No. 17-55723

IN THE

United States Court of Appeals for the Ninth Circuit

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, and

ENTERTAINMENT STUDIOS NETWORKS, INC.,

Plaintiff-Appellees,

v.

CHARTER COMMUNICATIONS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-cv-00609-GW-FFM

BRIEF FOR *AMICUS CURIAE* PUBLIC KNOWLEDGE IN SUPPORT OF PLAINTIFF-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Public Knowledge states that it has no parent corporation, and that no publicly held corporation holds 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Public Knowledge[1] is a non-profit organization that is dedicated to protecting the public's access to knowledge. It is focused on the intersection of telecommunications, media, intellectual property, technology, and the law. Public Knowledge seeks to guard the rights of consumers, innovators, and creators, including through regular participation in cases that could have broad implications in these areas.

[1] Both parties have consented to the filing of this brief. Public Knowledge fellow Arian Attar and intern Michael Chaia contributed to this brief. Pursuant to Fed. R. App. P. 29(a)(4)(e), no person outside *amicus curiae* Public Knowledge, its members, or its counsel authored any part of this brief, or contributed money to fund its preparation.

SUMMARY OF ARGUMENT

The First Amendment does not provide Charter with a shield against litigation alleging violations of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (2012)).

Charter contends that it had business, not expressive, reasons for declining to do business with ESN. If this is true, then Charter's non-expressive conduct is outside the ambit of the First Amendment. Many of a cable operator's business decisions necessarily relate to programming. This fact does not provide a means to avoid regulation, oversight, or litigation; Charter must still identify an expressive purpose, or a message it was trying to convey (or exclude) with its conduct.

As the Supreme Court recognized in *Turner Broadcasting v. Federal Communications Commission*, the unique characteristics of cable—specifically, the power cable operators have over the speech of programmers and the ability of viewers to access programming—justifies significant government intervention. 512 U.S. 622, 629-30, 633, 636, 643-45, 655-56 (1994). Consequently, even if the Court identifies some expressive component to Charter's action, intermediate

scrutiny would apply here. The Civil Rights Act of 1866—which is narrowly tailored to the compelling government purpose of eliminating racial discrimination in business dealings—easily passes this level of scrutiny.

One effect on speech present in *Turner* is absent here: the "crowding out" of programmers by broadcast stations that cable systems must carry. First, it is absent because the Civil Rights Act of 1866 is not a "must-carry" rule; it forbids racial discrimination in business dealings but does not mandate an outcome. Second, because the capacity of cable systems has increased since the time of *Turner*, any effect on the capability of Charter to carry programming would be *de minimis*.

Charter's argument also fails because the First Amendment generally provides no protection against laws of general applicability. Additionally, to the extent that it is speech, cable carriage is commercial and subject to a lesser degree of protection.

Finally, Charter's First Amendment arguments in this case are part of a trend by corporate litigants toward using the First Amendment for deregulatory purposes, rather than for protecting genuine free expression and the exchange of ideas. If accepted, Charter's arguments

could be applied to many areas of communications law, limiting the ability of legislatures to require accessibility of services to the disabled, to inform the public of emergency situations, and to address other matters not previously thought to be subject to constitutional challenge. This Court need not follow that path. Charter's First Amendment argument should be rejected, because the Civil Rights Act of 1866 is a constitutional exercise of Congress's power to prevent discrimination, including in the cable industry.

ARGUMENT

I. REGULATION OF CABLE OPERATORS' BUSINESS ACTIVITIES PROTECTS NUMEROUS, IMPORTANT, AND FUNDAMENTAL INTERESTS OF THE PUBLIC

The regulation of the cable industry is a substantial government interest, because of the industry's unique characteristics. Allowing the First Amendment to be used as a shield against a discrimination claim would frustrate that interest.

A. Regulating the Cable Bottleneck Is an Important Government Interest Because It Is a Communications "Bottleneck," and Because of Cable's Diversity Challenges

The role of cable operators as conduits for others' speech gives cable operators "undue market power … as compared to that of consumers and video programmers." *Turner*, 512 U.S. at 633. Congress found that this gave cable operators an incentive to harm programmers, and consequently enacted "must-carry" rules, requiring cable operators to carry broadcast stations in some circumstances. *Id*. The Supreme Court upheld these rules, applying a "bottleneck" theory to the facts of cable:

> When an *individual* subscribes to cable, the physical connection between the television set and the cable network

> gives the cable operator bottleneck, or gatekeeper, *control over* most (if not all) of the television programming that is channeled into the *subscriber's home*. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.

