No. _______

In the Supreme Court of the United States

THE CHAIRMAN AND COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS, PETITIONERS

v.

TIME WARNER CABLE INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Counsel of Record
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@texasattorneygeneral.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the statute governing Texas's transition from municipal-level to state-level cable franchising is subject to strict scrutiny under the Speech and Press Clauses of the First Amendment.

2. Whether a federal court of appeals can hold unconstitutional a state statute that has been amended during the pendency of the appeal, without first allowing the State to make a record in defense of the amended statute.

PARTIES TO THE PROCEEDING

Petitioners in this Court, defendants-appellees below, are the Chairman and Commissioners of the Public Utility Commission of Texas. Donna L. Nelson, the current Chairman, is successor in office to Barry Smitherman and Paul Hudson. Kenneth W. Anderson, Jr. and Rolando Pablos, the current Commissioners, are successors in office to Barry Smitherman, Donna L. Nelson, and Julie Parsley.

Intervenor defendants-appellees below, who are not parties here, were Southwestern Bell Telephone L.P., d/b/a SBC Texas; GTE Southwest Inc., d/b/a Verizon Southwest; Grande Communications Networks, Inc.; and the Texas Coalition of Cities for Utility Issues.

Respondents in this Court, plaintiffs-appellants below, are Time Warner Cable Inc. and the Texas Cable Association.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners the Chairman and Commissioners of the Public Utility Commission of Texas respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a-26a) is reported at 667 F.3d 630. The opinion of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Speech and Press Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law * * * abridging the freedom of speech, or of the press." Pertinent provisions of the Texas Utilities Code are set forth in the appendix to this petition. Pet. App. 49a-63a.

STATEMENT

This case concerns a chapter of the Texas Utilities Code that was added in 2005 by the Act Relating to Furthering Competition in the Communications Industry, and was subsequently amended in 2011. Tex. Util. Code Ann. 66.001 to 66.017 (Vernon 2007 & Supp. 2011) (codifying S.B. 5, § 27, 79th Leg., 2d C.S. (2005), and S.B. 1087, 82d Leg. (2011)) ("the Act"). The Act governs cable and video franchising in the State of Texas. The court of appeals held the Act unconstitutional under the First Amendment, as incorporated against Texas by the Due Process Clause of the Fourteenth Amendment.

1. Cable service providers need access to public rights-of-way to install the equipment that carries cable programming into customers' homes. Pet. App. 2a; *Tex. Cable & Telecomms. Ass'n* v. *Hudson*, 265 F. App'x 210, 212 (5th Cir. 2008). Until 2005, cable service providers had to seek permission from Texas municipalities to use public rights-of-way for this purpose. *Ibid.* A cable service provider and a municipality would negotiate a franchise agreement, in which the cable service provider obtained the necessary permission and, in exchange, agreed to pay fees, provide in-kind services, and accept municipal regulation. *Ibid.*; Pet. App. 3a.

Texas municipalities thus came to rely on cable franchise agreements in a number of ways. For example, in addition to paying franchising fees to the municipalities, cable service providers often agreed to provide public, educational, and governmental ("PEG") access channels, which a municipality uses to cablecast city council meetings and the like; to provide institutional network capacity, which a municipality uses for things like streetlight coordination; and to satisfy "build-out" requirements, which oblige the franchisee to provide universal cable service within a municipal franchise area.

Congress has made repeated attempts to promote competition in the cable industry.[1] These efforts were hindered in Texas by the regime of municipal franchising. According to a consultant's report provided to the Texas Legislature prior to its passage of the Act, the Texas cable industry suffered from a lack of competition that yielded higher prices and inferior service quality for consumers. The report identified municipal franchising as an impediment to competition. Among other problems, the municipal

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[1] Congress has on several occasions addressed the issue of cable franchising, in Texas and beyond. In 1984, Congress recognized the municipal cable franchising process and subjected it to various federal requirements. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in relevant part at 47 U.S.C. 522(10), 541-547, 556). In 1992, Congress forbade the award of exclusive cable franchises. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. 541(a)(1)). And in 1996, Congress opened the video programming market to telephone companies, who had previously been barred from entry by federal law. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 124 (repealing 47 U.S.C. 533(b)(1) (1994)).

franchising process required protracted negotiations with numerous local authorities and imposed onerous build-out requirements, thus dissuading potential new entrants to the cable market. A report by the Federal Communications Commission similarly concluded that local franchising requirements served as a barrier to entry in cable markets across the country. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 F.C.C.R. 5101, at ¶¶ 19-21, 31-42 (2007).

