NO. 17-1702

In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The Alliance for Community Media ("ACM") is a national nonprofit membership organization representing over 3000 public, educational, and governmental ("PEG") access organizations, community media centers and PEG channel programmers throughout the nation.[2] Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States.

The Alliance for Communications Democracy ("ACD") is a national membership organization of nonprofit PEG organizations that supports efforts to protect the rights of the public to communicate via cable television, defends PEG access at the Federal Communication Commission ("FCC") and in the courts, and promotes the availability of the widest possible diversity of information sources and services to the public.[3] The organizations represented by ACD have helped thousands of members of the public,

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[1] Pursuant to Supreme Court Rule 37.6 *amici curiae* state that: (i) this brief was not authored in whole or in part by a party's counsel; (ii) neither a party nor a party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person, other than *amici* or their counsel, contributed money to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that all parties have consented to the filing of this brief.

[2] Petitioner Manhattan Community Access Corporation ("MNN") is a member of ACM.

[3] ACD's members include MNN and *amicus curiae* Chicago Access Corporation. Neither MNN nor Chicago Access Corporation participated in, or was involved in, the drafting of this brief.

educational institutions and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

The National Association of Telecommunications Officers and Advisors ("NATOA") is a national nonprofit membership organization of local government representatives from across the nation whose responsibility is to develop and administer communications policy, including cable franchise agreements and PEG access, for the nation's local governments. Since its founding in 1980, NATOA has provided support for and advocated on behalf of local governments in the enactment and implementation of federal communications laws, administrative rulings, and judicial decisions impacting PEG access, and the cable franchises through which PEG channel capacity is designated.

ACM, ACD, and NATOA are participating as *amici* in support of Respondents in order to address the attempt of *amicus* NCTA—the Internet & Television Association ("NCTA") to inject a new constitutional issue here that was not raised before the courts below.

The issues before the Court are whether, or under what circumstances, private operators of cable system public access channels may be considered state actors for purposes of the state action doctrine. Pet'rs' Br. at i. Thus, at issue here are "the confines of the 'state action' doctrine." Pet'rs' Br. at 3; *See also* Resp'ts' Br. at 17-18 (summarizing Respondents' position as "Respondents have thus adequately pleaded that petitioners' challenged conduct was a state action.") (footnote omitted). Neither party, either before this Court or below, has called into

question the constitutionality of PEG access requirements. *Amicus* NCTA has nevertheless invited the Court to address "whether the requirement imposed on NCTA's members to set aside public access channels in the first place violates *their* First Amendment rights," NCTA Br. at 1. NCTA thereby has called into question the constitutionality of a federal statute that authorizes PEG requirements. 47 U.S.C. § 531.

NCTA's *amicus* brief has compelled ACM, ACD, and NATOA to file this *amicus* brief to urge the Court to reject NCTA's invitation. ACM's, ACD's, and NATOA's members, as well as local governments, PEG centers, and PEG programmers across the nation, rely on PEG requirements authorized by the federal Cable Act, 47 U.S.C. § 531, and contained in the cable television franchise agreements between franchising authorities and cable operators serving their communities. Those statutory rights, and the future of ACM's, ACD's, and NATOA's members' media operations, could be placed in severe jeopardy if the Court were to accept NCTA's arguments.

SUMMARY OF ARGUMENT

Amicus NCTA admits that "[t]he question of whether the PEG-channel requirement is itself constitutional is not directly before this Court . . . ." NCTA Br. at 3. It nevertheless requests that the Court issue an advisory opinion on the alleged burdens imposed by PEG requirements on cable operators' First Amendment rights. The Court should deny NCTA's request. This case does not present the Court with either a developed record on alleged burdens of PEG requirements on cable

operators, or adversarial legal arguments from the parties on this issue.

Prudential considerations strongly caution against consideration of NCTA's request. The Court generally does not address issues that are raised only by *amici*. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). It likewise does not ordinarily pass on questions of constitutional law "unless such adjudication is unavoidable." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)) (internal quotation marks omitted). That NCTA frames its request for an advisory opinion in terms of seeking "recogni[tion]" and "acknowledge[ment]," NCTA Br. at 2, 21, makes it no less advisory and no less inappropriate.

