *Id.*, ¶46 (J.A.1402); *see also* TC Exh 7 at 3 (J.A.743); Tr. 2249 (Bond) (J.A.332).[3]

The FCC had ample basis for concluding that this general practice of favoring affiliated networks over non-affiliates extended to Comcast's carriage decisions. *Order*, ¶¶45-49 (J.A.1402-04). As the agency explained, the record shows a clear correlation between the level of distribution Comcast gives to a sports network and Comcast's equity interest (if any) in that network. For example, Comcast distributes its two majority-owned sports networks, Golf Channel and Versus, on broadly distributed tiers reaching approximately [redacted] of Comcast customers; it carries sports networks in which it has a minority or indirect ownership interest (*e.g.*, NHL Network, MLB Network, and NBA Network) on an intermediate tier reaching

[3] There is no merit to Comcast's suggestion that, in relying on this evidence, the FCC acted inconsistently with its decision to exclude the same testimony from Mr. Burke in an earlier case. *See* Comcast Br. 37 (citing *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 26 FCC Rcd 8971 (2001)). The Commission explained that the ALJ refused to admit into evidence Mr. Burke's testimony in the earlier case because the complainant there had improperly attempted to introduce it without laying a foundation for the evidence, and failed to demonstrate that the testimony "fit into a pattern of circumstantial evidence" showing discrimination. *Order*, n.143 (J.A.1403). By contrast, the record in this proceeding included a sworn declaration by Mr. Burke acknowledging his prior testimony, and "[t]hat testimony provide[d] important context" buttressing the circumstantial evidence of discrimination in this case. *Id.*; *see* TC Exh. 19 (att. 2) (J.A.1163).

approximately [redacted] of its customers; and it relegates *only* unaffiliated sports networks, such as Tennis Channel, to the Sports Tier (which reaches approximately [redacted] of its customer base). *Id.*, ¶¶12, 47 (J.A.1390, 1403).

Moreover, the record shows that Comcast increases a network's distribution whenever it acquires an ownership interest in that network. For example, Comcast promptly repositioned the NHL Network from the Sports Tier to Digital Preferred when it became a partial owner of the network. And when Comcast obtained equity in the MLB network, it placed that network on the Digital Preferred tier instead of the Sports Tier, as it had originally planned. *Id.*, ¶48 (J.A.1403).

Comcast does not dispute that it carries *every one* of its affiliated sports networks on tiers that reach a much broader audience than the Sports Tier, but asserts that its carriage decisions as to those networks were based upon legitimate reasons unrelated to each network's affiliation. *See* Comcast Br. 37. The FCC reasonably concluded, however, *see Order*, ¶¶48-49 (J.A.1403-04), that Comcast's assertion that it does not consider affiliation in making carriage decisions was implausible given the shortcomings of its affiliated networks. For example, Comcast carried the affiliated Outdoor Life Network—the network subsequently renamed Versus—on widely distributed

tiers at a time when even Comcast's own programming chief considered it "a crappy channel that was dead in the water." *Id.*, ¶48 (J.A.1403). And in 2010, Comcast planned to launch on the Digital Preferred tier a new network (U.S. Olympic Network) focusing on programming concerning the Olympic games, even though that network had not even secured the rights to broadcast any of those games. *Id.*, ¶48 (J.A.1403); Tr. 2188-89 (Bond) (J.A.324-25). The FCC's conclusion was thus well supported by the record.

b. Tennis Channel Is Similarly Situated To Comcast's Affiliates.

Comcast's starkly differential treatment of Tennis Channel and its own affiliated networks could not be explained by any relevant differences between the three networks. To the contrary, substantial record evidence showed that Tennis Channel, Versus, and Golf Channel are similarly situated. Each broadcasts sports programming (including sporting events); each has similar audience demographics in terms of age, income, and gender; each targets or serves the same advertisers; and each receives remarkably similar ratings. *See Order*, ¶¶51-68 (J.A.1404-11).

Comcast largely ignores the FCC's factual findings concerning these similarities and the evidence that supports them. Instead, it contends that certain findings "conflict" with snippets of contrary evidence proffered by Comcast. Comcast Br. 38. But the Commission detailed its reasons for not

accepting that evidence and explained why the record—viewed as a whole—overwhelmingly supported its finding of affiliation-based discrimination. *See Order*, ¶¶56-67 (J.A.1405-10); *see also Thompson Med. Co. v. FTC*, 791 F.2d 189, 196 (D.C. Cir. 1986) (Court's role "is not to reweigh the evidence de novo," but simply "to determine if the Commission's finding is supported by substantial evidence on the record as a whole.").

For example, the agency explained that Comcast failed to show that Tennis Channel's programming is less attractive to subscribers than the programming of Golf Channel and Versus. *Order*, ¶59 (J.A.1406). It also found that the similarities between the three networks in terms of programming far outweigh any differences. *Id.*, ¶¶52, 65 (J.A.1404, 1409). And it explained that the evidence cited by Comcast to show that subscribers value Golf Channel and Versus more than Tennis Channel (such as programming expenditures) was outweighed by more persuasive evidence demonstrating that the three networks have "almost identical ratings." *Id.*, ¶¶55, 61-62 (J.A.1405, 1407).[4]

[4] The FCC reasonably rejected Comcast's claim (Br. 38) that MVPDs find ratings unimportant. Indeed, Comcast Vice-President Bond testified that he considered network ratings in making carriage decisions for Comcast. Tr. at 2201 (Bond) (J.A.326); *see also Order*, ¶62 (J.A.1407) ("Comcast itself relied upon ratings [redacted]).

c. The Commission Reasonably Rejected Comcast's Excuses.

Finally, the Commission reasonably rejected as pretextual Comcast's testimony concerning its purportedly legitimate reasons for its differential treatment of Tennis Channel.