The Act was calculated to address these problems by effecting an orderly transition from municipal-level franchising to state-level franchising. Proponents explained that the Act would introduce competition into the cable market by creating a streamlined and uniform franchising process, thereby offering more choices and lower prices to Texas consumers. At the same time, legislators recognized the importance of accommodating the existing reliance interests of municipalities.

The Act designates the Public Utility Commission of Texas ("PUC") as the state-level franchising authority for the provision of cable service. Tex. Util. Code Ann. 66.001. An entity providing cable service under a preexisting municipal franchise can continue to do so until the expiration of its agreement with the municipality, but all other provision of cable service in Texas requires a PUC franchise. *Id.* 66.003(a). Pursuant to the Act, PUC can grant a state-issued certificate of franchise authority that enables the holder to provide cable service and use public rights-of-way within a designated service area. *Id.* 66.003(c)(1)-(2).

PUC's application process is open to any would-be cable service provider, except that a provider may not secure a state-issued franchise to cover areas where it already holds a municipal franchise. Tex. Util. Code Ann. 66.004(a). In those areas, the entity continues to provide cable service according to its municipal franchise until that agreement expires, *id.* 66.003(a), at which time the entity may apply for a state-issued franchise as to the municipality, *id.* 66.004(a). The Act provided for a four-month window, ending January 1, 2006, during which certain cable service providers were allowed to terminate their existing municipal franchises and seek state-issued franchises from PUC. *Id.* 66.004(b). This opt-out provision was only available to entities that did not serve the largest number of cable subscribers in their municipal franchise areas and served fewer than 40% of those customers. See *ibid.*; see also *id.* 66.002(7) (defining "[i]ncumbent cable service provider").

The holder of a PUC franchise is never required to comply with mandatory build-out provisions, Tex. Util. Code Ann. 66.007, but is subject to various other conditions. For example, it must pay a franchise fee of 5% of gross revenues to each municipality in which cable service is provided. See *id.* 66.005(a); cf. 47 U.S.C. 542 (capping franchise fees at 5% of gross revenues). The holder must also pay the municipality a specified fee to support PEG access, see Tex. Util. Code Ann. 66.006(a)-(c), and must provide network capacity for carrying PEG channels, *id.* 66.009.

2. Respondents filed (and twice amended) a complaint under 42 U.S.C. 1983 in the United States District Court for the Western District of Texas, naming petitioners as defendants in their official capacities. Four other defendants were permitted to intervene as of right. The district court's jurisdiction was invoked under 28 U.S.C. 1331 and 1343(a)(3).

As relevant here, respondents claimed that the Act violates the Speech and Press Clauses of the First Amendment because it allows some entities to apply immediately for PUC franchises, even in the face of an unexpired municipal franchise, but forces others to adhere to their existing municipal franchises. Among other things, respondents sought declaratory and injunctive relief.

The district court initially dismissed for want of jurisdiction, concluding that Article III standing was lacking and that the claims were unripe. *Tex. Cable & Telecomms. Ass'n* v. *Hudson*, 458 F. Supp. 2d 309, 313-314 (W.D. Tex. 2006). The United States Court of Appeals for the Fifth Circuit reversed and remanded for further proceedings. *Tex. Cable & Telecomms. Ass'n*, 265 F. App'x at 219. This Court denied a petition for a writ of certiorari filed by a defendant intervenor. *Sw. Bell Tel. Co.* v. *Tex. Cable Ass'n*, 129 S. Ct. 146 (2008).

On remand, the parties filed opposing motions for summary judgment. Following a hearing, the district court granted summary judgment in favor of petitioners and the intervenor defendants. Pet. App. 47a-48a. Reasoning that the Act is a content-neutral regulation subject to intermediate scrutiny under the First Amendment, the district court concluded that the Act survives such scrutiny because it is narrowly tailored to serve significant governmental interests and leaves open alternative channels for communication. Pet. App. 34a-41a.