In any event, NCTA's *dicta* request rests on faulty factual and legal arguments. It identifies not a single concrete example of any burden that a PEG requirement has imposed on any particular cable operator. NCTA also makes sweeping, generalized assertions about the current media landscape in an attempt to support its claim that PEG requirements serve no government interest. But NCTA assumes that all Americans have equal access to online and other sources of video programming as they do to cable television. They do not. Whereas virtually all of the population has access to cable television, more than 24 million Americans lack access to fixed terrestrial broadband internet. *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, WC Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660,

1681, para. 50 (2018). NCTA likewise ignores the dominant and unique position of traditional cable television relative to other sources of video programming.

NCTA analogizes PEG channels to various internet-based and other sources of video programming, but the analogy does not disprove that PEG access serves a substantial, even compelling, government interest. PEG access centers are intrinsically connected to their local communities. PEG channels provide a platform for those seeking to share their stories, and they host content that commercial media—whether on cable or online—ignores. PEG access centers also provide coverage of local government bodies and hyper-local issues that cannot be found elsewhere.

PEG requirements thus advance the government interest in promoting localism and assuring that cable systems are responsive to local needs and interests. NCTA's emphasis on online and other sources of video programming is misplaced, because neither Congress nor the courts have justified PEG requirements solely on the basis of cable operators' bottleneck control over video programming distribution. NCTA's reliance on court decisions involving *other* Cable Act requirements is likewise misplaced. Unlike PEG requirements, those other Cable Act requirements were designed to address government interests relating to the amelioration of cable operator market power, and thus are forms of structural economic regulation designed to address the issue of cable operators' bottleneck control. Because PEG requirements serve other government interests, whether cable operators still possess bottleneck control is irrelevant to the constitutionality of those requirements.

Finally, PEG access requirements are content-neutral and survive intermediate scrutiny. The Cable Act only authorizes franchising authorities to require that channel capacity be set aside for PEG access; it does not require it. The actual requirements imposed by franchising authorities vary depending on individual local community cable-related needs and interests, and to succeed in its facial challenge to PEG requirements, NCTA would have to show that no PEG requirement could be imposed in a constitutionally valid manner. It has not, and cannot do so.

ARGUMENT

I. THE COURT SHOULD REJECT *AMICUS* NCTA'S REQUEST TO ADDRESS A CONSTITUTIONAL ISSUE OUTSIDE THE CASE AND CONTROVERSY BEFORE THE COURT.

NCTA's brief is principally devoted to arguing that Congress's authorization of PEG requirements burdens cable operators' First Amendment rights and that "the dramatic changes in the marketplace make it far more difficult today to justify the burden imposed by [the PEG-channel] requirement." NCTA Br. at 4; *see also id.* at 9-17. Although NCTA requests that the Court "not *decid[e]* that this [PEG] requirement is constitutional," it does ask the Court to "*recognize* in its opinion that the First Amendment rights of cable operators are burdened by the requirement that cable operators set aside public

access channels." *Id.* at 2 (emphasis added).[4] The Court should decline NCTA's request.

NCTA's argument is unhinged from the facts and legal issues raised by the parties in this case. It is instead based on unsupported assertions about supposed burdens on cable operators, sweeping generalizations about the current media landscape, and cases that address other Cable Act requirements imposed on cable operators that serve different government interests. *Amici* ACM, ACD, and NATOA respond to these allegations below. But in any event, the Court should follow its normal course of practice and decline NCTA's invitation to address issues of constitutional law unrelated to, and unnecessary to resolving, this case.

NCTA concedes that neither Petitioners nor Respondents have raised any issues regarding cable operators' First Amendment rights and that this issue is not before the Court. *Id.* at 1, 3. As a result, no factual record exists in this case concerning the supposed burdens that PEG requirements might impose on cable operators. In fact, the Court has been presented with no information about any burdens that PEG requirements impose on the cable

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[4] In parts of its brief, NCTA frames the issue as "the requirement imposed on NCTA's members to set aside *public access channels*," NCTA Br. at 1 (emphasis added), but elsewhere it refers more broadly to "PEG-channel requirements," *Id.* at 3. NCTA's arguments and request that the Court "recognize" the burdens imposed by these channels are misplaced, regardless of whether referring to only public access channels or to PEG access channels. But the fact that NCTA uses these terms interchangeably and glosses over distinctions among public, educational, and governmental access further highlights why the Court should not weigh in on this issue, which has had no record development in this case.

operators on whose systems MNN's public access channels are carried. When the D.C. Circuit previously rejected a facial challenge to the Cable Act's PEG provisions, the cable operator had "provided affidavits describing the impact, in terms of both finances and substantive programming, that the PEG requirements have had on cable operators around the country." *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 972 (1996), *aff'd in part and rev'd in part sub nom. Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) ("*Time Warner Entertainment*"). Here, the Court has no such evidence, from either the parties or *amicus* NCTA.