The FCC had ample basis for concluding that Comcast's refusal to give Tennis Channel broader distribution was not based on a good faith cost-benefit analysis. *See Order*, ¶¶76-82 (J.A.1414-17). The Comcast executive who performed the analysis admitted that she did not prepare *any* analysis of what Comcast might gain by moving Tennis Channel to a more widely distributed tier. *Id.*, ¶77 (J.A.1415); *see also* Tr. 2439 (Gaiski) (J.A.362). A "cost-benefit" analysis that does not even consider possible benefits is an oxymoron, and Comcast cannot overcome the serious flaws in its analysis simply by asserting—without any support in the record—that there were no benefits to making Tennis Channel (an established network with strong audience appeal) more widely available. *See* Comcast Br. 14, 31. Moreover, Comcast ignores undisputed evidence that it "would have paid substantially less to carry Tennis Channel broadly than it did to carry Golf Channel and Versus broadly." *Order*, ¶78 (J.A.1415). For example, in 2010, Comcast's costs of carrying Golf Channel and Versus were [redacted], respectively, whereas its costs of carrying Tennis Channel at the

same level of distribution would have been only [redacted]. *Id.* Thus, Comcast subjected Tennis Channel to a "cost-benefit" test for carriage that it concededly did not even apply to its own affiliates.

The Commission also had good reason to find unpersuasive Comcast's attempt to justify its carriage decision on the basis of its poll of regional executives. *See* Comcast Br. 31-32; *Order*, ¶¶80-81 (J.A.1416). Although Comcast undertook the formality of asking its regional executives whether there was any subscriber interest in Tennis Channel, it rejected Tennis Channel's carriage proposal even before those executives had an adequate opportunity to respond. *Order*, ¶80 (J.A.1416). Moreover, "Comcast had earlier overridden regional executives' decisions to carry Tennis Channel more broadly," thereby sending the unmistakable signal that Comcast "did not favor broad carriage of Tennis Channel." *Id.*

The FCC also acted within its discretion in rejecting Comcast's claim that the carriage decisions of other MVPDs established that Comcast did not engage in affiliation-based discrimination. *Id.*, ¶¶70-75 (J.A.1411-14). In fact, those carriage decisions supported the opposite inference. Relying upon data derived from Comcast's own economic expert, the FCC explained that Comcast carries Tennis Channel at [redacted] the average "penetration rate" (*i.e.*, the percentage of an MVPD's total subscribers) of other MVPDs;

at the same time, it carries Golf Channel and Versus at penetration rates that are [redacted], respectively, than the average of other MVPDs. *Id.*, ¶72 (J.A.1412). The FCC fully considered Comcast's evidence concerning the carriage decisions and data of other MVPDs (including individual MVPDs and subcategories of MVPDs), *see* Comcast Br. 33-35, but reasonably concluded that it was more "appropriate to view the market as a whole, and include in the comparison [all] MVPDs, [including those] that Comcast sees as its chief competitors," *i.e.*, DISH and DirecTV. *Order*, ¶71 (J.A.1411). *See Consolo v. FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

Comcast contends that the FCC abused its discretion by including DISH and DirecTV in the overall industry penetration figures because those MVPDs have a small equity interest in Tennis Channel. Comcast Br. 34-35.[5] But the Commission fully explained its reasons for doing so and, in any event, made clear that its conclusion would not have changed even if it had excluded consideration of the two satellite providers. *Order*, ¶75 (J.A.1414).

[5] *See* TC Exh. 14 (Solomon) at 5 (J.A.1030) (DIRECTV and the Dish Network have equity shares in Tennis Channel of approximately [redacted], respectively).

As an initial matter, the agency pointed out that ignoring the carriage decisions of those providers would not make sense because DirecTV and DISH are the second and third largest MVPDs in the nation and the closest rivals to Comcast for purposes of examining circumstantial evidence of affiliation-based discrimination. *Id.*, ¶74 & n.218 (J.A.1413, 1412). Moreover, as the agency found (and Comcast does not even attempt to refute), the record showed that the equity interests of those satellite providers played no role in the level of carriage they gave to Tennis Channel. *Id.*, ¶73 & n.218 (J.A.1412); *see also* Tr. 506-08 (Solomon) (J.A.201-03) (testifying that level of carriage was determined for both DirecTV and DISH without regard to considerations of affiliation). Just as the Commission did not simply assume that Comcast's equity interest necessarily meant that it discriminated in favor its affiliated networks, so too the Commission did not simply assume that DirecTV or DISH discriminated in favor of Tennis Channel.

In any event, the Commission explained that, even if it excluded consideration of how other MVPDs treated Tennis Channel, there was abundant independent evidence supporting its conclusion that Comcast had discriminated against Tennis Channel on the basis of affiliation (including, for example, "the evidence that Comcast treats affiliates like 'siblings' and

non-affiliates like 'strangers,'" as well as Comcast's failure "to engage in any actual cost-benefit analysis."). *Id.*, ¶75 (J.A.1414). Thus, Comcast's criticism of the FCC's metric is ultimately irrelevant to the agency's conclusion.

To be sure, the FCC recognized that other MVPDs generally carry Golf Channel and Versus more broadly than Tennis Channel. *Id.*, ¶73 (J.A.1412). In light of "Comcast's substantial market share and the fact that other MVPDs tend to treat Tennis Channel better and Golf Channel and Versus worse than Comcast," however, the agency concluded that "this difference in carriage is best explained by the ripple effect." *Id.*

Comcast misses the point in contending that the ripple effect rests on an "irrational" theory of "lemming"-like action under which one MVPD is presumed to "blindly follow" even "economically unsound" decisions of another MVPD. Comcast Br. 35. To the contrary, the ripple effect—which Comcast's own executives acknowledged—reflects the common-sense proposition that broad carriage on a market leader like Comcast greatly enhances a network's brand and attractiveness, thereby encouraging other MVPDs to likewise distribute the network broadly. *See* pp. 17-18, *supra*. Because Golf Channel and Versus (but not Tennis Channel) benefit from a prime position on Comcast's huge distribution platform, they are able to

enhance their brands and attractiveness to other programming distributors in a way that Tennis Channel is not. *See* n.2, *supra*. Thus, it is unsurprising that other MVPDs would afford those Comcast-affiliated networks broader carriage than otherwise would be the case if Comcast had not granted them dramatically preferential treatment (over Tennis Channel) to begin with.

Comcast's attempt to dismiss the ripple effect is particularly unpersuasive in light of its own actions. Comcast itself used the term "ripple effect" to express its concern that the repositioning of [redacted]. *Order*, ¶73 (J.A.1412); TC Exh. 38 (J.A.1172); Tr. 1901-04 (Rigdon) (J.A.246-49). And Comcast's Vice-President Gregory Rigdon, who replaced Mr. Bond as the official responsible for Comcast's carriage decisions, expressly acknowledged this effect. Tr. 1903-04 (Rigdon) (J.A.248-249); *see also* TC Exh. 16, at 41, 62-63, 70 (Singer) (J.A.1120, 1141-42, 1149) (confirming ripple effect based on knowledge as an expert in competition economics); Tr. 722 (Brooks) (J.A.215) (same, based on "own experience in this field"); TC Exh. 14, at 17 (Solomon) (J.A.1402) ("MVPDs often inquire about Tennis Channel's level of carriage on Comcast" and "often follow Comcast's lead.").