Turner Broad., 512 U.S. at 656 (emphasis added). Because they stand between consumers and their access to information,[2] "cable operator[s], unlike speakers in other media, [have the power to] silence the voice of

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[2] Cable television providers are not the only communications companies with this "bottleneck" power. Level 3 wrote, in the context of a dispute with Comcast, that "Comcast and other last-mile providers enjoy a unique position within the Internet—access to their subscribers must be achieved through direct or indirect interconnection with Comcast. There is simply no other way to deliver to Comcast's subscribers the content that they request." Letter from James Q. Crowe, Chief Executive Officer, Level3 Commc'ns to The Hon. Christine A. Varney, Ass't Att'y General for the Antitrust Division, U.S. Dep't of Justice, in FCC MB Docket No. 10-56 (Dec. 16, 2010). Similarly, a Federal Communications Commission (FCC) working paper once described the terminating access market power possessed by telephone companies:

> [T]he calling party's carrier … has no alternative carrier that can terminate a call to a particular called party. … In effect, each terminating carrier, no matter how small, has a monopoly over termination to its own customers.

Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* 25-26 (OPP Working Paper No. 33, 2000).

competing speakers with a mere flick of the switch."[3] *Turner Broad.*, 512 U.S. at 656.

An example shows the effects of cable bottleneck power. A customer in Lexington, Kentucky who just paid his bill "…was in the middle of watching a show when suddenly his screen went dark. He picked up his remote and changed the channel to find that several other channels from his lineup were also suddenly missing, replaced with a message that said they were no longer a part of his package."[4] That customer then called Charter and found that "[i]f he wanted his channels back, he'd have to start paying $139 every month instead of $103—an increase of nearly 35%."[5] *Id.* Only entities with bottleneck power can make such demands.

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[3] Contrary to some characterizations, s*ee Comcast Cable Commc'ns v. F.C.C.*, 717 F.3d 982, 993-94 (D.C. Cir. 2013), this is not a mere competition analysis. While it is true that cable operators face little competition, which heightens the danger of any abusive practices, the bottleneck in question is "control over . . . the subscriber's home," *Turner Broad.*, 512 U.S. at 656.

[4] Kate Cox, *Charter Disconnects Some Former TWC Subscribers Mid-Day, Demands More Money*, CONSUMERIST (May 5, 2017), https://consumerist.com/2017/05/19/charter-disconnects-some-former-twc-subscribers-mid-day-demands-more-money.

[5] *Id.*

This bottleneck power can affect viewers' ability to access certain perspectives. After a "business dispute," Time Warner Cable (now owned by Charter) cut off access to New Tang Dynasty, a U.S.-based Chinese-language channel that is "perhaps the only channel that airs programming and commentary that is openly critical of the Chinese Communist Party[.]"[6]

Smaller programmers have explained the threat the cable bottleneck poses to them. In carriage negotiations, FUSE Media has said that it is forced to "make anti-competitive concessions or, if unheeded, face losing potential (or actual) distribution and significant risk to … financial viability."[7] Similarly, beIN Sports, which telecasts many international and minority-interest sports events in the U.S., argues that in negotiations with cable systems the mere threat of removing "beIN's

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[6] Larry Ong, *Time Warner Cable Cuts Independent Chinese Channel*, THE EPOCH TIMES (June 29, 2016), https://www.theepochtimes.com/new-yorks-chinese-worry-over-time-warner-dropping-independent-broadcaster_2103834.html.

[7] FUSE Media Comments at 3, F.C.C. Docket No. 16-41, *Notice of Proposed Rulemaking* on Promoting the Availability of Diverse and Independent Sources of Video Programming (Jan. 26, 2017).

service gives the distributor significant leverage, regardless of proven consumer demand for beIN's programming."[8]

Applied to cable, the Civil Rights Act of 1866 could help remedy long-standing diversity and representation issues in that industry. Federal Communications Commission Commissioner Mignon Clyburn, speaking of the need to "ensure a sustainable future for independent programmers," observed: "[s]adly, I am aware of only one women-owned independent cable network and a mere handful that are African American–owned."[9] Indeed, the majority of cable networks are con-

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[8] beIN Sports Comments at 6, F.C.C. Docket No. 16-41, *Notice of Proposed Rulemaking* on Promoting the Availability of Diverse and Independent Sources of Video Programming (Jan. 26, 2016).