Likewise, the Court does not have the benefit of adversarial legal arguments from the parties on this issue. This issue was not even raised, much less litigated below, and neither decision below addressed the question now raised by NCTA. Indeed, NCTA's First Amendment challenge falls outside the Article III case and controversy before the Court. NCTA asks this Court to address the constitutionality of an act of Congress without the benefit of the views of the United States or the affected—or indeed, any—franchising authority. Fundamentally, the alleged injury to NCTA's members is not traceable to MNN's alleged conduct at issue here, nor would it be remedied by a resolution of the actual controversy before the Court.[5]

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[5] NCTA asserts that "however this Court resolves those questions [actually presented by the parties], it is likely to exacerbate the already substantial harm to cable operators' protected speech interests." NCTA Br. at 20. But NCTA provides no reasoned explanation as to why that might be so. The Court's decision resolving the questions presented would not reach or affect either the continued existence of PEG requirements or the Cable Act provision authorizing

Prudential considerations likewise caution against consideration of a First Amendment issue not even raised, much less developed, by the parties in this case.

The Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen*, 500 U.S. at 96 n.4 (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). Yet that is what NCTA seeks to do here. It "takes no position on the actual questions presented by the parties," NCTA Br. at 20, but instead invites the Court to opine on the First Amendment rights of cable operators. NCTA's request that the Court address a *constitutional* issue that has not been raised by the parties is particularly inappropriate. The Court has explained that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Clinton*, 520 U.S. at 690 n.11 (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)) (internal quotation marks omitted). That is the case here. The First Amendment issue raised by NCTA is clearly avoidable. The issue is not among the questions presented, neither Petitioners nor Respondents argue that this issue must be addressed, and the issue was not raised, much less addressed, by the courts below.

In essence, NCTA seeks an advisory ruling on a question of constitutional law that, although not

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franchising authorities to set aside channel capacity for PEG use, 47 U.S.C. § 531. NCTA has not shown that the alleged burdens of PEG requirements on cable operators' First Amendment rights would change in any way as a result of the Court's decision on the questions presented.

raised by the parties in this case, is of particular interest to NCTA's members. NCTA attempts to circumvent long-established principles against such advisory opinions by framing its request as seeking only that the Court "recognize" or "acknowledge" that the First Amendment rights of cable operators are burdened by PEG channel requirements. NCTA Br. 2, 3, 21. But whether or not PEG requirements place any cognizable burden on cable operators is simply not before the Court, nor was it before the courts below. That NCTA stops short of requesting that the Court hold that federal authorization of PEG requirements violates cable operators' First Amendment rights does not make its request for *dicta* any less advisory and therefore any less inappropriate.

Moreover, it is particularly inappropriate for the Court to make any generalized statements about the alleged burdens of PEG requirements because the PEG requirements that cable operators are subject to vary. *See* Resp'ts' Br. at 30-31 (discussing the significant differences among various state and local PEG requirements). The D.C. Circuit has previously explained that it is particularly "tricky" to evaluate a facial challenge of PEG requirements, because "rather than *requiring* PEG channel capacity, the statute merely *permits* local franchise authorities to require PEG programming as a franchise condition." *Time Warner Entertainment* at 972. While the D.C. Circuit could "imagine PEG franchise conditions that would raise serious constitutional issues," it explained that "we can just as easily imagine a franchise authority exercising its power without violating the First Amendment." *Id.* at 973. In contrast, NCTA asks the Court to issue an opinion that makes sweeping generalizations about

the alleged burdens imposed by all PEG requirements. Such a request, particularly coming from an *amicus* on an issue not necessary to resolve the issues in the case, should be declined.

Even if the Court were intrigued by the issue raised by NCTA, it should wait for an actual case or controversy that properly presents the issue. Until then, the issue of alleged burdens of PEG requirements on cable operators' First Amendment rights "remain[s] unfocused because [it is] not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

II. EVEN IF THE COURT WERE TO ADDRESS THE ISSUE, NCTA'S ATTACK ON THE CONSTITUTIONALITY OF PEG-CHANNEL REQUIREMENTS IS MISGUIDED.