2. The FCC's Finding Of Affiliation-Based Discrimination Is Firmly Grounded In The Statutory Text And Legislative History, And Is Consistent With Discrimination Law In General.

Unable to grapple with the substantial evidence supporting the Commission's finding of affiliation-based discrimination, Comcast claims that the agency impermissibly transformed section 616 from a discriminatory treatment provision into a disparate impact provision. *See* Comcast Br. 29.

Comcast misconstrues the FCC's analysis. As the agency explained, comparing a defendant's treatment of similarly situated persons as circumstantial evidence of *intentional* discrimination is a "hallmark of discrimination law." *Order*, ¶95 & n.305 (J.A.1422, 1423) (citing cases; emphasis added); *accord ID*, ¶105 (J.A.1364). The FCC's analysis in this case was consistent with that approach, and appropriately looked to evidence (including circumstantial evidence) of intentional discrimination on the basis of affiliation. *Id.*

In this regard, the Commission's analysis comports with legislative history showing that Congress intended the FCC, in resolving program discrimination complaints, to be "guided" by the "extensive body of law . . . addressing discrimination in normal business practices." House Report at 110. Under that body of law, plaintiffs in discrimination cases can (and do) establish intentional discrimination through a showing of disparate treatment

of similarly situated persons. *See, e.g.*, *Alliotta v. Bair*, 614 F.3d 556, 561 (D.C. Cir. 2010). Moreover, it is well-established that the plaintiff in a discrimination case is *not* required "to submit direct evidence of discriminatory intent." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 n.3 (1983). Rather, it may establish discriminatory intent through circumstantial evidence, such as evidence that the similarly situated persons have been treated differently, *see Palmer v. Shultz*, 814 F.2d 84, 115 n.23 (D.C. Cir. 1987), and that "defendant's explanation [of nondiscrimination] is unworthy of credence." *Desert Place, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

Comcast thus confuses (a) the Commission's analysis of differential treatment of similarly situated networks as circumstantial evidence supporting an inference of intentional discrimination with (b) an analysis—which the Commission did not undertake—that exclusively focuses on disparate impact of actions rather than disparate treatment. Comcast Br. 20. Contrary to Comcast's assertions, the Commission clearly required evidence of intentional discrimination. *See Order*, n.138 (J.A.1402) ("Section 616 does require a showing of intentional or deliberate discrimination. We note, however, that this showing can be made via the use of either direct or circumstantial evidence of discrimination."); *see also id.*, ¶95 (J.A.1422).

Indeed, after finding that Comcast treated a similarly situated network differently, it examined additional evidence that Comcast discriminates on the basis of affiliation (including Comcast's admissions about the "different level of scrutiny" "sibling[]" networks receive, and the consistent correlation between affiliation and broad carriage on Comcast cable systems). *Order*, ¶¶69-87 & n.306 (J.A.1411-19, 1423).[6]

B. The Commission Reasonably Construed And Applied The Unreasonable Restraint Standard.

Section 616 forbids "a multichannel video programming distributor" from "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation." 47 U.S.C §536(a)(3). Here, the FCC found that Comcast unreasonably restrained Tennis Channel's ability to compete fairly in various ways, including greatly diminishing its revenues and, in turn, harming its ability to compete for the same advertising accounts and programming rights sought by Comcast's favored affiliates. That holding is based on a reasonable

[6] For the same reasons, Comcast is wrong in contending (Br. 28) that the FCC applied a discrimination standard indistinguishable from that applied in cases involving claims of discrimination by common carriers under 47 U.S.C. §202(a).

construction of the ambiguous terms of the Communications Act and is supported by substantial evidence.

1. The FCC Reasonably Interpreted The Unreasonable Restraint Standard Not To Incorporate Antitrust Principles.

Comcast's primary attempt to rebut the Commission's findings is to claim that, as a matter of law, the Commission had no discretion other than to apply principles borrowed from the antitrust laws to determine whether Comcast violated section 616 of the Communications Act. Comcast argues that by prohibiting only discrimination that "unreasonably restrain[s] the ability of an unaffiliated programming vendor to compete fairly," Congress evinced a clear intent to borrow from the "essential-facilities doctrine"[7] that some courts have applied under the antitrust laws. Comcast Br. 20-25. According to Comcast, this deprived the Commission of discretion to apply any other standard. *Id.*

"[T]he short answer" to Comcast's argument "is that Congress did not write the statute that way." *Corley v. United States*, 129 S. Ct. 1558, 1567

[7] That doctrine holds that a monopolist must share any "essential facility" it operates that is needed by competitors. *See, e.g.*, 3B Areeda & Hovenkamp, ANTITRUST LAW ¶ 771, at 192-193 (3d ed. 2008). The Supreme Court has acknowledged "the 'essential facilities' doctrine crafted by some lower courts," but has never itself "recognized such a doctrine." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004).

(2009) (internal quotation marks omitted). If Congress wanted to bind the Commission to apply antitrust law, it easily could have done so in the text of section 616. For instance, given that essential-facilities cases predated the 1992 Cable Act, Congress could have referenced that doctrine. But the text of section 616 does no such thing. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (deferring to FCC's reasonable construction of the Communications Act "if Congress has not unambiguously foreclosed the agency's construction").