3. Respondents appealed. The parties joined issue in the court of appeals over the applicable level of scrutiny under the First Amendment, with petitioners urging intermediate scrutiny and respondents urging strict scrutiny. Pet. App. 16a n.12. Petitioners argued that the Act survives intermediate scrutiny because it is narrowly tailored to the advancement of two important governmental interests—namely, promotion of competition in the Texas cable market and protection of municipal reliance—and leaves open ample alternative channels for communication.

In 2011, while respondents' appeal was pending, the Texas Legislature amended the Act. See Pet. App. 7a-8a. Among other things, the amendment opened another four-month window, ending January 1, 2012, during which a cable service provider could terminate its remaining municipal franchises in cities with fewer than 215,000 people and seek state-issued franchises from PUC. See Tex. Util. Code Ann. 66.004(b-1). The amendment's opt-out period differed from the initial opt-out period in that it was open to all entities, including respondents, without regard to market penetration. *Ibid.*

At oral argument in the court of appeals, counsel for respondents cited the amendment in support of a new argument against the Act's constitutionality, contending that the amendment's opt-out period undermined petitioners' asserted governmental interest in protecting municipal reliance. C.A. Oral Arg. Recording at 13:46-14:40. Judge Elrod asked counsel for petitioners whether "new evidence" would be needed to sustain the Act against respondents' new argument that it was unconstitutional as amended. *Id.* at 26:29-27:14. Speaking from the podium, *id.* at 27:15-27:22, and in a subsequent letter to the court, counsel for petitioners argued that a remand would be in order if new evidence were deemed necessary, petitioners having had no chance to make a record in defense of the just-amended Act.

4. The court of appeals reversed the district court's grant of summary judgment and remanded for further proceedings. Pet. App. 26a. Writing for the court, Judge Elrod concluded that the amended Act violates the First Amendment. *Id.* at 15a-26a.

The court of appeals held that the Act "must endure strict scrutiny because it targets only a few incumbents." Pet. App. 16a. The court found that the Act originally compelled five cable service providers to honor their municipal franchises while allowing other entities to terminate such agreements in favor of state-issued franchises from PUC, and that the 2011 amendment reduced this number to two cable service providers by opening an opt-out period in cities with fewer than 215,000 people. *Id.* at 18a-19a. The court below understood this Court's precedent to require strict scrutiny in light of these figures, reasoning that "[i]n the arena of constitutional rights * * * , there is often safety in numbers." *Id.* at 19a; see *id.* at 16a-22a (citing *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), *Ark. Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), *Leathers* v. *Medlock*, 499 U.S. 439 (1991), and *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994)).

The court of appeals held that the amended Act did not survive strict scrutiny. Pet. App. 21a-22a. It went on to hold that the Act would not withstand intermediate scrutiny, either. *Id.* at 22a-26a. Pointing to the 2011 amendment, the court concluded that the Act did not actually further petitioners' asserted interest in protecting municipal reliance because, as amended, it allowed cable service providers to terminate municipal franchises in cities with fewer than 215,000 people. See *id.* at 25a ("[A]lthough defendants initially insisted that [the Act] could still further municipal reliance by preserving the primary agreements with incumbents, the legislature amended the law to allow incumbents to terminate their arrangements with all municipalities with a population under 215,000. At oral argument, the state provided no logical explanation why the reliance interests of heavily populated municipalities should matter more than those of less populated municipalities." (citation omitted)).

Having held the Act unconstitutional, the court of appeals reversed and remanded. Pet. App. 26a. The court of appeals instructed the district court to proceed with haste during the proceedings on remand. See *ibid.* ("Acknowledging that the plaintiffs have waited long to validate rights that are time-sensitive, we trust the district court will handle the matter expeditiously.").

REASONS FOR GRANTING THE PETITION

A. By Applying Strict Scrutiny, The Fifth Circuit Misapprehended This Court's Precedent And Created A Split With The D.C. Circuit

The court of appeals condemned the Act by subjecting it to strict scrutiny. Pet. App. 16a-22a. In so doing, the court below misinterpreted this Court's First Amendment decisions and created a circuit split on an important constitutional issue. Intermediate scrutiny is the appropriate standard.