For the reasons set forth above, the Court should not address issues relating to the First Amendment rights of cable operators in this case. But as Respondents note, PEG requirements do not infringe upon the rights of cable operators. Resp'ts' Br. at 42-43. Were the Court to address the issues raised by *amicus* NCTA, it should reject the argument that First Amendment rights of cable operators are burdened by PEG requirements.

A. NCTA's claims about the supposed burdens that PEG requirements place on cable operators are unsupported and misplaced.

NCTA's request that the Court address the alleged burden PEG requirements impose on cable operators' First Amendment rights is based on sweeping assertions about cable operators and PEG access that have little to no support, let alone the kind of support that could result from a developed and contested record.

1. In terms of the alleged burden on cable operators' speech, NCTA asserts that there is a "significant risk that cable subscribers . . . will incorrectly attribute the speech [carried on PEG channels] to cable operators, assuming that the cable operators have *chosen* to transmit the programming that appears on those channels." NCTA Br. at 9-10. NCTA asserts that "examples abound," but provides descriptions of just two instances where unnamed cable operators in unnamed communities carried certain programming that NCTA vaguely describes. *Id.* at 10 n.3. Even in those two vague examples, NCTA does not claim that even so much as a single viewer misattributed the speech in question to the cable operator.

NCTA also claims that cable operators "often must respond to customer complaints regarding programming that is transmitted on PEG channels." *Id.* But again, NCTA provides no examples of such complaints, nor does it provide any information on the extent to which cable operators receive complaints regarding programming transmitted on other, non-PEG channels. The two vague examples NCTA mentions do not include any claim that any

viewers contacted the cable operator about the programming at issue.

Despite the lack of any evidence that viewers misattribute the content of PEG channels to cable operators, NCTA attempts to analogize to the situation in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). In that case, the Court invalidated a requirement that an electric utility must allow particular groups to use space in billing envelopes to ratepayers to discuss any issues they choose. In concluding that this requirement violated the First Amendment, the Court emphasized that the utility "will feel compelled to respond" to the third-party speech in the billing envelopes. *Id.* at 16. Third-party use of confined mail envelope space in a utility bill is not at all similar to setting aside channel capacity on cable systems for PEG access. With the multitude—typically hundreds—of channels available on a cable system, there is not the same concern with forced association of cable operators with speech on PEG channels as there is for a utility company with speech in the confined space of a billing envelope.

NCTA relegates to a footnote the far more analogous situation in *Turner*, where the Court rejected the argument that viewers would attribute speech carried on broadcast stations to the cable operator. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655-56 (1994) ("*Turner*"). NCTA offers no support or explanation for its assertion that "there is a less clear demarcation between the programming that runs on PEG channels and the programming that runs on channels managed by the cable operator." NCTA Br. at 10 n.4. The only aspect of the Court's discussion of broadcast channels in *Turner* that would not apply to PEG channels is the federal

regulation requiring broadcasters to identify themselves at least once every hour. 47 C.F.R. § 73.1201. But in practice, PEG channels (as do almost all other cable programming channels that operators carry on their systems) also regularly identify themselves, and there is nothing before the Court in this case remotely suggesting that viewers are likely to be confused as to which channels are PEG access channels and which channels are voluntarily carried by the cable operator. (In fact, there is nothing in the record indicating that a cable operator "manages" the content of any unaffiliated video programming channel that it chooses to carry.)

2. NCTA goes on to assert that today's media landscape "renders untenable the claim that the PEG-channel requirement is necessary to serve a governmental interest." NCTA Br. at 17; *see also* Br. of Pacific Legal Foundation and TechFreedom ("PLF Br.") at 22-23. While the media landscape has undergone significant changes in the past decades, it does not follow that PEG access no longer serves a substantial, even compelling, governmental interest. In fact, PEG access continues to play a vital and irreplaceable role, contrary to the one-sided picture painted by NCTA.

NCTA repeatedly stresses that the rise of online sources of video content renders PEG access unnecessary. NCTA Br. at 13-17. It notes, for instance, that New York City posts videos of local government meetings online, and then claims that "[a]s that example illustrates, local governments, educations institutions, and individuals can (and do) now easily provide content to interested citizens in ways that are far more user-friendly than a PEG channel." *Id.* at 17. But just because the largest city

in the country[6] makes videos of governmental meetings available online does not mean that *all* local governments, educational institutions, and individuals therefore can easily do so. Furthermore, NCTA provides no explanation for its claim that New York City's online platform is "far more user-friendly than a PEG channel," *id.*, especially when 26 percent of New York City households lack broadband internet at home and 16 percent lack even a computer at home. New York City Comptroller, *Internet Inequality: Broadband Access in NYC Update—September 2015* (Sept. 22, 2015), https://comptroller.nyc.gov/reports/internet-inequality-broadband-access-in-nyc-update-september-2015/.