As the Commission explained, section 616—a provision designed to promote not only competition but also diversity of information sources in the MVPD market (*see Order*, ¶99 (J.A.1424))—does not "speak in terms of 'access to a necessary service'" nor does it otherwise make any reference to essential facilities or any other antitrust doctrine. *Id.*, ¶¶40-41 (J.A.1400-01). By using inherently ambiguous statutory language—"unreasonably restrain" an unaffiliated programmer's ability to "compete fairly"—and by directing the FCC to implement and enforce section 616, Congress delegated authority to the agency to delineate the contours of that statutory obligation in a reasonable fashion. *See, e.g., Capital Network Sys.*, 28 F.3d at 204 (because "'reasonable[]' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords

them.") (citing *Chevron*, 467 U.S. at 837); NCTA Br. 17 (acknowledging that the word "unfair" is "'inherently ambiguous'") (quoting *Cablevision*, 649 F.3d at 722); *see also AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 397 (1999) ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.").[8]

The Commission's conclusion that section 616 has meaning independent of the antitrust laws is consistent with the case law. It is well established that, in interpreting and applying provisions of the Communications Act that promote competition, the FCC is not cabined by "the letter of the antitrust laws." *United States v. FCC*, 652 F.3d 72, 88 (D.C. Cir. 1980 (*en banc*); *see also Turner Broad. Sys v. FCC*, 520 U.S. 180, 192, 194 (1997) ("*Turner II*") (FCC is not compelled to interpret Communications Act provision prohibiting anticompetitive behavior in a manner that reaches only conduct that "rises to the level of an antitrust violation"); *Goldwasser v. Ameritech Corp*., 222 F.3d 390, 399 (7th Cir. 2000) (rejecting argument that a Communications Act provision imposes duties that are "coterminous with the

[8] Comcast is unable to avoid routine application of *Chevron* deference by resting on the First Amendment. *See Cablevision*, 649 F.3d at 709 ("we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem.") (citation omitted). Because Comcast's First Amendment arguments lack merit (*see* Point II, *infra*), *Chevron* applies with full force.

duty of a monopolist to refrain from exclusionary practices."). If Congress wanted to vary that long-held understanding, it could have done so, but nothing in the text of section 616 establishes that it did so here.[9]

To the contrary, the statutory text confirms the reasonableness of the FCC's interpretation. By its terms, section 616 applies to *all* "multichannel video programming distributors," not just those cable companies with the kind of bottleneck power to which the essential-facilities doctrine would apply. *Order*, ¶40 & n.129 (J.A.1400). Congress's decision to extend section 616's prohibitions to satellite providers and other MVPDs that have never possessed bottleneck power would be inexplicable if that provision were intended to reach only those entities controlling essential bottleneck facilities.

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[9] When Congress wishes to bind the Commission to antitrust concepts, it does so explicitly. For example, section 613(f) of the Communications Act requires the FCC when regulating the total number of subscribers served by a cable operator to "take particular account of the *market structure* . . . including the nature and *market power* of the local franchise." 47 U.S.C. §533(f)(2)(C) (emphasis added). Section 616, by contrast, contains no such language unambiguously directing the Commission to incorporate antitrust principles into its analysis of competition. For this reason, amicus National Cable & Telecommunications Association's reliance on *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), and *Comcast Corp. v. FCC*, 579 F.3d 1 (2009), is misplaced. *See* NCTA Br. 18-19 (contending that FCC failed to adequately address Comcast's alleged lack of market power). Those cases addressed FCC regulations promulgated under section 613(f)—the provision that, unlike section 616, expressly requires consideration of market power as part of the agency's analysis. *See Time Warner*, 240 F.3d at 1133-1134; *Comcast*, 579 F.3d at 3; 47 U.S.C. §533(f)(2)(C).

By contrast, Congress has specifically limited other provisions of the Communications Act to cable operators and their affiliates. *See, e.g.*, 47 U.S.C. §§534-535 ("must-carry" provisions).

The legislative history also provides strong support for the FCC's reading of section 616. The House Report accompanying that provision makes clear that Congress' intention was "not to amend existing antitrust laws" but rather to "provide[] *new* FCC remedies." House Report at 111 (emphasis added). And in discussing the competition-enhancing provisions of the 1992 Cable Act more generally, the Report underscored that "traditional antitrust analysis has not been, and should not be, the sole measure of concentration in media industries. . . . The Committee believes that concentration of media presents unique problems that must be considered by the [Federal Communications] Commission." *Id.* at 42. Under Comcast's cramped interpretation, section 616 would proscribe only conduct that already is barred by the antitrust laws, and thus "would frustrate Congress's clear purpose to grant the Commission new authority to address concerns specific

to MVPDs and affiliated programming." *Order*, ¶41 (J.A.1401).[10] Moreover, by relegating section 616 to "a redundant analogue to antitrust law," *id.*, Comcast's interpretation violates "one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 447 (D.C. Cir. 2012) (citation omitted). In the guise of interpreting section 616 in accordance with "settled background legal principles" (Comcast Br. 13), Comcast would effectively render that section a nullity.

Asserting that vertical integration "is often pro-competitive and can enhance efficiency," Comcast contends that the FCC's application of section 616 in this case impermissibly extends to "reasonable" restraints on competition. Comcast Br. 24 (emphasis omitted). Comcast has misinterpreted the FCC's *Order*. The *Order* does not "permit[] [s]ection 616 to be satisfied by any 'restraining effect' on competition—whether reasonable or not." *Id.* at 26 (emphasis omitted). Comcast never argued, and the record

[10] The same problem arises even if, as Comcast contends, section 616 were "narrowe[r]" than section 1 of the Sherman Act. *See* Comcast Br. 23 (emphasis omitted). Whether section 616 is narrower than that provision or coterminous with it, it would serve no independent function under Comcast's reading of the statute: every section 616 violation already would constitute a violation of section 1 of the Sherman Act.

does not show, that its drastically unfavorable treatment of Tennis Channel (as compared with its treatment of Golf Channel and Versus) was "reasonable" because it created enhanced efficiencies or other alleged positive effects of vertical integration. Rather, as discussed below, the FCC found that Comcast used its position as the leading distributor of video programming to give an unfair advantage to its affiliated programmers, while unfairly excluding Tennis Channel—specifically on the basis of its unaffiliated status—and thereby restrained its ability to compete in the video programming marketplace. *See* Point I.B.2, *infra*. That conclusion is wholly consistent with the statutory text.

2. Substantial Evidence Supports The FCC's Conclusion That Comcast Unreasonably Restrained Tennis Channel's Ability To Compete.

