Leased Access: Has the Cable Television Carriage Requirement Become Unconstitutional?

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I. INTRODUCTION

Since the early days of the cable television industry in the 1980s, cable operators have been required by law to make a portion of their channel capacity available for leasing by programmers that are unaffiliated with the operator.[1] This leased access requirement allows programmers that do not share any common ownership with a cable operator a means of reaching the operator's subscribers with their programming, even when the cable operator otherwise refused to carry that programming. This requirement was imposed at a time when consumers had few choices to select as sources for television video programming, which meant that a programmer denied carriage by a cable operator may not have had another viable option for reaching consumers in that operator's geographic market.[2] Congress intended that the rule reduce the ability of cable operators, who faced little competition at the time, to control and limit the programming that was available to their subscribers.[3]

Today, however, consumers have a wide variety of sources of video programming, including satellite television services, streaming television services, and other online sources of programming available to them.[4] Thus, a programmer who is denied carriage by a cable operator today still has multiple means of making its programming available to consumers, unlike the conditions for programmers when the rule was first enacted in 1984. This fact undercuts the justifications for leased access, which is intended to promote diversity and competition in the sources of video programming. While the D.C. Circuit upheld the rule against a First Amendment challenge in 1996,[5] changes in the video marketplace since that time may have altered the application of that court's analysis and resulted in the leased access requirement becoming an unconstitutional infringement on the cable industry's First Amendment rights. In fact, the FCC has asked for public comment on this issue multiple times in recent years,[6] and expressed the view that the leased access requirement may no longer be consistent with the First

1. 47 U.S.C. § 532(b)(1) (2018).

2. *See, e.g.*, Time Warner Cable Inc. v. FCC, 729 F.3d 137, 145 (2d Cir. 2013) (citing Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460).

3. *See* H.R. REP. NO. 98-934, at 47-48 (1984).

4. *See, e.g.*, Reply Comments of NCTA—The Internet & Television Association at 3-9, Leased Com. Access, MB 07-42 (July 22, 2019) [hereinafter NCTA 2019 Comments], https://ecfsapi.fcc.gov/file/10722005877577/NCTA%20Comments%20on%20Leased%20Access%20Second%20FNPRM%20--%207.22.2019.pdf.

5. Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 962, 967-971, 983 (D.C. Cir. 1996) (per curiam).

6. Leased Com. Access, Modernization of Media Regul. Initiative, *Second Report and Order*, 35 FCC Rcd. 7589, para. 11 (2020) [hereinafter *2020 Second Report and Order*]; Leased Com. Access, Modernization of Media Regul. Initiative, *Report and Order and Second Further Notice of Proposed Rulemaking*, 34 FCC Rcd. 4934, para. 39-40 (2019) [hereinafter *2019 Report and Order*]; Leased Com. Access, Modernization of Media Regul.Initiative, *Further Notice of Proposed Rulemaking*, 33 FCC Rcd. 5901, para. 25 (2018) [hereinafter *2018 Further Notice of Proposed Rulemaking*].

Amendment.[7] Whether that is in fact the case is the primary focus of this article.

Part II of this article offers an overview of the history of the leased access requirement, examining the video programming marketplace as it existed at the time of the requirement's enactment, and how this contributed to the law's justification. Part III then examines the changes in the video programming marketplace since that time, which have created many new ways for video programmers to get their programming to consumers. Part IV discusses First Amendment issues with leased access, including the D.C. Circuit's reasoning in *Time Warner Entertainment Co. v. FCC*, a 1996 case upholding the constitutionality of the requirement,[8] as well as that of the U.S. Supreme Court in *Turner Broadcasting System v. FCC*,[9] a 1994 case considering the constitutionality of "must-carry," a similar cable carriage requirement. Finally, Part IV applies those cases and other precedent to the leased access requirement today, to determine whether the law could withstand a First Amendment challenge considering the current video programming marketplace. Because the leased access requirement is content neutral, intermediate scrutiny is the proper standard under which to evaluate the constitutionality of leased access.[10] The intermediate scrutiny standard requires that a law is intended to serve a significant government interest. Leased access is intended to promote diversity and competition, which fulfills this requirement. However, intermediate scrutiny also mandates that the law promotes, or is needed to promote, these government interests, which may not be accomplished by the leased access statute. Thus, the article concludes that the leased access requirement likely is no longer constitutional under the First Amendment.

II. HISTORY OF THE LEASED ACCESS REQUIREMENT

At the time that Congress initially considered adopting the leased access requirement in the early 1980s, consumers had limited options for watching video programming. They could watch their local broadcast television stations, which generally included the affiliates of the "Big Three" broadcast networks at the time—ABC, CBS, and NBC, as well as their local PBS station—and larger communities might have one or more independent

7. *2020 Second Report and Order*, *supra* note 6, at para. 11.
8. *Time Warner Ent.*, 93 F.3d at 967-971.
9. Turner Broad. Sys. v. FCC, 512 U.S. 622, 630 (1994).
10. *See Time Warner Ent.*, 93 F.3d at 969.

stations as well.[11] Video cassette recorders (VCRs) were becoming more affordable for many consumers in the 1980s, allowing consumers to rent or purchase videocassettes to watch at home.[12] The cable television industry was also developing in the 1980s, allowing service to become more widely available in many communities in the 1980s. Cable television allowed consumers to view multiple channels of programming selected by the cable operator with the payment of a monthly subscription fee.[13]

Most communities, however, were served by only a single cable operator; this was due in part to the need to obtain a franchise from a community in order to provide cable service and to the high cost of building more than one cable system in the same area.[14] These factors allowed cable operators to effectively maintain monopolies in many of the communities they served because consumers had only a single operator from which to subscribe for multiple channels of video programming.[15] In addition, other sources of subscription programming, such as direct broadcast satellite (DBS) service or Internet-provided video, were years in the future.[16] Because cable operators owned the facilities that connected subscribers' television sets to cable networks, cable operators were able to exercise "bottleneck control" over the programming services that reached their subscribers.[17] In other words, cable operators had the power to prevent certain programmers from reaching the operator's subscribers with their programming.[18] Programmers denied carriage by a cable operator did not, at that time, have other viable means of providing their programming to that operator's subscribers.[19]

Congress recognized that cable operators had the incentive to provide a diverse range of program services, as a greater diversity of services would appeal to a greater number of consumers. At the same time, however, Congress observed that cable operators did not have the same incentive to

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11. *See, e.g.*, *Big Three Television Networks*, WIKIPEDIA, https://en.wikipedia.org/wiki/Big_Three_television_networks [https://perma.cc/MRB6-SVE3]; *Television in the United States: the growth of cable TV*, BRITANNICA, https://www.britannica.com/art/television-in-the-United-States/The-era-of-the-miniseries#ref283637 (scroll to "The 1980s: television redefined"; then scroll to "The growth of cable TV"); Rick Du Brow, *TV and Radio in the Eighties: Cable Channels, VCR Lead TV Revolution for Viewer Independence*, L.A. TIMES, (Dec. 27, 1989), https://www.latimes.com/archives/la-xpm-1989-12-27-ca-956-story.html [https://perma.cc/A437-FJKN]; Mitchell Stephens, *History of Television*, MITCHELL STEPHENS, https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html [https://perma.cc/C6C7-ZXVC].

12. *See, e.g.*, ERIK BARNOUW, TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION 500-02 (2d rev. ed. 1990).

13. *See, e.g.*, *id*. at 493-96.

14. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 145 (2d Cir. 2013) (citing Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460).

15. *Id.*

16. *See, e.g.*, *id.* at 144.

17. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656-57 (1994) (plurality opinion)).

18. *Turner*, 512 U.S. at 656.

19. NCTA 2019 Comments, *supra* note 4, at 3.

offer a wide range of program sources, particularly when a program service competed with one already provided by the operator or when it offered content the operator did not wish to carry.[20] With this control exercised by cable operators over the channels of programming available to their subscribers, "Congress was concerned that programming networks unaffiliated with the cable operator, or that competed with channels already carried by the cable operator," might be unable "to gain carriage on the limited number of channels available on most systems, and that as a result, there would be a lack of diverse ownership in the programming offered to cable customers."[21]

These concerns led Congress to enact the leased access requirement so that programmers denied carriage by cable operators would still have the ability to provide their programming to those cable operators' subscribers.[22] The leased access requirement was enacted as part of the Cable Communications Policy Act of 1984 (1984 Cable Act)[23] in order "to assure that the widest possible diversity of information sources are made available to the public from cable systems."[24] The leased access rule requires cable operators to set aside a portion of their channel capacity, generally up to 15% of their channels, for lease by programmers unaffiliated with the cable operator.[25] Because of this, programmers other than those selected by a cable operator have a means of reaching that cable operator's subscribers, thus contributing to the "diversity of information sources" available to cable subscribers. The law allows cable operators to use any unused channels set aside for leased access for programming of their own choice.[26] Cable operators are generally prohibited from exercising editorial control over leased channels.[27]

Congress revisited the leased access regime when it enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable

20. H.R. REP. NO. 98-934, at 48 (1984).

21. NCTA 2019 Comments, *supra* note 4, at 4 (citing H.R. REP. NO. 98-934, at 48 (1984) (stating that "cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when . . . the offering competes with a program service already being provided by that cable system")).

22. *Id.*

23. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified beginning at 47 U.S.C. § 521).

24. 47 U.S.C. § 521(4).

25. 47 U.S.C. § 532(b)(1) (2018) ("A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements: (A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation. (B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation. (C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.").

26. 47 U.S.C. § 532(b)(4) (2018).

27. 47 U.S.C. § 532(c) (2018).

Act"),[28] a major purpose of which was "to remedy market power in the cable industry."[29] Congress remained concerned about the monopolies enjoyed by the vast majority of cable operators,[30] but now had an additional concern about how cable operators might abuse that monopoly position to the detriment of unaffiliated programmers. By the early 1990s, the cable industry had become vertically integrated to a significant degree, as cable operators owned many of the most popular cable networks.[31] Cable operators who also owned cable networks had the ability and incentive to give preferential treatment to those networks, such as by giving them a more desirable channel position than other networks, or by refusing to carry unaffiliated networks that competed with those owned by the operator.[32]

Further, unaffiliated networks that were able to gain carriage often had no choice but to do so on terms dictated by the cable operator, which frequently required those networks to grant the cable operator an ownership interest in their program services as a condition of gaining carriage.[33] Consequently, cable operators' monopoly position provided them with leverage to obtain a financial interest in the programming they selected to offer on their systems.[34] Leased access provided unaffiliated programmers with a means of gaining carriage on cable systems without having to agree to terms such as these.[35] Consequently, Congress added an additional purpose that the leased access requirement would serve: "promot[ing] competition in the delivery of diverse sources of video programming."[36]

At the same time, Congress observed that the leased access provisions had "hardly been used" since their enactment.[37] This was due to the structure and operation of the leased access regime, particularly because the statute allowed cable operators to establish the rates, terms, and conditions for leased access.[38] Because of the cable operators' interests and incentives that led to the adoption of leased access, Congress observed that allowing cable operators to determine the rates for leased access made "little sense."[39] As a result, the 1992 Cable Act also gave the FCC the ability to set maximum rates

28. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 9, 106 Stat. 1460.
29. S. REP. NO. 102-92, at 23 (1991).
30. *Id.* at 14.
31. *Id.*
32. *Id.* at 24-25.
33. *Id.* at 34.
34. *Id.* at 19.
35. *Id.* at 22.
36. *Id.* at 23.
37. *Id.*
38. *Id.* at 24; *see* Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 969 (D.C. Cir. 1996) (per curiam) (citing Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779).
39. S. REP. NO. 102-92, at 24.

for leased access.[40] At the same time, Congress provided that the price, terms, and conditions that cable operators charged independent programmers for leased access must "not adversely affect the operation, financial condition, or market development of the cable system."[41]

Cable operators subsequently challenged the constitutionality of the leased access statute, along with other cable carriage requirements contained in the 1992 Cable Act.[42] Cable operators objected to the requirements, alleging that they infringed on their First Amendment right of free speech by making them carry speech that they might otherwise decide not to carry on their cable systems.[43] They argued that the carriage obligations contained in the law interfered with their ability to design and offer the packages of program services they wanted to provide to their subscribers.[44] Cable programmers also objected to leased access, arguing that by forcing cable operators to dedicate a portion of their limited capacity to unaffiliated programmers, the leased access law made it more difficult for cable programmers to gain carriage on cable systems.[45]

In 1996, the leased access requirement was upheld against a First Amendment challenge in *Time Warner Entertainment Co. v. FCC*.[46] In that case, the D.C. Circuit determined that the leased access requirement was not a content-based restriction, as it did not favor or disfavor speech based on the views or ideas expressed.[47] Instead, the factor that determined whether a programmer was able to invoke leased access was whether the programmer was unaffiliated with the cable operator from whom leased access was sought.[48] As a content neutral regulation of speech, the *Time Warner* court subjected the leased access provisions to intermediate scrutiny, asking "if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim."[49] The court found promoting diversity and competition in the video programming marketplace to be important government interests.[50] The court also determined that leased access did not place a

40. 47 U.S.C. § 532(c)(4) (2018) (The 1992 Cable Act also gave the FCC the authority to "establish reasonable terms and conditions for such use, including those for billing and collection; and establish procedures for the expedited resolution of disputes concerning rates or carriage" between cable operators and leased access programmers).

41. 47 U.S.C. § 532(c)(1) (2018).

42. *See Time Warner Ent.*, 93 F.3d at 962.

43. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6 (D.D.C. 1993), *aff'd in part and rev'd in part*, Time Warner Ent. Co., L.P. v. United States, 211 F.3d 1313 (D.C. Cir. 2000).

44. *Id.*

45. *Id.*

46. *Time Warner Ent.*, 93 F.3d at 962, 967-971, 983.

47. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (plurality opinion)).

48. *Id.* (citing *Turner*, 512 U.S. at 638).

49. *Id.* (citing Time Warner Ent. Co. v. FCC, 56 F.3d 151, 184 (D.C. Cir. 1995)).