NCTA's argument also ignores the millions of Americans who lack access to broadband internet or do not use the internet because of the cost of doing so or other reasons. According to the Federal Communications Commission's ("FCC") 2018 Broadband Deployment Report, "over 24 million Americans still lack fixed terrestrial broadband speeds of 25 Mbps [download speed]/3 Mbps [upload speed]." 2018 Broadband Deployment Report, 33 FCC Rcd at 1681, para. 50.[7] This lack of access is more pronounced in rural areas and Tribal lands,

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[6] U.S. Census Bureau, *Annual Estimated of the Resident Population for Incorporated Places of 50,000 or More* (May 2018), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2017/PEPANNRSIP.US12A.

[7] Although the FCC found that over 99 percent of American's have access to mobile broadband with minimum advertised speeds of 5 Mbps download/1 Mbps upload, it rejected the argument that mobile services are a full substitute for fixed terrestrial services. *Id.* at 1666, para. 17.

where the percentages of people lacking access to fixed broadband is 30.7 percent and 35.4 percent, respectively. *Id.* at 1681, para. 50. The FCC's report also shows significant differences in broadband access based on income, with counties in the lowest quartile of median household income having just 56.2 percent of the population with access to both fixed and mobile broadband compared to 83.6 percent in the highest quartile. *Id.* at 1692, para. 62.

3. Apart from the issue of access, NCTA's sweeping assertions overlook that many more Americans view video programming via cable television than over the internet, and that far more Americans rely on traditional television, not the internet, for news. Recent research shows that "[a]mong the roughly half of U.S. adults who prefer to watch their news, the vast majority—75%—prefer the television as a mode for watching; 20% of watchers prefer the web." Amy Mitchell, Pew Research Ctr., *Americans Still Prefer Watching to Reading the News—And Mostly Still Through Television* (Dec. 3, 2018), http://www.journalism.org/2018/12/03/americans-still-prefer-watching-to-reading-the-news-and-mostly-still-through-television/.

Moreover, many Americans do not use the internet and thus cannot access the online sources of video content emphasized by NCTA. The Pew Research Center estimates that 11 percent of U.S. adults do not use the internet, and that jumps to over one third for both Americans 65 and older and Americans with less than a high school level of education. Monica Anderson, et al., Pew Research Ctr., *11% of Americans Don't Use the Internet. Who Are They?* (Mar. 5, 2018), http://www.pewresearch.org/fact-

tank/2018/03/05/some-americans-dont-use-the-internet-who-are-they/. And while "whites, blacks, and Hispanics are all equally likely to be offline," *id.*, there are significant racial disparities in terms of having a broadband connection at home. Andrew Perrin, Pew Research Ctr., *Smartphones Help Blacks, Hispanics Bridge Some—But Not All—Digital Gaps with Whites* (Aug. 31, 2017), http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/ (78 percent of whites report having a broadband connection at home, compared to 65 percent black respondents and 65 percent of Hispanic respondents).

In contrast, cable television service is both more widely available and viewed than online video. The FCC's most recent report on the Status of Competition in the Market for Delivery of Video Programming "assume[s] that cable [multichannel video programming distributors ("MVPDs")] are available to *over 99 percent* of housing units." *Annual Assessment of the Status of Completion in the Market for the Delivery of Video Programming*, WC Docket No. 16-247, Eighteenth Report, 32 FCC Rcd 568, 575, para. 20 (2017) (emphasis added).[8] The Nielsen Total Audience Report for the second quarter of 2018 notes that the average time per adult eighteen and over spent watching live and time-shifted television was four hours and twenty minutes, compared to just one hour and four minutes of all other video sources. The

[8] The report explains that previous data showed that cable MVPDs provide video service to 99.7 percent of housing units, but data on estimates for the number of housing units passed is no longer tracked. *Id.* at 8 n.33.

Nielson Co., *The Nielson Total Audience Report Q2 2018*, at 4 (2018), https://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2018-reports/q2-2018-total-audience-report.pdf ("Nielsen Report").[9] And traditional cable is the dominant way in which Americans access television. The same Leichtman Research Group press release cited by NCTA (at 13 n.5) shows that six largest cable companies have more total video subscribers than the top satellite TV providers, top telephone companies, and top internet-delivered pay-TV providers combined. Press Release, Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018* (Nov. 13, 2018), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/.