[9] Remarks of Federal Communications Commission Commissioner Mignon Clyburn at the Media Solutions Summit (Apr. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344609A1.pdf. Many policymakers recognize the challenges faced by independent networks. For example, in a 2017 letter to FCC Chairman Ajit Pai, Senator Claire McCaskill wrote that "In 2012, there were seven companies that accounted for roughly 95% of all television viewing hours in the United States. In addition to owning studios that develop content, all of these companies also own broadcast and cable networks that purchase the content.... Relatively rarer are 'independent networks,' which are not owned by or affiliated with a major broadcaster, MVPD, or media conglomerate company." Letter from Senator Claire McCaskill to FCC Chairman Ajit Pai at 2 (Feb. 6, 2017), https://www.hsgac.senate.gov/download/mccaskill-letter-to-fcc-chairman-pai.

trolled by only a few providers. The "Big Six" (Comcast, Disney, Fox, Time Warner, CBS, and Viacom) control a large percentage of television programming.[10] Up to recently, the Big Six controlled 72% of the ownership interests in the top 50 most-viewed basic cable networks, for a 73.19% weighted average.[11] This concentration harms diversity. The American Cable Association has stated that "major programming suppliers" prevent some systems from "experiment[ing] with innovative new channels,"[12] with one member adding that requirements from the-

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[10] Free Press, *Who Owns the Media?*, http://www.freepress.net/ownership/chart (last visited Dec. 14, 2017). It may soon become the "Big Five." *See* Ben Fritz, Amol Sharma & Sarah Rabil, *Disney Agrees to Buy Key Parts of 21st Century Fox in $52.4 Billion Deal*, WALL ST. J., Dec. 14, 2017, https://www.wsj.com/articles/disney-to-acquire-key-parts-of-21st-century-fox-for-52-4-billion-1513253593.

[11] Public Knowledge's analysis is based on ratings information from Tony Maglio, *Top 50 Top Basic Cable Channels of 2015*, THE WRAP, http://www.thewrap.com/50-top-basic-cable-channels-of-2015-espn-tbs-tnt-usa-disney-fox-news-tv-ratings (last updated Dec. 18, 2015).

[12] Press Release, American Cable Association, ACA Applauds FCC's Look at Broken Programming Market (Feb. 25, 2016), https://www.nctconline.org/index.php/about-nctc/press-releases/item/787-aca-applauds-fcc-s-look-at-broken-programming-market.

se major programmers "hinder our ability to take on new independent and diverse programming."[13]

The programming carried by such networks is not representative of the American population. The Ralph J. Bunche Center for African American Studies at UCLA recently found that minorities remain underrepresented at a rate "[g]reater than 2 to 1 among cable scripted leads," "[n]early 5 to 1 among the creators of cable scripted shows," and "[g]reater than 3 to 1 among the credited writers for cable scripted shows and digital scripted shows."[14]

Minorities, particularly minority-owned independent cable networks, face numerous challenges with respect to the cable industry. These may be due to structural bias, economic concentration, or other issues. Major cable companies, such as Charter and Comcast, have committed to improve matters by entering into binding Memoranda of Understanding with leading civil rights organizations, but more re-

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[13] *Id.*

[14] Ralph J. Bunche Center for African American Studies at UCLA, 2017 Hollywood Diversity Report: Setting the Record Straight 1 (Feb. 2017), http://expre.ss.ucla.edu/wp-content/uploads/2017/04/2017-Hollywood-Diversity-Report-2-21-17.pdf.

mains to be done.[15] Legislation can have a role in overcoming such bias and underrepresentation. Thus, there is a substantial government interest in applying the Civil Rights Act of 1866 to cable operators.

B. Communications Regulation Promotes Many Important Interests, Which an Incorrect View of the First Amendment Could Harm

Communications policy protects many important interests, such as accessibility and emergency communications. Although an unlikely occurrence, if Charter's First Amendment argument prevails on the theory that its business decisions and routine operations are "speech," it could harm the ability of Congress and the FCC to regulate the communications industry in the public interest.

1. Accessibility

Under Title II of the Communications Act, telecommunications service providers and manufacturers of equipment are required to make their products accessible to the disabled (if "readily achievable").