50. *Id.* (citing *Turner*, 512 U.S. at 663).

significant burden on cable operators' speech. Accordingly, the court found leased access to be constitutional.[51]

While the FCC has made minor adjustments to the operation of the leased access regime over the years,[52] the overall thrust of the leased access statute has remained the same: a cable operator must make up to 15% of their channel capacity available for leasing by programmers unaffiliated with the operator.[53] However, on multiple occasions in recent years, the FCC has questioned the continuing validity of the leased access requirement under the First Amendment,[54] due largely to the fact that that the video distribution marketplace has changed significantly since the enactment of the requirement in 1984.[55] At that time, consumers typically had only a single cable operator from which they could obtain subscription television service.[56] Today, the video distribution marketplace is "far more competitive," with a much larger number of media platforms that programmers can use to distribute their content to consumers.[57] This growth in platforms, including distribution of programming via the Internet, provides consumers with the ability to access video programming in a number of ways, in addition to accessing it through traditional cable operators.[58]

Consequently, the FCC has sought public comment on the continuing validity of the leased access requirement on two separate occasions in recent years.[59] In 2019, the FCC observed that "while the leased access rules were originally justified as safeguarding competition and diversity in the face of cable operators' monopoly power, the growth in available platforms to distribute programming seems to have eroded this justification." [60] Subsequently, in 2020, the FCC concluded that these "changes in the video marketplace have substantially weakened the justifications for leased

51. *Id.* at 971. A more in-depth discussion of the case is provided in Part IV.

52. For example, in 2019, the Commission eliminated the requirement that cable operators provide leased access on a part-time basis. *2019 Report and Order*, *supra* note 6, at para. 4. It also made changes to rules governing the relationship between cable operators and independent programmers seeking leased access, as well as modifications to the procedures applicable to leased access disputes. *Id*. In 2020, the FCC revised the formula used to determine the rates cable operators could charge independent programmers seeking leased access. *See 2020 Second Report and Order*, *supra* note 6, at para. 1.

53. 47 U.S.C. § 532(b)(1) (2018).

54. *2020 Second Report and Order*, *supra* note 6, at para. 11; *2019 Report and Order*, *supra* note 6, at para. 39-40; *2018 Further Notice of Proposed Rulemaking*, *supra* note 6, at para. 19.

55. *2018 Further Notice of Proposed Rulemaking*, *supra* note 6, at para. 777.

56. *Id.*

57. *Id.*

58. *Id.*

59. *2020 Second Report and Order*, *supra* note 6, at para. 11; *2019 Report and Order*, *supra* note 6, at para. 39-40; *2018 Further Notice of Proposed Rulemaking*, *supra* note 6, at para. 25.

60. *2019 Report and Order*, *supra* note 6, at para. 39 (citations omitted).

access,"[61] such that "the constitutional foundation for the leased access regime is in substantial doubt."[62]

However, because the leased access regime was mandated by Congress through statute, rather than by a regulation that originated with the FCC, the FCC lacks the authority to eliminate it.[63] As the FCC noted, "Only the courts and Congress can change these provisions. In the meantime, the Commission is obligated to carry out the directions given to them by Congress."[64] The FCC thus declined to eliminate the leased access requirement, instead leaving it to Congress or the courts to take action.[65] While leased access had previously been upheld as constitutional, the FCC pointed out that that that 1996 decision largely antedates the market developments that led it to doubt the continuing constitutionality of leased access.[66] Those marketplace developments are examined in more depth in the next section of this article.

III. MARKETPLACE CHANGES

The media marketplace has undergone vast changes since the leased access requirement was first enacted in 1984, when consumers' options for paid television service was typically limited to a single cable operator.[67] According to the cable industry, as represented by NCTA – The Internet & Television Association, [68] the video marketplace today is "almost unrecognizable" when compared to the 1980s.[69] For example, today, as opposed to 1984 or 1992 when the statute was revised, most consumers have

61. *Id.* at para. 40 (citations omitted).

62. *2020 Second Report and Order*, *supra* note 6, at para. 11. The Commission acknowledged that it had "rejected similar constitutional arguments" in a 2008 Leased Access Order. *2019 Report and Order*, *supra* note 6, at para. 40. In that 2008 Order, the FCC found that "While MVPDs argue that there are more outlets today for independent programmers, such as the Internet, they fail to demonstrate that these alternative outlets can be considered sufficient to conclude that Congress's goals of promoting competition and diversity in passing the leased access provisions of the 1992 Cable Act have been achieved." Leased Com. Access, *Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 2909, para. 72 (2008). Vacating the 2008 Order with its 2019 Order, the FCC explained that its "analysis has changed because the facts have changed: . . . the growth in alternative outlets for programmers—particularly on the Internet—has exploded in the decade since the adoption of the 2008 Leased Access Order." *2019 Report and Order*, *supra* note 6, at para. 40 (citation omitted).

63. *2020 Second Report and Order*, *supra* note 6, at para. 11 (observing that the "leased access rules are required pursuant to a specific statutory mandate from Congress").

64. *2019 Report and Order*, *supra* note 6, at para.47 (citation omitted).

65. *2020 Second Report and Order*, *supra* note 6, at para. 11.

66. *2019 Report and Order*, *supra* note 6, at para.47 (citing Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (per curiam)).

67. *See* Time Warner Cable Inc. v. FCC, 729 F.3d 137, 145-46 (2d Cir. 2013) (citations omitted).

68. NCTA - the Television and Internet Association, "is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80% of the nation's cable television customers, as well as more than 200 cable program networks." NCTA 2019 Comments, *supra* note 4, at 1, n.1.

69. *Id.* at 3 (citing *2019 Report and Order*, *supra* note 6, para. 39-40, 47).

at least three multichannel video programming distributors (MVPDs)[70] from which to obtain service: a local cable company and the two national direct broadcast satellite (DBS) services, DirecTV and Dish Network.[71] Consumers in some markets also have one or more additional MVPDs from which they can obtain service.[72] Today, an unaffiliated programmer denied carriage by a cable operator could still seek to reach consumers in that operator's market via carriage on these competing MVPDs.[73]

Furthermore, the Internet provides programmers with additional means of reaching audiences not available to them when the leased access provisions were enacted.[74] For example, programmers may gain carriage on online streaming services providing linear channels of programming, much like traditional cable service, through services such as Hulu with Live TV, YouTube TV, SlingTV, DIRECTV NOW, and others.[75] Streaming video on demand services such as Netflix, Hulu, Amazon Prime, iTunes, Google Play, and others provide an additional platform through which programmers may reach consumers.[76] Programmers also have the option to directly distribute their content to consumers through video sharing platforms like YouTube, Facebook Live, Vimeo, Periscope, Twitch, and others.[77] Content providers might also distribute their programming via their own websites, using video apps that consumers can access through mobile devices, or by way of traditional television sets with the use of devices like Roku, Chromecast, Amazon FireTV, or Apple TV.[78] Thus, programmers are no longer limited to a single cable provider to reach consumers in a market, but have multiple means of doing so today.[79]

In addition, online platforms are becoming increasingly popular with consumers, as demonstrated by the fact that 76% of consumer Internet traffic

70. Today, "MVPDs include (1) cable operators, such as Time Warner and Comcast Corporation ("Comcast"), which transmit programming over physical cable systems; (2) direct broadcast satellite ("DBS") providers, such as DISH Network and DIRECTV, which transmit programming via direct-to-home satellite; and (3) telephone companies, such as AT&T and Verizon, which transmit programming via fiber-optic cable." *Time Warner Cable*, 729 F.3d at 144 (citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report*, 27 FCC Rcd. 8610, para. 18, 30 (2012)).

71. *Time Warner Cable*, 729 F.3d at 152-53.

72. *See, e.g.*, NCTA 2019 Comments, *supra* note 4, at 4-5 (citing Commc'ns. Marketplace Rpt., *Report*, 33 FCC Rcd. 12558, para. 51 (2018)).

73. *Id.* at 5.

74. *Id.* at 6 (citing *2019 Report and Order*, *supra* note 6, at para. 10) ("[C]onsumers are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose.")).

75. *Id.* (citation omitted).