Having reasonably rejected Comcast's argument for narrowing section 616 to reach only violations of the antitrust laws, the FCC found that Comcast's discriminatory conduct unreasonably restrained Tennis Channel's ability to compete fairly in the video programming marketplace. For example, by depriving Tennis Channel of the same level of distribution that it accorded to its own affiliates (Golf Channel and Versus), Comcast foreclosed Tennis Channel from access to approximately [redacted] additional subscribers on Comcast systems alone. *Order*, ¶83 (J.A.1417); *ID*, ¶82

(J.A.1356). While Comcast's own affiliates benefited from access to [redacted] of Comcast's subscribers, Tennis Channel's placement on the Sports Tier enabled it to access only about [redacted] of those subscribers. *Order*, ¶68 (J.A.1411). And, to make matters worse, Tennis Channel's total national audience was likely further diminished by the ripple effect of Comcast's carriage decisions on other MVPDs. *Order*, ¶83 (J.A.1417); *see also* pp. 17-18, 35-36, *supra*.

Because Tennis Channel's license fees are computed on a per-subscriber basis, even under Comcast's own figures, this drastic loss of audience translated into lost revenues of between [redacted] over the remaining term of the parties' carriage agreement. Comcast Exh. 588 (J.A.713). As the FCC found, this severe reduction in audience size and revenues materially affected Tennis Channel's ability to compete for valuable programming rights and advertising dollars—while at the same time providing a significant competitive advantage to Comcast's affiliates. *Order*, ¶¶83-87 (J.A.1417-19). In this regard, the agency explained that Comcast-affiliate Versus "competes directly with Tennis Channel for programming rights," and therefore "directly benefits from the difficulties in acquiring programming rights that Tennis Channel faces as a consequence of more limited carriage, a detrimental effect that even Comcast executives have

acknowledged." *Id*., ¶85 & nn. 271, 272 (J.A.1418). The undisputed record evidence shows, for example, that Tennis Channel's limited distribution was the reason the network did not secure the rights to broadcast portions of important sports events such as the [redacted]. *Id.*, ¶84 & n.263 (J.A.1417).

Abundant record evidence also supports the FCC's determination that Comcast's discriminatory distribution dramatically reduced the advertising revenues needed by Tennis Channel to remain competitive in the video marketplace—and, in particular, to compete with Versus and Golf Channel for the same advertising accounts. *Order*, ¶¶84-86 (J.A.1417-19). For example, Tennis Channel's Vice-President of Advertising Sales testified that its limited distribution is "the single most prevalent reason" that advertisers give for refusing to purchase advertising on the network. *Id.*, ¶84 (J.A.1417); TC Exh. 15 at 2, 5 (Herman) (J.A.1059, 1062). Relegated to the Sports Tier, Tennis Channel was unable to reach the minimum 40 million viewer threshold generally necessary to attract national advertisers. *Id.*, ¶84 (J.A.1417). Thus, prominent advertisers such as [redacted] sharply curtailed or simply declined to place any advertising on the network. *Id.*

Comcast does not challenge any of the factual findings underlying the FCC's conclusion that Comcast unreasonably restrained Tennis Channel's ability to compete fairly. Instead, it argues that these sorts of competitive harms must exist in every program carriage case and thus "cannot constitute an unreasonable restraint" as a matter of law. Comcast Br. 13-14. But the FCC did not find an unreasonable restraint merely because Tennis Channel could "secure *more* viewers and advertising revenue via broader carriage" (*id.* at 13). Rather, it explained that the harms caused by Comcast's discrimination were "of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks." *Order*, ¶84 (J.A.1417). Moreover, the severe harms to Tennis Channel were not limited to its [redacted] losses in revenues; they extended to the exclusionary impact of Comcast's discrimination (including Tennis Channel's diminished ability to compete against Comcast's favored affiliates for programming rights and advertising accounts). Those harms are not present in every case: an MVPD's conduct in favoring its affiliate will not always afford that affiliate a competitive advantage in competing for advertising dollars and programming rights, as the FCC found here.

Comcast further contends that it does not unreasonably restrain Tennis Channel from competing in the video programming marketplace because it

makes the network available to almost all its subscribers on the Sports Tier for an added fee. As the FCC pointed out, however, the fact that only approximately [redacted] of Comcast subscribers pay that additional fee is highly probative evidence that Tennis Channel's placement on the Sports Tier serves as a significant impediment to the ability of Tennis Channel to attract those subscribers. *Id.*, ¶87 (J.A.1419).

Equally flawed is Comcast's claim that Tennis Channel's ability to fairly compete could not have been unreasonably restrained because the network still may reach viewers who subscribe to MVPDs other than Comcast. There is no basis for immunizing an MVPD from liability under section 616 where it can point to the willingness of some *other MVPD* to carry the complainant's network in a nondiscriminatory manner. The statutory text refers to discrimination that "unreasonably restrain[s]" an unaffiliated network's ability to compete fairly, 47 U.S.C. §536(a)(3); it does not require complete foreclosure from any alternative means of distribution.[11]

[11] Indeed, even the antitrust laws do not require complete foreclosure. *See, e.g., In the Matter of Time Warner Inc.*, FTC Docket No. C-3709 (Statement of Chairman Pitofsky, and Comm'rs Steiger & Varney), available at http://www.ftc.gov/os/1997/02/c3709other.htm (concluding, under Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act that the ability of an MVPD with a 17% market share to exclude unaffiliated programming rivals from its distribution network could have "critical" effects on competitive viability).

In any event, as Comcast serves nearly a quarter of all pay-TV homes in the nation, its discriminatory conduct can (and does) have far-reaching influence in the marketplace. *See Order*, ¶87 (J.A.1419). Dr. Hal Singer, a respected competition scholar, testified that control of access to 20 percent of the market could be competitively significant; Comcast's market share significantly exceeds that 20 percent threshold. *See* TC Exh. 16 at 70 (¶101) (Singer) (J.A.1149). Thus, ample evidence supported the FCC's conclusion that Comcast unreasonably restrained Tennis Channel's ability to fairly compete by foreclosing the network from nearly 25 percent of the entire MVPD market—as well as a significant percentage of subscribers in major regional markets—while at the same time providing dramatically broader distribution to its affiliated networks. *Order*, ¶87 (J.A.1419).[12] Indeed, this is precisely the type of competitive injury that Congress had in mind when enacting the 1992 Cable Act. *See, e.g.*, House Report at 42 (noting that the largest cable operator at the time "control[led] access to almost 25 percent of all U.S. cable subscribers" and this percentage "may be quite significant

[12] For similar reasons Comcast is wrong in contending (Br. 29-30) that Tennis Channel's ability to fairly compete could not have been unreasonably restrained because the FCC found it is similarly situated to Versus and Golf Channel. A network like Tennis Channel may have obtained the viewers, programming, and advertising sufficient to show it is similarly situated with the defendant MVPD's affiliated networks, and yet be unreasonably restrained in its ability to more effectively compete against those affiliates.

depending on the subscriber level needed to launch and *sustain* a cable programming service.") (emphasis added).