The Fifth Circuit reduced the applicability of strict scrutiny to an exercise in counting. See Pet. App. 19a (embracing this characterization and noting that, "[i]n the arena of constitutional rights * * *, there is often safety in numbers"). According to the opinion below, the Act comes in for strict scrutiny because it discriminates against a small number of cable service providers by refusing to let them opt out of their municipal franchises in favor of state-issued franchises. *Id.* at 16a-20a. To support this conclusion, the Fifth Circuit principally relied upon a pair of decisions from this Court in which taxes targeting a few members of the press were subjected to strict scrutiny. See *ibid.* (citing *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), and *Ark. Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987)).

The Fifth Circuit rejected petitioners' argument that intermediate scrutiny was appropriate because the small number of regulated speakers reflected the market conditions that occasioned the Act in the first place—namely, the dearth of competition in the Texas cable market. Pet. App. 21a. This Court has rejected the notion "that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 660 (1994) ("*Turner I*") (discussing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Differential treatment of a segment of the press warrants strict scrutiny if it "raise[s] suspicions that [the] objective [is], in fact, the suppression of certain ideas," but there will be no grounds for suspicion when "the differential treatment is 'justified by some special characteristic of' the particular medium being regulated." *Id.* at 660-661 (quoting *Minneapolis Star*, 460 U.S. at 585). Petitioners urged the Fifth Circuit to adhere to *Turner I* in this regard, but to no avail. Continuing its "safety in numbers" theme, the Fifth Circuit refused to apply intermediate scrutiny, as this Court had in *Turner I*, 512 U.S. at 661-662, because the statute at issue in *Turner I* "impacted 'almost all cable systems in the country, rather than just a select few,' " Pet. App. 21a (quoting *Turner I*, 512 U.S. at 661).

The applicable level of scrutiny would have been different in the D.C. Circuit, which frequently entertains First Amendment challenges when Congress and the Federal Communications Commission regulate the cable industry at the national level. The D.C. Circuit would not share the Fifth Circuit's unquestioning belief that *Minneapolis Star* and *Arkansas Writers' Project* control the analysis in a case, like this one, that does not involve taxation of the press. Compare *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 68 n.11 (D.C. Cir. 1998) ("[W]e have described *Minneapolis Star* and *Arkansas Writers' Project* as 'likely addressed only to the special complexities of taxation.' " (quoting *Walsh* v. *Brady*, 927 F.2d 1229, 1236 (D.C. Cir. 1991))), with Pet. App. 16a-20a (purporting to follow *Minneapolis Star* and *Arkansas Writers' Project*).

Moreover, the D.C. Circuit recognizes that if there is a good reason for the number of regulated entities to be small, then the simple fact that the number is small does not trigger strict scrutiny of the regulation. See *Time Warner Entm't Co.* v. *FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (per curiam) (applying intermediate scrutiny to cable statute and noting that its "vertically integrated programming provisions apply to only a limited number of companies for a perfectly legitimate reason: the antitrust concerns underlying the statute arise precisely because the number of vertically integrated companies is small" (citing *Turner I*, 512 U.S. at 660-661)); *BellSouth*, 144 F.3d at 68-69 (applying intermediate scrutiny to electronic-publishing statute and noting that "Congress's imposition of structural separation on the [Bell operating companies explicitly named in the statute] because of their status as price-regulated bottleneck monopolies is certainly no more suggestive of any effort to exercise a content preference than were the must-carry provisions upheld in [*Turner I*]").[2]

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[2] *Chesapeake & Potomac Telephone Co.* v. *United States*, 42 F.3d 181, 196-198 (4th Cir. 1994), likewise departed from the Fifth Circuit's "safety in numbers" regime of strict scrutiny, but this Court vacated the Fourth Circuit's judgment and remanded for a mootness determination, see *United States* v. *Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (per curiam).

The applicable level of First Amendment scrutiny for a statute that happens to regulate a small number of speakers thus depends upon the forum in which it is challenged. In the Fifth Circuit, strict scrutiny is all but assured, as is invalidation of the statute. In the D.C. Circuit, by contrast, the government has a chance to qualify for intermediate scrutiny and then mount a defense of the statute. This Court alone can resolve this division of authority concerning an important principle of constitutional law.