After traditional cable, satellite providers have the next most pay-TV subscribers. *Id.* But although satellite providers are not subject to PEG requirements, they are subject to various public interest requirements. 47 C.F.R. § 25.701(b)-(d) (political related public interest requirements), § 25.701(e) (commercial limits in children's programming), § 25.701(f) (carriage obligations for noncommercial programming of educational or informational nature). NCTA makes no mention of these access requirements on satellite providers, but they refute its claim that "cable operators, alone among all of these providers of video programming

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[9] The other sources are: (1) "Video Focused App/Web on a Table" (five minutes); (2) "Video Focused App/Web on a Smartphone" (ten minutes); (3) "Video on a Computer" (five minutes); and (4) "TV-Connected Devices (*DVD, Game Console, Internet Connected Device*)" (forty-four minutes). *Id.*

services, are uniquely subject to onerous carriage obligations." NCTA Br. at 16.

NCTA also claims that "'virtual' MVPDs now compete with cable operators to provide full-fledged channel line-ups," *id.* at 14. But less than 3.5 percent of television households access cable content through a virtual MVPD. Nielson Report at 16. And only 6.3 percent of households access such content exclusively through a broadband internet connection. *Id.* In short, NCTA ignores the unique importance of cable television as a means of reaching large audiences and grossly overstates online and other non-cable sources of video programming as a substitute to reach such audiences.

4. NCTA's argument that (some) people can access "video content" through a variety of internet-based and other sources wrongly assumes that the availability of *any* video content through non-cable service sources automatically eliminates any government interest in PEG access. It does not. Many of the examples of online applications given by NCTA, such as Netflix, Hulu, and Amazon Prime Video, do not allow the public, educational institutions, or governmental bodies to provide programming over their platforms. So, although these platforms may have name recognition, they provide no support at all for NCTA's assertion that "those speakers could reach that audience in numerous ways other than through a public access channel." NCTA Br. at 17 (footnote omitted).

The subset of online video applications that does allow users to upload video content is fundamentally different from PEG access.[10] Unlike

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[10] The only example of such an online application cited by NCTA is YouTube.

online platforms such as YouTube, PEG access centers provide more than just a means of making video content available to the world at large. "PEG channels reflect the special interests and character of each local community." Steven Waldman et al., FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 171 (2011), https://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf. They provide a unique outlet for small, underserved, and unserved segments of the community, such as non-English-language speakers, to connect and share their voices. PEG channels are also an outlet for nonprofit organizations to reach those in need of assistance and build community relationships. Moreover, PEG access centers do more than provide a platform for speech; many support those in their communities through media production and literacy training. *Id.*

PEG channels' fundamental connections with their local communities also position them as unique platforms for local civic and political issues. They cover local elections often overlooked by larger, and even local, commercial media sources, and they also engage in issues affecting communities outside of major media markets.[11] Although some major cities

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[11] *See* Joint Petition to Deny of the Alliance for Community Media and the Alliance for Communications Democracy, Appendix 2, *Application of Charter Comm'ns, Inc., Time Warner Cable Inc. & Advance/Newhouse P'ship for Consent to the Transfer of Control of FCC Licenses & Authorizations*, MB Docket No. 15-149 (filed Oct. 13, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001303513 (detailing ACM's fall 2012 survey of over 200 of its member PEG centers' 2012 election coverage and programming, which shows that 85 percent of respondents produced and/or aired

such as New York put videos of government meetings online, others rely on PEG channels to deliver local government transparency to residents. And many of the videos of local government meetings that are available online are produced by PEG access centers.

5. By mischaracterizing the current media landscape and the relationship between PEG access and cable systems, NCTA overlooks the benefits of PEG access channels and the various substantial, indeed compelling, government interests they serve. It instead suggests that the government's *only* interest in PEG access is to address cable operators' bottleneck control over video programming. NCTA Br. at 12; *see also* PLF Br. at 22-23. NCTA's argument relies on two opinions that emphasize the issue of bottleneck control of cable operators: *Turner*, and then-Judge Kavanaugh's dissenting opinion in *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) ("*Cablevision*"). Neither of these opinions, however, discusses PEG requirements or stands for the proposition that the only governmental interest served by PEG access is ameliorating cable operators' bottleneck market power.[12]

2012 election programming and, of those that reported covering the election, 95 percent covered local elections).