II. THE *ORDER* IS CONSISTENT WITH THE FIRST AMENDMENT.

A. The *Order* Is Subject To Intermediate Scrutiny.

The FCC's adjudication of Tennis Channel's complaint and equal-carriage remedy are content-neutral actions that are subject to intermediate scrutiny under the First Amendment. "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis omitted). Thus, governmental action "that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

The FCC's purpose here was to ensure that Comcast does not leverage its position as the leading distributor of video programming to favor its affiliated networks—and to discriminate against Tennis Channel, an unaffiliated network—in a way that unreasonably restrains Tennis Channel's ability to fairly compete in the video programming market. That content-neutral action is designed "to prevent [the] cable operator[] from exploiting [its] economic power," by harming fair competition and diversity of information sources—not to favor or penalize "speech on the basis of the

ideas or views expressed." *Turner II*, 520 U.S. at 186. It implements a statute that "regulat[e] cable . . . operators on the basis of the 'economics of ownership,' a characteristic [that is] unrelated to the content of speech." *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996).

Comcast argues that it was unlawful for the agency to examine whether Tennis Channel is "similarly situated" with Golf Channel and Versus for purposes of examining evidence of affiliation-based discrimination. According to Comcast, this similarly-situated analysis entails a content-based restriction of speech that triggers "strict scrutiny" and is thus presumptively unconstitutional. Comcast Br. 43-50. But in front of the ALJ and the Media Bureau (and before the ALJ concluded, based on substantial record evidence, that the three networks are similarly situated), Comcast specifically *urged* the agency to employ the very similarly-situated analysis that it now argues violates its First Amendment rights. *See, e.g.*, Comcast Answer ¶¶40-44 (J.A.95-98) ("Absent direct evidence of discriminatory intent, a complainant may prevail only if it can show both that (a) the defendant treated *similarly situated* entities dissimilarly, and (b) the defendant's non-discriminatory rationale for such disparate treatment was a mere pretext for discrimination.")

(citation omitted; emphasis altered).[13] Only after Comcast lost on the evidence did its legal theory change.

New Radio v. FCC, 804 F.2d 756, 760 (D.C. Cir. 1986), forbids that type of "gamesmanship." In that case, an FCC license applicant presented its case to an ALJ based on a legal theory that the ALJ subsequently rejected. Upon further review before the FCC, the applicant argued that its own theory was "not the proper grounds to begin with," and—like Comcast here—presented an entirely different theory of the case. *Id.* This Court held that the applicant's new theory was "effectively waived by [its] failure to raise the issue before the ALJ." *Id.* The same conclusion should apply here.

In any event, Comcast's argument is meritless. The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner I*") (quoting *Ward*, 491 U.S. at 791). The FCC did nothing of the sort here. Rather, it considered the programming of the three networks

[13] Comcast specifically urged the ALJ to scrutinize the content of the three networks' programming, pointing to alleged differences between Tennis Channel and Comcast's affiliates within various subcategories of sports programming, such as event (*e.g.*, tournaments) versus non-event programming. *ID*, ¶29 (J.A.1331). Comcast also urged consideration of alleged differences in the "images" projected by the three networks. *See id.*, ¶¶30-36 (J.A.1331-34).

as one consideration (among others) to determine whether there was circumstantial evidence of affiliation-based discrimination. That analysis required the agency to consider whether the networks compete for the same audiences, advertisers, and programming rights. The *particular* content of the programming at issue was irrelevant; the only relevant fact was that it was similar. As shown above, the FCC's analysis simply tracked the approach of discrimination law in general, which routinely looks to disparate treatment of similarly situated persons as circumstantial evidence of intentional discrimination. *See* pp. 36-39, *supra*. "[T]here is absolutely no evidence, nor even any serious suggestion, that the Commission [acted] to disfavor certain messages or ideas." *Cablevision*, 649 F.3d at 717 (applying intermediate scrutiny).

Indeed, this Court has recognized that intermediate scrutiny applies even in those instances where the government's action "might in a formal sense be described as content-based." *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998). In *BellSouth*, for example, the Court addressed a provision of the Communications Act that "define[d] the field of expression to which it applie[d] by reference to a set of categories" defined by subject-matter, such as "'news,' 'entertainment,' and 'research material.'" *Id.* In rejecting a First Amendment challenge, the Court explained that

"intermediate scrutiny is appropriate because . . . there is simply no hint that 'the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Id.* (quoting *Turner I*, 512 U.S. at 642). The same conclusion applies here. The goal of the FCC's *Order*—"promoting diversity and competition in the video programming market" (*Order*, ¶¶99-100 (J.A.1424-25))—"is independent of content and viewpoint." *BellSouth*, 144 F.3d at 69. Intermediate scrutiny therefore applies.

Comcast accuses the FCC of "conflating *content*-based rules with viewpoint-based restrictions." Comcast Br. 45. But Comcast's quarrel is ultimately with the test for content-based regulation of speech enunciated by the Supreme Court. *See Turner I*, 512 U.S. at 642; *Ward*, 491 U.S. at 791 ("The government's purpose is the controlling consideration. . . . Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech") (citation and internal quotation marks omitted). In any event, Comcast's argument is a red herring: Comcast does not claim (nor could it) that the *Order* engages in any sort of viewpoint-based discrimination. And the cases on which it relies are far afield, as all involved government actions that banned or burdened speech expressly based on its content and in a manner that raised suspicion

that the government's underlying objective was to restrict speech because of the ideas or messages it conveyed. *See, e.g.*, Comcast Br. 45 (discussing cases addressing "prohibition[s] of public discussion of an entire topic").[14]

Finally, the suggestion that any carriage requirement inherently triggers strict scrutiny because it amounts to "compelled speech" is flatly inconsistent with Supreme Court precedent. *See, e.g.*, *Turner I*, 512 U.S. at 653-64 (cable must-carry rules that compel speech are subject to intermediate scrutiny). In neither object nor form does the FCC's *Order* "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642.