B. The Fifth Circuit Should Not Have Held That The Act Fails Intermediate Scrutiny Without First Giving Texas A Chance To Make A Record In Defense Of Its Amended Statute

The court of appeals took a belt-and-suspenders approach in declaring the Act unconstitutional, holding that, "[e]ven assuming the defendants are correct that intermediate scrutiny applies, the legislation's exclusion of incumbents would not survive." Pet. App. 22a. That alternative holding should not dissuade this Court from deciding whether the Act was properly subjected to strict scrutiny. The intermediate-scrutiny analysis in the court below was fatally flawed because it was based on an incomplete record.

The Texas Legislature changed the legal footing of this case during the pendency of respondents' appeal by amending the Act to create an opt-out period for cable service providers with municipal franchises in cities under 215,000 people. See Tex.

Util. Code Ann. 66.004(b-1).[3] In adjudicating respondents' constitutional claim for prospective relief, the court of appeals was obliged to evaluate the law in existence at the time it decided the case, rather than the law as it existed when the district court rendered judgment. See, *e.g.*, *Kremens* v. *Bartley*, 431 U.S. 119, 129 (1977); *Fusari* v. *Steinberg*, 419 U.S. 379, 387 (1975); *Diffenderfer* v. *Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (per curiam); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.). Unfortunately, the court of appeals had before it a record that was compiled based on the law as it used to be. This was the natural consequence of a legislative change that postdated all proceedings in the district court.

Despite the fact that petitioners had been given no opportunity to make a record in the district court concerning the pertinent legislation, however, the court of appeals held that the Act, as amended, did not withstand intermediate scrutiny. Pet. App. 22a-26a. The court found that petitioners' arguments in support of the original Act did not show that the amended Act could withstand intermediate scrutiny, *id.* at 25a—ignoring the fact that petitioners were bound by the limitations of the record in attempting to defend a new statutory regime. A federal court

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[3] This amendment did not render the matter moot because there remains an Article III "Case[]" or "Controvers[y]" as between petitioners and those respondents who have unexpired municipal franchises in cities with over 215,000 people. See *Ne. Fla. Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 661-663 & n.3 (1993).

thus took the "delicate and awful" step of condemning a state statute as unconstitutional without first giving the State a chance to make a record in defense of its enactment. *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.); see also *Kremens*, 431 U.S. at 128 (noting that adjudicating the constitutionality of a state statute is "a matter of 'great gravity and delicacy' " (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring))).

This error may be explained, though it certainly is not justified, by the express desire of the court of appeals to "handle the matter expeditiously." Pet. App. 26a. At most, the Fifth Circuit should have vacated the district court's judgment and remanded for further proceedings in light of the intervening amendment to the Act. As the Seventh Circuit has noted, "[I]n some circumstances, it is advisable for an appellate court to remand a case for further proceedings at the trial level when new legislative enactments affect ultimate disposition of the case." *Orrego* v. *833 W. Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991). To take a recent example, the Second Circuit vacated and remanded in a case involving a First Amendment challenge to the USA Patriot Act, where Congress had amended the pertinent provision during the pendency of the appeal. *Doe* v. *Gonzales*, 449 F.3d 415, 418-419 (2d Cir. 2006) (per curiam). This Court has taken the same approach when confronted with intervening amendments to statutes challenged on constitutional grounds. See, *e.g.*, *Maher* v. *Doe*, 432 U.S. 526, 528 (1977) (per curiam); *Kremens*, 431 U.S. at 134, 137; *Fusari*, 419 U.S. at 380, 386-390. In its haste to pass judgment on Texas's amended Act, the Fifth Circuit diverged from the sound practice of the federal courts. *Festina lente.*

It is therefore important for this Court to take up the first question presented and decide whether the Act was properly subjected to strict scrutiny in the court below. If the Act is indeed subject to scrutiny that is " 'strict' in theory and fatal in fact,"[4] then perhaps the court of appeals can be forgiven for having deprived petitioners of a chance to make a record in defense of the statute: No harm, no foul. But if the Act is subject only to intermediate scrutiny, then petitioners are entitled to an opportunity—their first—to make a record in the district court demonstrating that the amended Act survives that gentler inquisition. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 185 (1997) ("*Turner II*") ("A plurality of the [*Turner I*] Court considered the record as then developed insufficient to determine whether the provisions were narrowly tailored to further important governmental interests, and we remanded the case to the [district court] for additional factfinding."); *Turner I*, 512 U.S. at 668 (plurality opinion) ("[W]e think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.").