76. *Id.* (citation omitted).

77. *Id.* (citation omitted).

78. *Id.* at 6-7 (citations omitted).

79. *Id.* at 7.

in 2017 consisted of video programming.[80] In fact, subscription video on demand services Netflix and Amazon Prime each have more subscribers than the country's largest cable operators.[81] YouTube, which is free to both viewers and content providers, is even more popular as it is "the most widely used video platform in the world, with more than 1.9 billion users per month."[82] More than 720,000 hours of new content is uploaded to YouTube daily, and users watch more than 1 billion hours of video per day.[83]

Moreover, at the time of the 1992 Cable Act, cable was described by Congress as "our Nation's dominant video distribution medium,"[84] with over 95% of the U.S. MVPD market.[85] In recent years, the percentage of the public subscribing to cable has been in steady decline, with only about 40% of U.S. households subscribing to cable television service today.[86] The level of vertical integration in the cable industry has also declined significantly since that time, as most cable networks carried on cable systems today are unaffiliated with a cable operator.[87] In 2017, the percentage of national cable networks in which cable operators had an ownership interest was 9.1%,[88] down from approximately 57% in 1992.[89] At the same time, cable operator channel capacity has significantly increased, [90] providing greater opportunities for programmers to gain carriage on cable systems without invoking the leased access statute.[91]

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80. *Id.* at 8 (citing *VNI Forecast Highlights Tool*, CISCO, https://www.cisco.com/c/dam/assets/sol/sp/vni/sa_tools/vnisa-highlights-tool/vnisa-highlights-tool.html#:~:text=The%20Cisco%20VNI%20Service%20Adoption,select%20from%20specific%20service%20categories [https://perma.cc/YZV6-YJXT] (last visited July 7, 2019)).

81. *Id.* (citing *Industry Data*, NCTA–THE INTERNET AND TELEVISION ASS'N, https://www.ncta.com/industrydata) [hereinafter NCTA Industry Data] ("In fact, only one cable operator ranks among the top five video subscription services—the remaining two spots are occupied by DIRECTV and Hulu.")).

82. *Id.* (citing *YouTube for Press*, YOUTUBE, https://www.youtube.com/yt/about/press/ [https://perma.cc/RYM6-KKCG]).

83. NCTA 2019 Comments, *supra* note 4, at 8 (citing James Hale, *More Than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute*, TUBEFILTER (May 7, 2019) https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/ [https://perma.cc/RY2H-DC6R]).

84. S. REP. NO. 102-92, at 3 (1991).

85. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 145 (2d Cir. 2013) (citing Implementation of Cable TV Consumer Prot. & Competition Act of 1992, *Report and Order*, 17 FCC Rcd. 12124, para. 20 (2002)).

86. NCTA 2019 Comments, *supra* note 4, at 7 (citing NCTA Industry Data, *supra* note 81).

87. Thomas Hazlett, *Vertical Integration in Cable Television* 6 (Oct. 19, 2007) (https://arlingtoneconomics.com) (unpublished paper commissioned by Comcast).

88. NCTA 2019 Comments, *supra* note 4, at 5-6 (citing Comments of NCTA – The Internet and Television Association at 10, Ann. Assessment, MB 17-214 (Oct. 10, 2017), https://www.ncta.com/sites/default/files/2017-10/101017%2017-214%20Comments.pdf).

89. *Time Warner Cable*, 729 F.3d at 1533 (citing H.R. REP. NO. 102-628, at 41 (1992)).

90. *2018 Further Notice of Proposed Rulemaking*, *supra* note 6, at n.39 (citations omitted).

91. NCTA 2019 Comments, *supra* note 4, at 6 (citations omitted).

These developments led the Commission to observe in 2020 that "the marketplace has changed in ways that lessen the governmental interest in leased access regulations,"[92] such that "consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was imaginable a quarter century ago."[93] This led the FCC to question whether the leased access requirement continued to be a permissible burden on cable speech.[94] That question is considered in the next section of this article.

IV. FIRST AMENDMENT ANALYSIS

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[95] The Supreme Court has held that "cable operators and other MVPDs 'engage in and transmit speech' protected by the First Amendment."[96] Cable operators do so by providing original programming and by exercising editorial control over the programs and program services they select to provide to their subscribers.[97] The leased access requirement infringes on cable speech in two ways. First, by requiring cable operators to make channels available for lease by unaffiliated programmers, the leased access requirement reduces the number of channels over which operators exercise unfettered editorial control.[98] Second, requiring a portion of a cable operator's channels to be set aside for leased access makes it "more difficult for cable programmers to compete for carriage on the limited channels remaining."[99] Thus, the leased access requirement burdens cable speech. The question then is whether that burden is acceptable under the First Amendment.

A. Level of Scrutiny

To assess the current constitutionality of leased access, a court would first need to determine the level of scrutiny that would apply to such a requirement. The level of scrutiny to be applied turns on whether the leased access requirement is content-based or content neutral. Content-based laws

92. *2020 Second Report and Order*, *supra* note 6, at para. 5.

93. *2019 Report and Order*, *supra* note 6, at para. 10 (citation omitted). However, the Commission noted that "some commenters maintain that 'cable operators do indeed still occupy a dominant position in the pay-TV marketplace.'" *2020 Second Report and Order*, *supra* note 6, at para.14 (citations omitted).

94. *2020 Second Report and Order*, *supra* note 6, at para.11; *2019 Report and Order*, *supra* note 6, at para. 39-40; *2018 Further Notice of Proposed Rulemaking*, *supra* note 6, at para. 25.

95. U.S. CONST. amend. I.

96. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 154 (2d Cir. 2013) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (plurality opinion)).

97. *Turner*, 512 U.S. at 636 (citing Los Angeles v. Preferred Commc'ns., Inc., 476 U.S. 488, 494 (1986)).

98. *See id.* at 636-37.

99. *Id.* at 637.

typically "favor or disfavor speech on the basis of the ideas or views expressed or the messages conveyed," while content neutral laws "do not burden or benefit speech due to its content."[100] In other words, "Content-based regulations target speech based on its communicative content," while content neutral laws apply regardless of content.[101] Content-based laws are subject to strict scrutiny, which "requires that a statute be narrowly tailored to serve a compelling governmental interest."[102] Content neutral laws, on the other hand, are subject to less demanding intermediate scrutiny, which requires that the law "'advances important governmental interests unrelated to the suppression of free speech' and that it not 'burden substantially more speech than necessary to further those interests.'"[103]

In its 1996 decision upholding the leased access requirement, the D.C. Circuit found that the provisions were content neutral, rather than content-based, because they "do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed."[104] The court observed:

> What programs appear on the operator's other channels—that is, what speech the operator is promoting—matters not in the least. So too with respect to the speech of those who use the leased access channels. Their qualification to lease time on those channels depends not on the content of their speech, but on their lack of affiliation with the operator.[105]

Thus, it is the identity of the speaker or source of the information that determines whether the leased access statute applies, not the content of the cable operator's or the unaffiliated programmer's speech. This determination led the court to apply intermediate scrutiny to the law, which requires the law to serve an important or substantial government interest in a manner that does not burden substantially more speech than necessary to achieve that purpose.[106]

In its 2020 Report and Order, the FCC observed that there was "a lack of consensus" among commenters about the level of scrutiny that should be applied to leased access, with some commenters arguing that strict scrutiny should apply.[107] In response to commenters who argued that marketplace changes merited the application of strict scrutiny, the National Association of

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100. Reply Comments of Nat'l Ass'n of Broads. at 2, Leased Com. Access, MB 07-42, (Aug. 5, 2019) [hereinafter NAB 2019 Reply Comments], https://www.nab.org/documents/filings/ReplyCommentsLeasedAccessAugust2019.pdf (citing *Turner*, 512 U.S. at 643-46).