[12] NCTA also cites to the district court decision in *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 6 (D.D.C. 1993), *aff'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *aff'd in part and rev'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000). But the language NCTA quotes pertains to *both* "PEG and leased access provisions" of the Cable Act. *Id.* The court upheld the validity of the PEG requirements, and it

Turner, and its discussion of the bottleneck rationale in particular, addressed the constitutionality of the Cable Act's broadcast station must-carry provisions. The Court summarized Congress's reasoning behind the must-carry provisions:

> In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

Turner at 632-33.

In *Cablevision*, the D.C. Circuit addressed the FCC's decision to extend the Cable Television Consumer Protection and Competition Act of 1992's prohibition on exclusive programming contracts between a cable operator and cable-affiliated programming networks. Then-Judge Kavanaugh's dissenting opinion noted that this prohibition "arose out of a simple congressional concern. Cable programming networks that were vertically integrated with bottleneck monopoly cable operators might 'simply refuse to sell to potential competitors'

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did not address whether any additional government interests further supported their validity.

in the video programming distribution market, such as emerging 'cable operators, satellite dish owners, and wireless cable operators.'" *Cablevision* at 1320 (quoting S. Rep. No. 102-92, at 26 (1991) *reprinted in* 1992 U.S.C.C.A.N. 1133, 1189).

Thus, the sole government interest at issue in the *Turner* and *Cablevision* opinions related to federal economic structural regulation of the cable industry justified by concerns over market power arising from cable operators' bottleneck control over video programming distribution. PEG requirements, on the other hand, are not intended to ameliorate cable operators' market power. The legislative history of the Cable Act notes several ways in which PEG access advances the public interest, but none of them relates to competition or ameliorating market power:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

The Cable Act also states that one of its purposes is to "establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). This government interest in localism is advanced by PEG access and is independent from the issue of cable operators' bottleneck control over video programming.

6. PEG access requirements, which are set forth in local franchise agreements, are obligations imposed on cable operators in return for their use of the public's rights-of-way to install and operate their systems. They are thus consideration for use of the public's property, not structural economic regulation unrelated to use of public property, as must-carry requirements are. In exchange for permitting a cable operator to install and operate its private commercial facilities in the public rights-of-way, the local franchising authority may reasonably require that the cable operator set aside PEG capacity on the system for the public's use, rather than just the operator's private use. *See* Resp'ts' Br. at 32-43. Subject to the federal law requirement that such channel capacity "be designated for public, educational, or governmental use," 47 U.S.C. § 531(b), the public, through the franchising authority, is entitled to use of a modest portion of cable system capacity that would not exist but for the public property that the cable operator uses to build and operate its system. Whatever First Amendment rights cable operators have regarding their cable systems as a whole do not absolve them of the obligation to provide a public benefit in return for their use of the public's property, nor do they entitle them to demand that public property be transformed into cable operators' own private speech preserve.

Thus, neither Congress nor the courts have justified PEG requirements solely on the basis of the continuing existence of cable operator's bottleneck control. There are, at minimum, serious questions about the accuracy and reliability of NCTA's factual assertions that cable operators no longer possess bottleneck control. But even assuming that cable operators do lack bottleneck control, NCTA is simply wrong in contending that PEG access serves no government interest.

B. NCTA cannot make a facial claim against PEG access requirements.

The Cable Act was enacted "[t]o assure a cable system provides programming that is responsive to the needs of the local community." *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996), *aff'd sub nom. Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997) ("*Time Warner Cable*"). The Act does not require that cable operators carry PEG channels; rather, it authorizes franchising authorities to require PEG channels be set aside as a condition of granting a franchising license. *Id.* Not only does the cable operator get a franchise license in exchange for setting aside PEG channel capacity; it gets to use public rights-of-way and easements for the cable operator's requisite wires to reach its viewers. *Time Warner Entertainment* at 973.[13]

1. Seeking to invalidate all PEG requirements, NCTA asserts that PEG requirements are content-

[13] Unlike broadcast television, cable requires a physical presence, with wires installed underground and on poles. *Time Warner Cable* at 1367.

based *on their face*. NCTA Br. At 3 ("Moreover, the PEG-channel requirement is facially content-based."). But to succeed in a facial challenge of PEG requirements, NCTA would have to "show that no franchise authority could ever exercise the statute's grant of authority in a constitutional manner." *Time Warner Entertainment* at 973. This NCTA does not, and cannot, do. A PEG franchise condition that requires a channel devoted to broad, nondiscriminatory public use is content-neutral under *Turner*. *Time Warner Entertainment* at 973. Likewise, requirements for educational or governmental use of channel capacity can be exercised in an expansive, content-neutral manner so as to survive a facial First Amendment challenge. The Court's reasoning in *Turner* for rejecting the argument that the Cable Act's must-carry regulations are content based equally applies to PEG requirements:

> [The challenged provisions] 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.