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[15] *See* Memorandum of Understanding between Charter Communications, Inc. and Multicultural Leadership Organizations (Jan. 15, 2016), http://policy.charter.com/wp-content/uploads/2016/01/New-Charter-and-Multicultural-Organizations-MOU-FINAL-1-15-2016.pdf; *see also* Memorandum of Understanding between Comcast Corp., NBC Universal and African American Leadership Organizations (Dec. 13, 2010), https://ecfsapi.fcc.gov/file/7020924324.pdf.

47 U.S.C. § 255. The 21st Century Communications and Video Accessibility Act, Pub. L. No. 111–260, 124 Stat. 2751 (2011) , contains many provisions, including requiring television programming distributed on the internet to be closed-captioned, requiring "video description" (an audio track that describes what is happening on screen), enhancing closed-captioning support, and requiring consumer video equipment to be accessible. 47 U.S.C. § 613. Broadcasters, too, are often required to provide closed captioning, 47 C.F.R. § 79.1, as well as access to emergency information to persons with disabilities, 47 C.F.R. § 79.2.

Each of these requirements necessarily involves expression—and a litigant could attempt to frame its responsibilities to the public as "forced speech" or an undue burden on its First Amendment interests. To protect the interests of the disabled, the First Amendment should not be incorrectly applied here.

2. Emergency Communications

The federal government maintains the Emergency Alert System, which is

> a national public warning system that requires TV and radio broadcasters, [and] cable television systems…to offer to the President the communications capability to address the

> American public during a national emergency. The system also may be used by state and local authorities to deliver important emergency….[16]

Bolstered by a trend toward using free speech to achieve deregulation, a company may wish to claim that transmitting emergency messages is compelled speech, or crowds out its own communications. A ruling following Charter's arguments in this case could assist such an argument, ultimately hurting the public interest in emergency situations.

3. Common Carriage

As applied to communications services, common carriage requires carriers to transmit communications without unjust or unreasonable discrimination. 47 U.S.C. § 202. Although telegraph, telephone, and many other systems have long been treated as common carriers without serious constitutional objection,[17] broadband providers have repeatedly challenged common carrier designation of their activities on First Amendment grounds. In short, they wish to claim a free speech

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[16] Consumer Guide: Emergency Alert System (EAS), Federal Communications Commission, https://transition.fcc.gov/cgb/consumerfacts/eas.pdf (last updated Nov. 4, 2015).

[17] *See generally* Angela Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071 (1992).

right to block or degrade consumer access to certain websites or other internet services.

For example, Alamo Broadband argues that prioritizing certain internet communications (and thus degrading others by comparison) "convey[s] a message. . .that prioritized content is superior," Joint Reply Brief for Petitioners Alamo Broad. and Daniel Berninger at 1, *U.S. Telecom Ass'n. v. F.C.C.,* No. 15-1063 (D.C. Cir. Oct. 5, 2015), and refers to a requirement that ISPs not block access to lawful content as "compelled carriage." *Id.* at 7. Notably, if true, this argument would suggest that communications common carriage per se is, and always has been, unconstitutional. For instance, this would suggest that a telephone company should be free to deny service to whoever it wishes, decline to connect calls to competitors, or to reroute consumer calls as it sees fit. Thus far, courts have rightly rejected this line of argument, *see U.S. Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 739 (D.C. Cir. 2016), but it is not inconceivable that Charter's arguments here, if successful, could be applied in the common carrier context.

4. Wireless

Like cable companies, wireless companies (mobile phone providers, broadcasters, and others) transmit speech. Under a view of the First Amendment that erects barriers to regulating their activities, FCC licensing requirements,[18] rules that seek to limit interference,[19] and technical standards[20] could all be argued to run afoul of the Constitution. Even federal and local rules concerning the constitution, safety, and placement of wireless towers and other facilities[21] could suddenly be constitutionally suspect. The First Amendment never has been, *see Red Lion Broad. Co. v. F.C.C.,* 395 U.S. 367, 389 (1969), and should not become a means for entities that use the public airwaves to evade rules designed to protect their efficient use.

5. Programming Availability

Other cable regulations of the kind challenged in *Turner* could also fall to this new constitutional understanding, or at least be subject to costly litigation to determine if they are permissible under some

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[18] *E.g.*, 47 U.S.C. § 301.
[19] *E.g.*, 47 U.S.C. § 333; 47 C.F.R. § 20.21(6).
[20] *E.g.*, 47 C.F.R. § 73.682.
[21] *See* 47 U.S.C. § 332(c)(7).

standard of heightened scrutiny. This could leave not only FCC "must-carry" rules, but FCC policies designed to limit the power of dominant providers (program access rules, 47 U.S.C. § 548; 47 C.F.R. § 76.1000-1004, which require certain programming to be sold to competitors, and program carriage rules, 47 U.S.C. § 536, 47 C.F.R. § 76.1301, which require cable systems to treat independent programmers fairly) subject to challenge.