101. *Id.* (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (citations omitted)).

102. *2020 Second Report and Order*, *supra* note 6, para.12 (citing Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)).

103. Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 971 (D.C. Cir. 1996) (per curiam).

104. *Id.* at 969 (citing *Turner*, 512 U.S. at 642 (plurality opinion)).

105. *Id.* (citing *Turner*, 512 U.S. at 645).

106. *Id.* (citing *Time Warner Ent. v. FCC*, 56 F.3d at 184).

107. *2020 Second Report and Order*, *supra* note 6, at para. 5, 12 (citations omitted).

Broadcasters ("NAB")[108] argued that marketplace changes were irrelevant to the level of scrutiny that should be applied, as that determination hinges on whether the law is content neutral or content-based.[109] NAB also pointed out that multiple courts, including the U.S. Supreme Court, have upheld various cable carriage requirements, finding them content neutral and thus subject to intermediate scrutiny.[110]

NCTA, on the other hand, argues that the leased access law is content-based and is thus subject to strict scrutiny.[111] NCTA pointed out that the *Time Warner* court determined that the leased access requirement was content neutral because the applicability of the statute was determined by the identity of the speaker, i.e., its being unaffiliated with the cable operator.[112] NCTA criticized this determination as being at odds with the Supreme Court's observation in the 2015 case *Reed v. Town of Gilbert* that "'the fact that a distinction is speaker-based does not . . . automatically render the distinction content neutral.'"[113] According to NCTA, "The Supreme Court and other courts have made clear that speaker-based preferences warrant strict scrutiny just as content-based preferences do."[114]

NCTA appears to misread the Court's holding and reasoning in *Reed*. In that case, the Court observed that speaker-based restrictions could be subject to strict scrutiny because they "are all too often simply a means to control content."[115] Accordingly, the Court observed that it had applied strict scrutiny to laws that favored some speakers over others "when the legislature's speaker preference reflects a content preference.'" [116] An example of such a law is provided by *Buckley v. Valeo*.[117] At issue in *Buckley* was a law that prohibited individuals from spending more than $1,000 a year to support or oppose a particular political candidate.[118] The government interest to be served by the law was to "equaliz[e] the relative ability of

108. "NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts." NAB 2019 Reply Comments, *supra* note 100 at 1 n.2.

109. *See id.* at 3 (citation omitted).

110. *Id.* at 2 (citing *Turner*, 520 U.S. at 180 (1997) (must carry rules); Satellite Broad. & Commc'n Ass'n v. FCC, 275 F.3d 337, 354 (4th Cir. 2001) (carry one, carry all rules); Cablevision Sys. Corp. v. FCC, 649 F.3d 695, 699 (D.C. Cir. 2011) (extended program access requirements); Time Warner Cable Inc. v. FCC, 729 F.3d 137, 145-46 (2d Cir. 2013) (video program carriage discrimination rules)).

111. NCTA 2019 Comments, *supra* note 4, at 13-15.

112. *Id.* at 17 (citing Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 969 (D.C. Cir. 1996) (per curiam).

113. *Id.* at 17 (citing Reed v. Town of Gilbert, 576 U.S. 155, 169 (2015)).

114. *Id.* at 14-15 (citing *Reed*, 576 U.S. at 169).

115. *Reed*, 576 U.S. 155 at 170 (quoting and citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010)).

116. *Id.* (2015) (quoting and citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) (plurality opinion)).

117. Buckley v. Valeo, 424 U.S. 1, 6-7 (1976).

118. *See generally id.*

individuals and groups to influence the outcome of elections."[119] Despite the fact that there was no reference to the content of speech in the law, the Court found it to be content-based. The Court reasoned that the spending limit "was designed to ensure that the political speech of the wealthy not drown out the speech of others," and thus was "concerned with the communicative impact of the regulated speech."[120] According to the Court, *Buckley* "stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[121]

The *Buckley* holding, however, does not mean that "all speaker-partial laws are presumed invalid. Rather, it stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."[122] The key consideration here is the government's purpose behind the law: "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others."[123] In other words, government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."[124]

The Supreme Court analyzed this issue in a case involving the constitutionality of must-carry, a cable carriage requirement sharing significant similarities with leased access.[125] Must-carry generally requires cable operators to carry the local broadcast television stations in the markets they serve.[126] In determining whether must-carry was content-based or content neutral, the Court in *Turner Broadcasting System v. FCC* observed that the question was "whether Congress preferred broadcasters over cable programmers based on the content of programming each group offers."[127] The *Turner* Court found that the extent of a cable operator's must-carry obligations had nothing to do with any programming or speech offered by the operator, as "[n]othing in the [must-carry law] imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has

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119. *Turner*, 512 U.S. at 657-58 (citing *Buckley*, 424 U.S. at 48).

120. *Id.* at 657-58 (citing *Buckley*, 424 U.S. at 17 ("[I]t is beyond dispute that the interest in regulating the . . . giving or spending [of] money 'arises in some measure because the communication . . . is itself thought to be harmful.'") (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)).

121. *Id.* (citations omitted).

122. *Id.* at 657-58 (citing Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 548 (1983))

123. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).

124. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)) (emphasis added).

125. *Turner*, 512 U.S. at 622.

126. 47 U.S.C. § 534 (2018).

127. *Turner*, 512 U.S. at 658-59 (citations omitted).

selected or will select."[128] Rather, the number of channels a cable operator had to set aside for must-carry was based on its channel capacity.[129] The same analysis applies to the leased access requirement, as it applies regardless of the content of any programming offered by a cable operator, and the number of channels an operator must devote to leased access is determined as a percentage of its channel capacity.[130]

On the other hand, the benefits provided by must-carry to television stations was also unrelated to their content, as the "rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network-affiliated, English or Spanish language, religious or secular."[131] Eligibility for carriage under must-carry was determined by the identity of the speaker, as the law applies to every full power commercial and noncommercial broadcast television station that operates within the same television market as the cable system on which carriage is sought.[132] Must-carry thus distinguishes among speakers "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored."[133] This reasoning applies to leased access as well, although the determining factor for leased access is the lack of affiliation with the cable operator rather than the means of transmission.[134]

The *Turner* Court also found that Congress did not seek to favor or disfavor any particular type of content with must-carry. Instead, Congress' imposition of the must-carry requirement was based "on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry[,]"[135] rather than because of any content-related concerns. The *Turner* Court observed that "[s]o long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment."[136] All of this led the Court to find the must-carry rules content neutral,[137] even though broadcasters benefited from the law at the expense of cable programmers, because there was no content that was favored or disfavored by the must-carry obligations.[138] This reasoning applies to the leased access requirement as

128. *Id.* at 644 (citation omitted).
129. *Id.* at 643-44 (citation omitted).
130. 47 U.S.C. § 532(b)-(c) (2018).
131. *Turner*, 512 U.S. at 645.
132. *Id.*
133. *Id.*
134. 47 U.S.C. § 532(b)(1) (2018).
135. *Turner*, 512 U.S. at 659 (citations omitted).
136. *Id.* at 645.
137. *Id.* at 643.
138. *Id.* at 659 (citations omitted).

well, as no specific type of content is favored, or disfavored, by the leased access obligations.[139]

In sum, the *Turner* Court made the following observations about must-carry:

> The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech. The rules, as mentioned, confer must-carry rights on all full-power broadcasters, irrespective of the content of their programming. They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.[140]

These observations, too, apply equally to the leased access requirement. Despite the fact that the leased access requirement's applicability is speaker-based, is nevertheless content neutral. The amount of capacity that a cable operator must make available for leased access is based on a percentage of the operator's overall capacity,[141] and has nothing to do with any specific content provided by the operator. The only requirement for a programmer to take advantage of the leased access requirement is that they be unaffiliated with the cable operator.[142] The regulations were not adopted because of any government agreement or disagreement with the content of either a cable operator's or unaffiliated programmer's speech. Further, the purposes behind the requirement—promoting diversity and fair competition[143]—are likewise unrelated to content. Thus, despite what NCTA argues, the leased access requirement is not content based.