Turner at 647. Because NCTA has not shown, and cannot show, that there are no conceivable PEG channel franchise requirements that are content-neutral, its facial challenge to PEG channel requirements as content-based regulations would fail, even if it were properly before the Court (which it is not).

2. In another attempt to apply the strict scrutiny standard of a content-based regulation to PEG channel requirements, NCTA claims that cable operators have the same First Amendment rights "afforded to traditional members of the print media who both produce their own content and exercise editorial discretion." NCTA Br. at 5 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). But this Court and Congress have long declined to extend the same level of First Amendment protection to cable television as they do to newspapers and other print media; that is because cable televisions "partakes of [only] *some* of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Los Angeles v. Preferred Comm'ns, Inc.*, 476 U.S. 488, 494-95 (1986) (emphasis added). Cable television has unique characteristics that subject it to special regulation.[14] Unlike cable operators, newspapers do not install and operate their printing presses on public property. *See id.* at 493-95. "[Cable systems] are unusually involved with government, for they depend upon government permission and

[14] NCTA attempts to argue that these characteristics have been changed by digital media. As discussed above, the changes in the media landscape has not been shown to warrant a change in the treatment of cable television.

government facilities (streets, rights-of-way) to string the cable necessary for their services." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996). Newspapers do not hold their local subscribers captive, as readers can access multiple papers from different cities and different states. *Turner* at 656. Cable subscribers are captive to the content their local cable operator chooses to transmit due to the control that operators hold over the "physical connection between the television set and the cable network." *Id.*[15] These and other distinctions render NCTA's simplistic analogy of cable operators to newspapers inapt, especially so on this undeveloped record.

C. PEG access requirements further substantial government interests and impose at most a tailored, incidental restriction on cable operators' First Amendment freedoms.

A content neutral regulation, such as a PEG channel requirement, survives intermediate scrutiny if "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

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[15] This is to be distinguished from the bottleneck control issue discussed above. Whether or not a cable operator has bottleneck control over all means of access to video programming in a market, it does inherently own and control the wires from the operator's headend into the home over which video programming is delivered. A newspaper neither owns nor controls the streets that its delivery trucks use to deliver newspapers to the homes of its subscribers.

Amendment] freedoms is no greater than is essential to the furtherance of that interest." *Turner* at 662.[16]

PEG channel requirements unquestionably serve "important or substantial governmental interest[s] . . . unrelated to the suppression of free expression." *Id.* PEG programming advances the Cable Act's goal of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). It also serves the Cable Act's goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), which is "consistent with the First Amendment's goal of a robust marketplace of ideas." *Time Warner Cable* at 1368. "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner* at 663. PEG channel requirements help ensure that access to electronic media is not monopolized by "the licensees or owners of those media" as has traditionally happened. *Time Warner Cable* at 1369.

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[16] As noted above, PEG access requirements are obligations in local franchise agreements accepted by cable operators as consideration for use of the public's property. As such, it is not clear that they burden cable operators' First Amendment rights to the extent of the federally-mandated must-carry obligations upheld in *Turner*. Thus, while PEG requirements would withstand intermediate scrutiny, as shown below, a fully developed record and adversarial legal arguments may well indicate that level of scrutiny is unwarranted where cable operators have granted access to a small portion of the cable system in exchange for the valuable benefit of using public property over which they do not have an independent right of access.

NCTA asserts that these vital governmental interests no longer matter because consumers can access video content through non-traditional, internet sources. As noted above, NCTA's assertions are both misguided and unsupported. Thus, even if the Court were to address NCTA's arguments (which it should not), it should reject them.

CONCLUSION

Amici ACM, ACD, and NATOA respectfully request that the Court decline *amicus* NCTA's invitation to address any issues regarding the First Amendment rights of cable operators. If the Court were to address such issues, however, it should reject NCTA's argument that the First Amendment rights of cable operators are burdened by PEG requirements.

Respectfully submitted,

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