* * *

While these harms are merely potential, they are a natural consequence of flipping the First Amendment on its head by using it to protect platforms and conduits, rather than speakers. Fortunately, the Supreme Court has recently issued a decision which appears to re-center the rights of speakers to access the internet, writing that

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.… While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular.

Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017). This confirms that the purported First Amendment rights of infrastructure providers do not overcome those of persons with legitimate expressive interests. While the attempts to use the First Amendment as an anti-regulatory cudgel will likely continue, the Court here need not help them.

II. THE FIRST AMENDMENT IS NOT A FREE PASS ALLOWING CABLE OPERATORS TO EVADE BUSINESS REGULATION

A cable operator cannot invoke the First Amendment to shield itself from a discrimination claim merely because it is in the media business. It must show that the specific conduct at issue actually constitutes protected speech. In this instance, the Civil Rights Act of 1866 does not interfere with a cable operators' speech interests because there is no effect on its carriage capacity, and its decision to not carry a channel in this instance does not appear to be editorial in nature. Even if Charter's conduct were "expressive," however, the application of the Act would pass intermediate scrutiny. Further, because Charter is engaging in at most commercial speech, and because the Act is a law of

general applicability, allowing ESN to make its case with respect to a claim of discrimination does not offend the First Amendment.

A. Charter's Decision Not to Carry Particular Programming is Not Editorial, and Thus, Not Speech

The Supreme Court has observed that "[c]able programmers and cable operators engage in and transmit speech." *Turner Broad.*, 512 U.S. at 636. It is undisputed that to the extent that cable operators produce original programming, or engage in editorial discretion over which programs to carry, they are entitled to some level of First Amendment protection. It does not follow, however, that all of a cable operator's *business activities* constitute protected speech. Necessarily many cable business decisions relate to programming, but to bring the dispute here into the ambit of the First Amendment, Charter must first show that in choosing not to do businesses with ESN it intended to convey or exclude a message. The fact that it is *possible* for a decision not to carry a particular programmer to be editorial (for example, based on objectionable content) does not make every such decision so. Charter itself concedes that it "declined to carry ESN's channels for legitimate business reasons, including bandwidth limitations and a

decision not to launch general entertainment channels on its basic tier of service." Br. for Appellant at 2. If this is the case, then Charter cannot *also* claim the protection of the First Amendment.[22]

The First Amendment protects conduct "so long as that conduct 'convey[s] a particularized message' and is likely to be understood in the surrounding circumstances." *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012) (quoting *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (per curiam)). While "[a] 'narrow, succinctly articulable message' is not required," *Kaahumanu*, 682 U.S. at 798 (citing *Hurley*, 515 U.S. at 569), Charter must still demonstrate *some* expressive purpose to bring its business decisions under the First Amendment. *See Barnes v. Glen Theatre*, 501 U.S. 560, 576-77 (1991). It has not done so.

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[22] Charter simultaneously claims that it has legitimate business reasons for its actions, which it spells out, *and* that it is impermissible for ESN to "to probe the reasons *why* Charter declined to carry ESN's content." Br. for Appellant at 51. But if Charter's contention is correct, it would prevail on a claim under Section 1981, removing any need for this Court to pass on the constitutional issue. While *amicus* claims no insight into Charter's motivation, its forceful constitutional argument makes the most sense only if 1) it is trying to set a First Amendment precedent to use in other cable regulatory contexts, or 2) it is not able to substantiate its claim of legitimate business reasons.

Looking at Charter's programming lineup and marketing materials, an expressive purpose is impossible to discern. For example, Charter advertises its service as offering "Entertainment for Everyone," further promising "Spectrum TV has something for everyone."[23] It describes categories of programming such as "Lifestyle," "Sports," "News," and "Kids" in broad and generic terms. This marketing language appears tailored to attract potential customers of all interests, not to convey a point of view. Speakers must also communicate their message in a way that is likely to be understood in the surrounding circumstances. *See Spence*, 418 U.S. at 409-11. Here, even if Charter's business decision was intended to convey a message, it is unlikely to be understood as expressive given the circumstances. Cable systems are seen as conduits for others' speech, and are operated for profit—not to express some message. In *Turner*, the Supreme Court found that rules that require cable operators to carry broadcast stations ("must-carry") did not affect cable autonomy, because "given cable's long history of serving as a conduit for broadcast signals, there appears little risk that