Since the leased access requirement is content neutral, intermediate scrutiny is the correct standard to apply. The Supreme Court outlined the requirements of intermediate scrutiny in *Turner*: "a content neutral regulation will be sustained if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

139. *See* 47 U.S.C. § 532(b)-(c) (2018). There is an exception to this, in that "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity…." 47 U.S.C. § 532(c)(2) (2018). The 1992 Cable Act revoked immunity that cable operators previously had for obscene programming carried on leased access channels. In doing so, the Act granted cable operators the ability to refuse to carry obscene programming. *See* Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 981 (D.C. Cir. 1996) (per curiam) (citations omitted).

140. *Turner*, 512 U.S. at 647.

141. 47 U.S.C. § 532(b)(1)(A)-(E) (2018).

142. 47 U.S.C. § 532(b)(1) (2018).

143. 47 U.S.C. § 532(a) (2018).

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[144] Intermediate scrutiny does not require a regulation to be the least restrictive means of achieving the government's objective, but the regulation must "promote[] a substantial government interest that would be achieved less effectively absent the regulation."[145] In other words, the regulation must "not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[146] The application of the requirements of intermediate scrutiny to the leased access statute is considered next.

B. Intermediate Scrutiny: Importance of the Government Interest

The first requirement of intermediate scrutiny is that a restraint on speech "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression . . . ."[147] The leased access statute specifies that it serves "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[148] Two very similar interests were used to justify must-carry in *Turner*: (1) "promoting fair competition in the market for television programming" and (2) "promoting the widespread dissemination of information from a multiplicity of sources."[149] The Court found each of these goals to be important government interests unrelated to the suppression of free expression.[150]

The *Turner* Court observed that the second interest—promoting a multiplicity of information sources for the public— "is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[151] Furthermore, "the Government'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

144. *Turner*, 512 U.S. at 662 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)).

145. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985) (internal quotation marks omitted).

146. *Id.* (quoting *Ward*, 491 U.S. at 799).

147. *Id.* (citing *O'Brien*, 391 U.S. at 377 (internal quotation marks omitted)).

148. 47 U.S.C. § 532(a) (2018).

149. *Turner*, 512 U.S. at 662 (citing S. REP. NO. 102-92, at 58 (1991); H.R. REP. NO. 102-6, at 28, 63 (1992); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(8)-(10), 106 Stat. 1460).

150. *Turner*, 512 U.S. at 662-663 (1994) (citing *O'Brien*, 391 U.S. at 377).

151. *Id.* at 663-64 (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (plurality opinion) (quoting Associated Press v. United States, 326 U.S. 1, 20) (quotations omitted)).

by the First Amendment."[152] Subsequent to *Turner*, the D.C. Circuit ruled on the constitutionality of leased access in *Time Warner*, where the court observed: "After *Turner*, 'promoting the widespread dissemination of information from a multiplicity of sources' and 'promoting fair competition in the market for television programming' must be treated as important governmental objectives unrelated to the suppression of speech." [153] Accordingly, the leased access provisions satisfy the government interest component of intermediate scrutiny.

C. Intermediate Scrutiny: Not Burdening Substantially More Speech Than Necessary/Narrow Tailoring

Intermediate scrutiny also requires the government to show that the law "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" [154] In its 1993 review of the constitutionality of leased access, the D.C. District Court determined that the leased access provisions were not overly broad, reasoning that they "are directly proportional to the number of channels a cable operator has available, never exceeding 15 percent of total capacity. Operators retain discretion over the remainder, and may, of course, utilize them as they wish, for their own programming or for that of affiliated programmers." [155] The Court also observed that the leased access statute allowed a cable operator to use any unused leased access channel capacity for programming of its own choice.[156]

In assessing the burden that must carry imposed on cable speech, the *Turner* Court noted that the record before it lacked "any findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers," such as the extent of the changes cable operators would have to make to their programming selections due to must-carry, "the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters."[157] The Court observed that the answers to questions such as these were "critical" in determining whether the law placed an impermissible burden on speech, because "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television."[158]

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152. *Id.* at 664 (citing Lorain J. Co. v. United States, 342 U.S. 143, 152-54 (1951); *Associated Press*, 326 U.S. at 20).

153. Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 969 (D.C. Cir. 1996) (per curiam) (citing *Turner*, 512 U.S. at 664 (plurality opinion)).

154. *Turner*, 512 U.S. at 664-65 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

155. Daniels Cablevision v. U.S., 835 F. Supp. 1, 7 (D.D.C. 1993).

156. *Time Warner Ent.*, 93 F.3d at 971 (citing 47 U.S.C. § 532(b)(4)).

157. *Turner*, 512 U.S. at 667-68.

158. *Id.* at 668 (1994) (citing *Ward*, 491 U.S. at 799).

The *Time Warner* court noted *Turner*'s requirement for evidence on the extent of the burden imposed by the law on the speech of cable operators and programmers.[159] The *Time Warner* court, however, had no evidence before it "showing either the extent to which operators have refused to carry unaffiliated programmers or the effect of the leased access provisions on the speech of the operators."[160] Instead, the court noted that Congress, the FCC, cable operators, and leased access programmers had all concluded that "relatively little leased access capacity is being used by unaffiliated programmers."[161] The court also observed that cable operators and leased access programmers disagreed as to the reasons for this, and that it lacked sufficient information to make a determination on this point.[162]

Without evidence to base a determination of the extent of the actual burden of leased access on cable speech, the *Time Warner* court's solution was to accept Time Warner's argument that there was not any significant demand for leased access by unaffiliated programmers as true and consider the implications of that.[163] If there is little demand for leased access, the court reasoned:

> Then the provisions will have no effect on the speech of the cable operators. None of their programming would have to be dropped. The channels set aside for leasing will either be vacant or they will be occupied according to the wishes of the cable operators. The operators' editorial control will remain unimpaired and so will their First Amendment right to determine what will appear on their cable systems.[164]

In other words, with little demand for leased access by unaffiliated programmers, Time Warner and other cable operators would be able to fill the unused leased access channels with programming of their own choosing, which meant that leased access did not impose a significant burden on cable speech.[165]

Under this analysis, it appears that the burden of leased access on cable speech remains low today. In 2019, the FCC observed that "demand for leased access has remained low . . . ."[166] NAB argued that this showed that the leased access requirement did not significantly burden cable speech.[167] In addition, NAB argued that the vast increases in channel capacity in recent years have

159. *Time Warner Ent.*, 93 F.3d at 971 (citing *Turner*, 512 U.S. at 637 (plurality opinion)).
160. *Id.* at 970.
161. *Id.* at 969 (quoting Implementation of Sections of the Cable TV Consumer Prot. and Competition Act of 1992: Rate Regulation, Leased Com. Access, *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 16933, para. 6 (1996)).
162. *Id.* at 970.
163. *Id.*
164. *Id.* at 971.
165. *Id.*
166. *2019 Report and Order*, *supra* note 6, at para.10 (citation omitted).
167. NAB 2019 Reply Comments, *supra* note 100, at 7, n.22 (citation omitted).

also reduced the burden of leased access on cable speech.[168] However, this analysis may be incomplete. As was discussed above, the *Turner* Court required evidence on the actual burden of must carry on cable speech,[169] a requirement which the *Time Warner* court sidestepped in determining the constitutionality of leased access in 1996.[170] There appears to be good reason for this avoidance.