B. The *Order* Satisfies Intermediate Scrutiny.

A content-neutral governmental action will withstand intermediate scrutiny if it: (1) "advances important governmental interests unrelated to the suppression of free speech"; and (2) "does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189 (citation omitted).

[14] *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (right-of-reply statute applicable to speech critical of political candidates, thereby forcing them to publish a counterbalancing message that effectively would dilute their original message); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (statute criminalizing depictions of animal cruelty).

1. The FCC's Action Directly Advances Substantial Government Interests.

The FCC's action promotes competition in the video programming market and "diversity" in the available sources of video programming, *see Order*, ¶104 (J.A.1426), both of which are "important governmental objectives unrelated to the suppression of speech." *Time Warner*, 93 F.3d at 969.

The "[g]overnment's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Turner I*, 512 U.S. at 664. And "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Id.* at 663. Indeed, the First Amendment stems from the premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (citation omitted).

As the Supreme Court has made clear, these important governmental interests are not constrained by principles of antitrust law. *See Turner II*, 520 U.S. at 194 ("Federal policy . . . has long favored preserving a multiplicity of broadcast outlets *regardless of whether the conduct that threatens it is*

motivated by anticompetitive animus or rises to the level of an antitrust violation.") (emphasis added). Thus, there is no more basis in the First Amendment than there is in the text of the program carriage statute to conclude that section 616 must be cabined by antitrust law doctrines (including requirements of market power or bottleneck control). Contrary to the claims of Comcast and its amicus (Comcast Br. 20; NCTA Br. 17), the Supreme Court in the *Turner* cases never suggested that any carriage requirement imposed on cable operators—as a constitutional minimum—must target the exercise of monopoly "bottleneck" power. Rather, the Court made clear that the government may properly rely on the distinct, but related, interests in "promoting fair competition" and diversity of information sources. *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 189-190; *see also Cablevision*, 649 F.3d at 711.[15]

[15] Because Comcast relies on the mistaken premise that any constitutional application of section 616 must target the exercise of "bottleneck" power (Comcast Br. 20; *see also* NCTA Br. 22), its argument that cable operators no longer exercise such power (Comcast Br. 51-53) is beside the point. In any event, this Court observed only recently that, "[w]hile cable no longer controls 95 percent of the MVPD market, as it did in 1992, [it] still controls two thirds of the market nationally," and "enjoy[s] [even] higher shares in several markets," some of which remain "highly susceptible to near-monopoly control." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010); *Cablevision*, 649 F.3d at 712. Here, as the FCC found, Comcast "represents nearly 24 percent of the [MVPD] market and has even greater influence on the market due to the ripple effect." *Order*, ¶87

Like the underlying statute, the FCC's *Order* redresses harms to fair competition and diversity of information sources by requiring Comcast to refrain from its exclusionary and affiliation-based discrimination. As discussed above, overwhelming record evidence showed that Comcast's discriminatory treatment of Tennis Channel (and favoring of its own affiliates) severely restrained Tennis Channel's ability to compete in the video programming market, including its ability to fairly compete for viewers, advertisers, and programming rights. *Order*, ¶¶45-87 (J.A.1402-19); *see also* Point I.B.2, *supra*. By ordering Comcast to cease its discriminatory treatment, the *Order* directly furthers the government's substantial interests. *Turner II*, 520 U.S. at 213-14.

2. The Equal-Carriage Remedy Does Not Burden Substantially More Speech Than Necessary.

To satisfy intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. A content-neutral regulation will be sustained if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (quoting *Ward*, 491 U.S. at 799).

(J.A.1419). Indeed, its market shares exceed [redacted] in seven of the top ten MVPD markets, with shares above [redacted] in Philadelphia and Chicago. *Id*.

The FCC's equal-carriage remedy comfortably satisfies that standard. The requirement is narrowly drawn to address Comcast's violation of section 616: Comcast's prohibited conduct consists of anticompetitive discrimination on the basis of affiliation, and the remedy orders Comcast to stop such discrimination by affording Tennis Channel treatment that is equal to that it affords to its own affiliates.[16] The remedy is also sensitive to Comcast's First Amendment rights because it leaves to the cable operator's discretion whether to carry all three networks on broadly penetrated tiers, to carry all three networks on the Sports Tier or some intermediate tier, or not to carry the three networks at all. *Order*, ¶90 & n.309 (J.A.1421, 1423).

Comcast faults the FCC for not requiring Comcast to carry Tennis Channel on the intermediate Digital Preferred Tier, which it asserts is a "less intrusive remedy" than the one adopted by the FCC. Comcast Br. 56. In fact, that alternative remedy would impose a greater burden on Comcast's editorial discretion than the equal-carriage requirement because it would compel Comcast to carry a specific network to a particular audience. Moreover,

[16] NCTA argues (Br. 10) that the remedy is overly broad because it required equal carriage on a national basis while, according to NCTA, Comcast may possess bottleneck power only in individual local markets. That argument is misconceived because, as shown above (pp. 42-43, 58-59, *supra*) neither the text of the statute nor the First Amendment requires proof of bottleneck or monopoly control to establish a violation of section 616.

Comcast never argued before the agency that, in the event of finding a violation of section 616, carriage on the Digital Preferred Tier would be a less speech-restrictive remedy. *See Order*, n.290 (J.A.1420).

Comcast also argues that the FCC's remedy is unconstitutionally overbroad insofar as it "may" require Comcast to pay additional compensation to Tennis Channel. *Id.* On its face, that claim is speculative—and hence unripe—because it is entirely uncertain how Comcast will elect to comply with the equal-carriage remedy (and thus whether the remedy will require Comcast to pay any increased license fees). *See Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009).

Contrary to Comcast's assertion (Comcast Br. 41), it was entirely proper for the FCC to specify that, if Comcast moves Tennis Channel to a more widely distributed tier, the company "must pay Tennis Channel any additional compensation" required by the parties' contractual arrangements for broader carriage. *Order*, ¶92 (J.A.1422). A "remedy" that permits Comcast to distribute Tennis Channel's programming to additional Comcast subscribers for free effectively would reward Comcast for violating section 616. Comcast's suggestion that the *Order* precludes the parties from negotiating appropriate license fees for any broader carriage is mistaken. The FCC "did not prescribe specific license fees," but instead make clear that the

fees for any broader carriage would be governed by existing or future contractual arrangements between Comcast and Tennis Channel. *Id.* There is nothing "unjustifiable" (Comcast Br. 41) about holding Comcast to its contractual commitments.