[23] *Cable TV*, Spectrum, https://www.spectrum.com/cable-tv.html (last visited Dec. 14, 2017).

cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner Broad.*, 512 U.S. at 655 (emphasis added). Indeed, most of the programming cable carries is from outside sources. *Id.* at 629-30. Once a cable operator makes its business decisions about what programming to carry, the ". . . system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers." *Id.* at 630. By acting as a conduit, the cable provider is not making any content-based decisions regarding that speech. "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id. at* 655. This remains the case today; a carriage decision (or the negotiations leading up to one) by itself is unlikely to be understood by subscribers as an attempt to communicate a viewpoint.

Hurley, which Charter relies on extensively, in fact approves of *Turner*. *See Hurley*, 515 U.S. at 570. While observing that the First Amendment protection does not "require a speaker to generate, as an

original matter, each item featured in the communication," *id.*, the Supreme Court distinguished the facts of *Hurley*, which was a case about compelled speech in the context of a parade, from cable systems:

> Parades and demonstrations … are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience.

Id. at 576. By contrast, Charter is either engaged in routine business decision-making (as it claims), which is not entitled to First Amendment protection without a demonstration of expressive purpose, or it is engaged in racial discrimination, which equally lacks First Amendment protection.[24]

Allowing a cable operator to claim First Amendment protection for business operations would not only allow companies to use "free speech" as a tool to evade basic government oversight and regulation in ways that could permit racial discrimination—it would also harm the First Amendment interests of legitimate speakers, such as video programmers, who seek the protection of long-standing civil rights laws to

[24] *See infra*, Section II(D)(2).

ensure they can engage in carriage negotiations without the tinge of racial animus holding them back.

B. Unlike the Must-Carry Rules Challenged in *Turner*, the Civil Rights Act of 1866 Does Not Reduce a Cable Company's Ability to Carry Other Programming

Any purported burden on speech in this case is much less than what the Court found in *Turner Broadcasting*. In *Turner*, the Supreme Court found that "must-carry" rules burden speech, in part because "must-carry" stations reduce the capacity of a cable system to carry other programming channels. *See Turner Broad.*, 512 U.S. at 643-45. Because those rules were content-neutral, the Supreme Court applied an intermediate scrutiny analysis, which they passed. *See id.* at 661-62. However, the Civil Rights Act of 1866, unlike the must-carry rules, does not create a burden on speech.

First, this is not a "must-carry" case. ESN is not claiming that Charter *must* carry any programming that ESN or anyone else produces. Though upholding the regime, *Turner* did find that "must-carry" interfered with cable operators' discretion by reducing the number of free channels. *Turner*, 512 U.S. at 644-45. By contrast, the Civil Rights Act of 1866 does not mandate program carriage—it merely forbids dis-

crimination. *See* Civil Rights Act of 1866, codified as amended at 42 U.S.C. §§ 1981-1982. A cable operator does not have a license to discriminate in its business dealings merely because they, like many cable activities, involve programming. While *amicus* expresses no view on the merits of ESN's claim, the First Amendment poses no bar to its making it.

Second, technology has moved on since 1994. In *Turner*, the Supreme Court noted that "[t]he must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete." 512 U.S. at 645. At the time, "More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels. And about 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels." *Id*. at 628. Today, the number of channels a cable system can carry has increased from tens to potentially more than a thousand.[25] Thus, even if the Act was viewed as analogous to the "must-carry" provisions at issue in *Turner*, changes

[25] Steven J. Crowley, *Capacity Trends in Direct Broadcast Satellite and Cable TV Services* (Oct. 8, 2013), http://www.nab.org/documents/newsRoom/pdfs/100813_Capacity_Trends_in_DBS_and_Cable_TV_Services.pdf.

in cable technology would require a different outcome, because if ESN prevails the burden on Charter's ability to carry additional programming channels would be *de minimis*.

C. The Civil Rights Act of 1866 is a Generally-Applicable Law

Generally-applicable laws "do not offend the First Amendment simply because their enforcement … has incidental effects" on free speech interests. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). "[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice v. Paladin Enter.*, 128 F.3d 233, 243 (4th Cir. 1997).