At that time of the *Time Warner* court's decision, the Commission had just exercised its recently granted authority to set maximum rates that cable operators could charge for leased access.[171] Previously, cable operators were not constrained because the 1984 Cable Act allowed cable operators to set the rates for leased access.[172] Thus, the rules regarding the maximum rates cable operators could charge for leased access had just taken effect at the time of the *Time Warner* decision. If, as unaffiliated programmers had argued, the high rates cable operators set for leased access were responsible for the low demand for leased access,[173] then the FCC's new rules were intended to obviate that issue. However, there would have been little time to learn about the effects of the new rules, meaning that it would likely have been premature for the D.C. Circuit to obtain sufficient evidence to make an informed determination on this point.

That is not the case today, however, as the rules have now been in effect for more than twenty years. Accordingly, a reviewing court should require evidence on this point before making a determination about the burden imposed by leased access. However, with little apparent usage of leased access by unaffiliated programmers, the requirement still does not appear to place a significant burden on cable speech. Nevertheless, a reviewing court should require evidence of the extent of any burden actually imposed by the leased access requirement on cable speech. If leased access is found not to place an impermissible burden on cable speech because there is little demand for leased access channels by unaffiliated programmers, as was the case in *Time Warner*, then this lack of usage of leased access channels seems to indicate that the statute has not been successful in promoting the interests it was intended to serve. That issue, and its implications for the constitutionality of leased access, are considered next.

D. Intermediate Scrutiny: Promotion of the Government Interest

In addition to intermediate scrutiny's requirement that a law serves an important or substantial government interest, intermediate scrutiny requires

168. *Id.* at 6 (citation omitted).

169. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 668-69 (1994) (plurality opinion).

170. *See* Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 970-71 (D.C. Cir. 1996) (per curiam).

171. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 9, 106 Stat. 1460.

172. *Time Warner Ent.*, 93 F.3d at 968 (discussing and citing 47 U.S.C. § 532(c)(1)).

173. *Id.*

that the law actually advances that government interest.[174] As the Court explained in *Turner*:

> That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[175]

In *Turner*, this led the Court to ask "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."[176] As the Court put it, this question went to the need for must carry in achieving the government interests it meant to promote.[177]

Significantly, the D.C. Circuit court in *Time Warner* did not consider whether the leased access requirement in fact promoted the interests the law was meant to serve as directed by *Turner*. Instead, as is discussed above, the court determined that leased access did not place an impermissible burden on cable speech based on two factors: (1) that there was little demand for leased access by unaffiliated programmers, meaning the channels set aside by cable operators for leased access were not being used by unaffiliated programmers, and (2) that the law allowed cable operators to use any leased access channels not being used by unaffiliated programmers for programming of their own choice.[178] This analysis, however, focuses on the burden of leased access, or the lack thereof, on cable operators' speech. It does consider whether the requirement actually advances the government's interests meant to be promoted by the law, which the *Turner* Court required of must-carry in that case.

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174. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 160 (2d Cir. 2013) (citing *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

175. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality opinion) (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985); Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); Los Angeles v. Preferred Commc'ns., Inc., 476 U.S. 488, 496 ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (internal quotation marks omitted); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'") (citation omitted)).

176. *Turner*, 512 U.S. at 664-65 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

177. *Time Warner Ent.*, 93 F.3d at 970 (citing *Turner*, 512 U.S. at 667-68 (plurality opinion)).

178. *Time Warner Ent.*, 93 F.3d at 970-71.

Considering that the *Time Warner* court's conclusion that leased access did not impermissibly burden cable operators' speech was based on the assumption that there was little demand for leased access by programmers, it is hard to see how such low usage of leased access channels by unaffiliated programmers would do much to promote the government's interests.[179] Thus, the intermediate scrutiny requirement that the regulation actually advance the government interest it is intended to serve, as described in *Turner*, poses the most significant problem for the constitutionality of the leased access requirement. It does so in two ways. First, is the question of whether leased access has actually been utilized by unaffiliated programmers in a manner and to an extent such that the intended interests to be serve by the law have been effectively advanced. Second, is the question of whether the requirement is needed today to promote the intended government interests in light of changes in the marketplace that have occurred since the law's enactment in 1984.

Regarding the lack of leased access usage, the cable industry reports that "[l]eased access requests are very rare," and "[i]n most cases, requests for information about leased access go no further." [180] Nevertheless, two commenters report some degree of success gaining cable carriage through leased access. Charles Stogner claims to be "a user of leased access with local programming at sites coast to coast, border to border . . . ."[181] In addition, Small Business Network reports that since beginning business in January of 2017, it has obtained carriage "on 17 Comcast and 2 Cablevision systems serving in excess of 900,000 subscribers."[182] However, even with its success in obtaining cable carriage through leased access, Small Business Network reports it was unable to lease carriage with other cable operators, "due in large part to a refusal of those operators to follow the rules and to act in a cooperative fashion."[183] According to Small Business Network, "the existing leased access rules are not strong enough to incent cable operator compliance and cooperation . . . ."[184]

The record that the FCC compiled lacks other significant examples of usage of the leased access provisions to successfully attain cable carriage. One of the most significant reasons offered for why there is not greater usage of the leased access provisions by unaffiliated programmers is the high cost

179. *Id.*

180. Comments of the Am. Cable Ass'n at 5, Leased Com. Access, Modernization of Media Regul. Initiative, MB 07-42 (July 22, 2019) [hereinafter Am. Cable Ass'n Comments] https://ecfsapi.fcc.gov/file/10731970020259/180730%20Leased%20Access%20Commentsv8.pdf [https://perma.cc/8SUN-RAW2].

181. Charles H. Stogner, Comment Letter on Leased Com. Access, Modernization of Media Regul. Initiative, (July 30, 2018), https://www.fcc.gov/ecfs/filing/107302733128641 [https://perma.cc/Q323-YCN4].

182. Small Bus. Network, Comment Letter on Leased Com. Access, Modernization of Media Regul. Initiative, (July 30, 2018), https://www.fcc.gov/ecfs/filing/10730655117524 [https://perma.cc/D7HP-VE5Z].