III. THE COMMISSION REASONABLY CONSTRUED ITS STATUTE OF LIMITATIONS RULE IN CONCLUDING THAT TENNIS CHANNEL'S COMPLAINT WAS TIMELY FILED.

Section 76.1302(f)(3) of the FCC's rules provides that a section 616 complaint must be filed within one year after the party "has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of" the program carriage rules. 47 C.F.R. §76.1302(f)(3) (2010).[17] Tennis Channel notified Comcast of its intent to file a complaint in December 2009 and filed its complaint in January 2010. Tennis Channel also filed its complaint within one year of the date of the allegedly discriminatory conduct, *i.e.*, Comcast's refusal in June 2009 to move Tennis Channel to more widely distributed tier. *Order*, ¶30 (J.A.1397). The FCC's determination that Tennis Channel's complaint was timely is thus based upon a straightforward and textual reading of section 76.1302(f)(3). *See id.*, ¶¶30-34 (J.A.1397-99). Because that reading is neither "plainly

[17] We refer to the limitations rule in effect when Tennis Channel filed its complaint. That rule, which was amended in October 2011, is now found at section 76.1302(h).

erroneous [n]or inconsistent with" the agency's rule, it "is 'entitled to controlling weight.'" *Star Wireless*, 522 F.3d at 473.

Comcast contends that the FCC's reading of section 76.1302(f)(3) is at odds with the FCC's "historical understanding" that the provision applies "only where an MVPD denies or refuses to acknowledge a request to negotiate for carriage." Comcast Br. 60. That claim lacks merit. While the text of the rule as originally promulgated was limited to denials or to refusals to negotiate for carriage, "the Commission removed th[at] limiting language in 1994." *Order*, ¶32 (J.A.1398). Thus, Comcast bases its reading on limiting language that was *deleted* from the rule 18 years ago.

Comcast also argues that "[b]y seeking an order that compels Comcast to carry it more broadly," Tennis Channel is "attempting to rewrite the terms of [its] contract" with Comcast. It contends (Br. 60) that the applicable time limit is therefore provided by section 76.1302(f)(1), which requires a party to file a program carriage complaint within one year of the date upon which it enters into a carriage contract "that a party alleges to violate one or more of the [Commission's] rules." 47 C.F.R. §76.1302(f)(1) (2010).

This argument fares no better. By its terms, section 76.1302(f)(1) applies only when a *contract* is alleged to violate the FCC's rules implementing section 616. Here, Tennis Channel's complaint made no

allegation that the 2005 carriage agreement between the parties was itself unlawful. Rather, it complained that Comcast's subsequent refusal in 2009 to move Tennis Channel to a more widely distributed tier violated section 616. *Order*, ¶29 (J.A.1397). Because Tennis Channel does not contend that the contract itself violates FCC rules, but instead maintains that Comcast's discriminatory carriage of Tennis Channel is unlawful, section 76.1302(f)(1) is inapplicable.

The agency's application of section 76.1302(f)(3) in this case is consistent with the its prior interpretations of that provision. *See HDO*, ¶¶13-15 (J.A.1303-04). For example, in *NFL Enterprises LLC v. Comcast Cable Communications*, Comcast entered into a contract with NFL Network that entitled Comcast to move the network to the Sports Tier if certain events occurred. When Comcast, exercising that contractual right, moved NFL Network to the Sports Tier, the network brought a section 616 complaint against Comcast. The Media Bureau rejected Comcast's claim that the complaint was barred by section 76.1302(f)(1), explaining that the relevant triggering event for purposes of the limitations period was Comcast's retiering of NFL Network, *not* the date of execution of the contract. *Herring Broad. d/b/a WealthTV v. Time Warner*, 23 FCC Rcd 14787, 14820 (¶¶69-70)

(Media Bur. 2008). Thus, the complaint was governed by—and timely under—section 76.1302(f)(3). *Id.*

Comcast unsuccessfully raised similar arguments in a program carriage case involving Mid-Atlantic Sports Network ("MASN"). In that case, the carriage agreement left it to Comcast's discretion whether to carry the network on certain of its systems. Because the complaint alleged that Comcast acted unlawfully by declining to carry MASN on those systems, the Bureau rejected Comcast's claims that section 76.1302(f)(1) applied, and found the complaint timely under section 76.1302(f)(3). *Id.*, ¶¶102-105. In light of the *NFL* and *MASN* decisions, Comcast cannot claim that that the FCC's reading of its rule subjects it to "unfair surprise." Comcast Br. 60.

Nor is there merit to Comcast's claim that the FCC's reading of section 76.1302(f)(3) renders the other subsections of section 76.1302(f) superfluous and effectively "allow[s] a party to a carriage contract to bring suit at any time." Comcast Br. 59. The FCC interprets the rule consistent with the well-established doctrine of laches to "impliedly require notification of an intent to file a complaint within a reasonable time" after "discovery of the allegedly unlawful conduct." *Order*, n.105 (J.A.1397). Thus, complainants have a strong incentive not to simply sit on their rights; unreasonable delay will result in forfeiture of their claims. Here, "the allegedly unlawful conduct

. . . occurred within one year of the filing of the complaint," *id.*, and Comcast cannot plausibly claim that it is unreasonable to permit programmers to file a complaint within one year of the discriminatory conduct. Under Comcast's proposed reading of the FCC's rule, a programming network effectively would be barred from complaining about any carriage-related discrimination occurring more than one year after the execution of its contract.

Equally flawed is Comcast's contention (Br. 62) that Tennis Channel's complaint is untimely because Tennis Channel had considered filing a program carriage complaint in 2007 and 2008, but refrained from doing so at that time. As the Commission found, Tennis Channel reasonably "waited until it thought it had a sufficiently compelling case for broader carriage" in light of its improved programming and viewership. *Order*, ¶34 (J.A.1399); *see also id.*, ¶12 (J.A.1390). The fact that Tennis Channel could have asked—and been refused—broader distribution at an earlier time does nothing to undermine the Commission's determination that Tennis Channel's 2010 complaint, based on Comcast's actions in 2009, was timely filed.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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December 3, 2012

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 13,950 words.

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12-1337

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Comcast Cable Communications, LLC, Petitioners

v.

Federal Communications Commission and the United States of America, Respondents

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on December 3, 2012, I electronically filed the foregoing Final Public (Redacted) Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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