Thus, the First Amendment does not permit a company to "publish copyrighted material without obeying the copyright laws. Similarly, the media must obey the National Labor Relations Act, and the Fair Labor Standards Act; may not restrain trade in violation of the antitrust laws, and must pay nondiscriminatory taxes." *Cohen*, 501 U.S. at 670. The Supreme Court has also "recognized the strong gov-

ernmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982). Here too, the First Amendment does not permit a cable company to ignore civil rights legislation.

D. If the Business Decisions of a Cable Operator are "Expressive," Then, At Most, Intermediate Scrutiny Applies

Even if the court considers Charter's business decision here to be expressive, the Civil Rights Act of 1866 should be accorded at most intermediate scrutiny.

Because the Civil Rights Act of 1866 is content-neutral, it will be upheld because "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

1. The Civil Rights Act of 1866 is Content-Neutral

The Act is content-neutral because a prohibition on racial discrimination while contracting is "without reference to the content

of…regulated speech," *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Just as "[n]othing in the [Cable] Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operators has selected or will select," *Turner Broad.*, 512 U.S. at 644, nothing in the Civil Rights Act of 1866 imposes a restriction on cable operators based on the views or content of a programmer. The Act only requires that a cable operator not discriminate against a programmer on the basis of race.

2. Both the Regulation of Cable and Combating Racial Discrimination are Paramount Government Interests

As discussed in Section I, the Supreme Court has confirmed that the characteristics of cable justify regulation to protect the public interest.

Combating racial discrimination in all its forms is likewise a compelling government interest. *See Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *Bob Jones Univ. v.*

United States, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education."). Laws targeting racial discrimination are thus likely to pass constitutional review. Indeed, certain discriminatory acts, even if expressive, are not entitled to constitutional protection at all. As the Court explained in *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984),

> [A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

This applies here.

Charter relies on a district court case, *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 993, 996 (M.D. Tenn. 2012), which applies *Hurley* and finds that "under appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment." *Claybrooks* at 996. *See* Br. of Appellant at 4, 19, 60-61. But those cases say, at most, that the First Amendment forbids the

government from compelling a speaker to communicate a non-discriminatory message. Charter has not identified what message carrying ESN would convey that it disagrees with. Charter's attempt to claim that *Hurley* stands for the proposition that it need have no "particular viewpoint that it is trying to promote or overall message to convey," Br. for Appellant at 55 n.25, misreads that case. While *Hurley* says that a speaker need not have a "narrow, succinctly articulable message," 515 U.S. 569, this does not mean that it needs to have no message at all it wishes to communicate or exclude. The Supreme Court wrote that "the Council clearly decided to exclude a message it did not like from the communication it chose to make," 515 U.S. 574, and that "[t]he message it disfavored is not difficult to identify." *Id.* Discussing with approval a dissent below, it wrote that "even if the parade had no message at all, [a] particular message could not be forced upon it." 515 U.S. 565. *Hurley* thus does not allow Charter to cloak non-expressive business activities in the First Amendment. Further, *Hurley* itself explains why its holding is inapplicable to cable. *See Hurley,* 515 U.S. at 575-77.

Because Charter has failed to identify an expressive reason to decline to carry ESN, it cannot overcome the compelling government interest in preventing discrimination in contracting.

3. The Civil Rights Act of 1866 Goes No Further than Necessary to Promote Its Aim

In this case, any "incidental restriction on alleged First Amendment freedoms is no greater than is essential," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), to the promotion of its aim. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the government's interests. "Rather, the requirement…is satisfied 'so long as the…regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (quoting *United States v. Albertini*, 472 U.S. 675, 688-89 (1985)). The means chosen must not "burden substantially more speech than is necessary to further the government's legitimate interests," *id.*, but such a restriction is not "invalid simply because there is some imaginable alternative that might be less burdensome." *Albertini*, 472 U.S. at 689.

Here, the Act does not restrict more speech than necessary. The Act prohibits *all* racial discrimination when contracting. But as the Supreme Court has found, "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). This is the case here. Racial discrimination in contracting is an evil the government has the right to prohibit outright; a less-restrictive law would allow it in some circumstances, undermining its purpose. In any event, the "First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." *Albertini*, 472 U.S. at 688.

E. At Most, Charter Is Engaging in Commercial Speech

To the extent Charter's activities can be viewed as expressive, they are commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of New York*, 447 U.S. 557, 561, 566 (1980). Because Charter's selection of channels appears based on a

desire to attract and retain customers, not convey a message, these actions, if speech, are commercial.