183. *Id.*

184. *Id.*

charged by cable operators.[185] In addition, commenters report that other requirements for leased access discourage programmers from utilizing it. These requirements include "accessibility; channel/tier placement; coverage areas by targeted zone[;] insurance requirements; rates; contracts; methods of delivering programming to cable; expense of technical support; [and] competition from cable site's own local origination channels and local 'ad inserts.'"[186]

It thus appears that the structure of the leased access regime allows cable operators to impose requirements on would-be leased access programmers that hinder or discourage their attempts to obtain carriage through leased access. Perhaps a differently structured leased access regime might be more successful in promoting cable carriage of unaffiliated programmers via leased access. However, it would not be the role of a reviewing court to rewrite the statute enacted by Congress or the regulations crafted by the FCC to implement the statute.[187] Rather, a court would consider the constitutionality of the statute and regulations before it and whether their operation actually promoted the government's intended interests.[188] Again, it appears that there has been little usage of leased access by unaffiliated programmers over the years.[189] If leased access channels are not being used by unaffiliated programmers to any significant extent, then it would not seem that the leased access obligations are promoting the government's interests in any meaningful way, which could lead the statute to fail intermediate scrutiny.

While a court might conclude that leased access cannot withstand intermediate scrutiny because it has failed to promote the interests it was meant to serve to any significant extent, it might also reach that conclusion by finding that marketplace changes have made it such that leased access is no longer needed to promote those interests. As was discussed above, programmers have much greater means of reaching consumers with their programming today than they did at the time of the enactment of either the 1984 or 1992 Cable Acts. NCTA argues that "today's robust video marketplace provides the American public and content providers with precisely the competition and diversity in sources of video programming that

185. *See e.g.*, Combonate Media Grp., Comment Letter on Leased Com. Access, Modernization of Media Regulat. Initiative, (July 30, 2018), https://www.fcc.gov/ecfs/filing/10731082646228 [https://perma.cc/8ZZY-JHUR]; Baskin Jones, Comment Letter on Leased Com. Access, Modernization of Media Regul. Initiative, (July 30, 2018) https://www.fcc.gov/ecfs/filing/10730170728787 [https://perma.cc/47LA-AYCH].

186. Stogner, *supra* note 181.

187. *See* Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000) ("[T]he role of the judicial branch is to apply statutory language, not to rewrite it." (citing Badaracco v. Comm'r, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); Blount v. Rizzi, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); Korman v. HBC Fla., Inc., 182 F.3d 1291, 1296 (11th Cir. 1999) ("It is not the business of courts to rewrite statutes.")).

188. *Id.*

189. *See 2019 Report and Order*, *supra* note 6, at para. 10 (citing Am. Cable Ass'n Comments, *supra* note 180, at 2, 4 n.12).

Congress desired."[190] NCTA goes on to argue that leased access is not needed to promote competition and diversity, as "[t]he marketplace has achieved those goals on its own."[191] At the same time, NCTA argues that marketplace changes have resulted in cable operators no longer having the bottleneck power that once enabled them to prevent unaffiliated programmers from reaching consumers, a fact that has been acknowledged in multiple court cases.[192] Thus, the marketplace seems to have changed since the leased access requirement was upheld in 1996 such that it is no longer needed to promote the interests the law was intended to serve.[193]

In a 2013 decision on other the constitutionality of other cable carriage requirements, the Second Circuit recognized that the video programming industry had "changed significantly" in the twenty years since the enactment of the 1992 Cable Act: "cable operators' share of the MVPD market has declined due to increased competition from DBS providers and telephone companies, OVDs [online video distributors, such as Netflix and Hulu] are an increasingly available alternative to MVPDs, and vertical integration between cable operators and programming networks has decreased."[194] These factors, observed the court, showed that the television programming industry was becoming more competitive.[195] The court continued: "If the trend continues, a day may well come when the anticompetitive concerns animating Congress's enactment of [the carriage requirements at issue in the case] will so effectively be eliminated or reduced as to preclude government intrusion on MVPDs' carriage decisions."[196] The court, however, concluded then "that such a day has not yet arrived."[197]

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190. NCTA 2019 Comments, *supra* note 4, at 9.

191. *Id.* at 2.

192. *Id.* at 18-19 (citing Comcast Corp. v. FCC, 579 F.3d 1, 8 (D.C. Cir. 2009)). In 2009, the D.C. Circuit observed that "[c]able operators 'no longer have the bottleneck power over programming that concerned the Congress in 1992.'" *Comcast Corp.*, 579 F.3d at 8; s*ee also* Comcast Cable Commc'ns, LLC v. FCC, 717 F.3d 982, 993-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market."); Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1315-16 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("Cable operators no longer possess bottleneck monopoly power.").

193. *See, e.g.*, NCTA 2019 Comments, *supra* note 4, at 20-21.

194. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 161 (2d Cir. 2013) (citing Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 969 (D.C. Cir. 1996) (per curiam) (citing and applying Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (plurality opinion)).

195. *Id.*

196. *Id.* (citing Time Warner Ent. Co. v. FCC, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (noting that, "at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest.").

197. *Id.* The court also observed that, at oral argument, "the FCC acknowledged the possibility that, at some future time, this conclusion will no longer obtain in light of increased competition in the video programming industry." *Id.* The court considered "this possibility more real than speculative," which led it to "encourage the FCC to reevaluate the program carriage regime as warranted by increased competition in the video programming industry." *Id.* at 167.

That day now appears to have come, as the trends and developments underlying the Second Circuit's observations about changes in the video marketplace undercutting the need for cable carriage requirements have only continued and grown since the court's 2013 decision.[198] Today, there are more diverse sources of programming and more competition in the video programming industry than at the enactment of either the 1984 or 1992 Cable Acts,[199] undercutting the need for leased access to promote these interests. Furthermore, it does not appear that there has been sufficient usage of leased access by unaffiliated programmers to promote the achievement of those interests to any significant extent.[200] Moreover, it appears that changes in the television programming marketplace have resulted in the promotion of those interests to such an extent that leased access is no longer required. Accordingly, the leased access requirement has failed to promote the interests it was intended to serve and is no longer needed to promote those interests. As a result, the leased access statute fails this requirement of intermediate scrutiny and should be found unconstitutional.

V. CONCLUSION

Congress had good intentions when it enacted the leased access provisions, as it sought to limit the ability of cable operators, who had monopolies in their local communities at the time, to prevent unaffiliated programmers from reaching their subscribers.[201] However, the law did not produce the results Congress intended, as there has been little usage of leased access by unaffiliated programmers in the years it has been in effect.[202] This may be due to problems with the law's structure, as it may have allowed cable operators to impose terms on those seeking leased access that discouraged them from obtaining it. As a result, the law in practice did not operate in such a manner that it meaningfully contributed to the promotion of diversity and competition in the television programming marketplace. Further, the marketplace has become significantly more diverse and more competitive on its own since the imposition of the leased access requirement, such that the law is no longer needed to promote those interests. Thus, the law has not been effective at promoting its purported goals, and the reasoning supporting the law has been eclipsed by changes in the marketplace in recent decades. For these reasons, leased access should fail intermediate scrutiny and be found unconstitutional.

198. *See* NCTA 2019 Comments, *supra* note 4, at 3-9.

199. *Id.*

200. *See* S. REP. NO. 102-92, at 30 (1991); Time Warner Ent. Co., L.P. v. FCC, 93 F.3d 957, 970 (D.C. Cir. 1996) (citation omitted); *2019 Report and Order*, *supra* note 6, at para.10 (citing Am. Cable Ass'n Comments, *supra* note 180, at 2, 4 n.12)).

201. 47 U.S.C. § 532(b)(1) (2018).

202. *See* S. REP. NO. 102-92, at 30; *Time Warner Ent.*, 93 F.3d at 970 (citation omitted); *2019 Report and Order*, *supra* note 6, at para. 10 (citing Am. Cable Ass'n Comments, *supra* note 180, at 2, 4 n.12).