Under *Central Hudson*, the Supreme Court applied a more lenient standard to the regulation of commercial speech than to other speech even if a regulation relates to content. *Cent. Hudson* at 564 n.6, 566. While the Court has clarified that strict scrutiny would still apply in the case of commercial speech if a regulation were based on government disagreement with a particular message, *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2659, 2664 (2011); *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (Alito, J., opinion), this situation does not obtain here, because Charter has not identified a particular message it wishes to convey.

Thus, even viewing the Civil Rights Act of 1866 as content-based as applied here, the Act would still apply for the reasons above.

III. THE FIRST AMENDMENT SHOULD NOT BE USED FOR DEREGULATORY PURPOSES RATHER THAN TO PROTECT EXPRESSION

Charter's "free speech" argument in this case is part of a broader trend among corporate litigants to use the First Amendment as a

means to evade regulation. As Robert Post and Amanda Shanor put it, "plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166-67 (2015).

This enables plaintiffs to sidestep arguments on the merits and circumvent duly-enacted laws. It also turns free speech on its head, transforming it from a means of protecting the right of individuals to participate in a democratic society,[26] to a way for unaccountable corporations to do as they please. Frederick Schauer has called this kind of use of the First Amendment an "argumentative showstopper," writing

> [t]hat the First Amendment is so often pressed into service for tasks on the periphery of its central purpose is a product of its success....if the doctrine and rhetoric [of the First Amendment] have been developed opportunistically in the service of goals external to the First Amendment rather

[26] Morgan N. Weiland discusses the various traditional (liberal and republican) understandings of free speech, and how modern trends diverge from them, in *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1403 (2017).

> than as a consequence of the purposes the First Amendment was designed to serve, we may as a nation find ourselves with a cultural understanding of the First Amendment that diverges substantially from what a less misused First Amendment would have produced.

Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). Justice Rehnquist sounded the alarm on these issues years ago. In a dissent to *Central Hudson*, he wrote,

> I think the Court . . . has effectively accomplished the "devitalization" of the First Amendment .... I think it has also, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as Lochner and Tyson; *Brother v. Banton*, 273 U. S. 418 (1927). New York's order here [which was overturned by the majority] is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

447 U.S. at 591. Using this "devitalized" First Amendment, the Kimberly-Clark Corporation has claimed a First Amendment right to label wipes as "flushable" if it disagrees with government's assessment that they are not, Complaint for Declaratory, Injunctive, and Other Relief, *Kimberly-Clark Corp. v. District of Columbia, et al.*, No. 1:17-cv-01901 (D.C. Cir. 2017); a pharmaceutical supplier has argued that selling lethal drugs for executions "is an expression of political views, no

different than signing a referendum petition or selling a t-shirt," Motion for Leave to File Petition for Writ of Prohibition or Mandamus at 13, *In re Missouri Dep't of Corrections*, No. 16-3072 (8th Cir. 2016); and Comcast has claimed that a Vermont requirement that it expand its service area "amount[s] to undue speaker-based burdens on Comcast's protected speech under the First Amendment," Plaintiff's Complaint for Declaratory and Injunctive Relief at 22, *Comcast v. Vermont Pub. Util. Comm'n*, No. 5:17-cv-00161-gwc (D. Vt. 2017). These are only a few recent cases demonstrating Rehnquist's point about the "Lochnerization" of the First Amendment.

Litigants have good reason to frame their policy arguments in First Amendment terms, since some courts have adopted such rationales when striking down regulations. For instance, the D.C. Circuit found that the Food and Drug Administration's attempt to require that tobacco manufacturers graphically warn smokers of the dangers of their product violated the First Amendment (rather than just the Administrative Procedures Act, which would have been enough to decide the case). *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012). In another example, the Supreme Court has held

that pharmacies have a First Amendment right to sell their customers' confidential medical information. *See Sorrell*, 131 S. Ct. at 2659.

Fortunately, in this case, there is no precedent that would require a court to give credence to Charter's First Amendment claims, and the District Court properly rejected them. However, the trend toward the "Lochnerization" of the First Amendment in this context deserves the notice of this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's finding that applying the Civil Rights Act of 1866 to Charter does not violate the First Amendment.

Respectfully submitted,

Dated: December 24, 2017

s/*John Bergmayer*

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I hereby certify that I electronically filed the foregoing Brief of Public Knowledge as Amicus Curiae in support of plaintiff-appellees with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on [date].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 24, 2017

s/*John Bergmayer*
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