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[4] Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (coining the phrase).

Accordingly, a holding by this Court that the Act was incorrectly subjected to strict scrutiny will alter the judgment of the court of appeals, while simultaneously resolving a circuit split and correcting a departure from the accepted and usual course of judicial proceedings. See Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DAVID C. MATTAX
Deputy Attorney General
for Defense Litigation

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Counsel of Record
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@
texasattorneygeneral.gov
(512) 936-1700

April 2012

APPENDIX A

Time Warner Cable Inc. v. *Hudson*,
667 F.3d 630 (5th Cir. 2012)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
F I L E D
January 13, 2012
Lyle W. Cayce
Clerk

No. 10-51113

TIME WARNER CABLE INC.;
TEXAS CABLE ASSOCIATION,

Plaintiffs - Appellants,

v.

PAUL HUDSON, in His Official Capacity as Chairman of the Public Utility Commission of Texas; JULIE PARSLEY, in Her Official Capacity as Commissioner of the Public Utility Commission of Texas; BARRY SMITHERMAN, in His Official Capacity as Commissioner of the Public Utility Commission of Texas,

Defendants – Appellees,

TCCFUI, Texas Coalition of Cities for Utility Issues; GTE SOUTHWEST INC., doing business as Verizon Southwest; SOUTHWESTERN BELL TELEPHONE L.P., doing business as SBC Texas; GRANDE COMMUNICATIONS NETWORKS, INC.,

Intervenor Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before REAVLEY, ELROD, and GRAVES, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Time Warner Cable and Texas Cable Association appeal the district court's grant of summary judgment that dismissed their claims that a Texas statute violates the First and Fourteenth Amendments of the Constitution or is preempted by federal law. Because the statute unjustifiably discriminates against a small number of incumbent cable providers in violation of the First Amendment, we REVERSE.

I.

A.

A cable provider relies on public rights-of-way and easements to build cable networks and provide video programming services to a municipality's residents. "As a result, the cable medium may depend for its very existence upon express permission from local governing authorities." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994). Historically, cable providers in Texas obtained that local government permission by negotiating long-term franchise agreements with each municipality. In return for the necessary access to public rights-of-way, municipalities imposed franchise fees and subjected cable operators to extensive regulation, such as requiring that they carry public-access channels and "build-out," or lay cable in, all of the municipal franchise area.

Beginning in 1984, Congress introduced additional federal regulation to these franchise agreements. For example, federal law requires that the franchising authority "[i]n awarding a franchise . . . shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides," a practice known as red-lining. 47 U.S.C. § 541(a)(3).

Many Texas municipalities have traditionally received cable services entirely from a single "incumbent" cable operator, often the operator that first installed a cable network for that community. *See Tex. Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x 210, 212 (5th Cir. 2008). However, incumbent operators began to face competition from overbuilders[1] and telephone companies entering the video services market.[2] *Id.* Nevertheless, the cost of negotiating separate franchise agreements with each targeted municipality across the state hindered the ability of new entrants to compete.

In response to this barrier to entry, the Texas legislature enacted Senate Bill 5 (S.B. 5), an "Act Relating to Furthering Competition in the Communications Industry," aimed at reforming the cable service industry in Texas. S.B. 5 creates a new state-level franchising system that obligates the Public Utility Commission (PUC) to grant a franchise for the requested areas if the applicant satisfies basic requirements. *See* Tex. Util. Code § 66.003. New entrants, like the telephone companies, may obtain a single statewide franchise that avoids the expense and inconvenience of separate municipal franchise agreements across the state. Overbuilders may terminate their existing municipal franchise agreements in favor of the

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[1] "Overbuilder" is a term in the industry for companies that build their own cable systems in areas already served by a cable operator. The term does not refer to what the cable market can bear.

[2] Federal law once banned telephone companies from providing cable services, but Congress repealed that ban in 1996. *See* 47 U.S.C. § 533(b)(1) (1994) repealed by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 124. Telephone companies subsequently have upgraded their networks to provide video services to certain municipalities.

convenience of the statewide franchise. § 66.004(b).[3] Incumbent cable providers, on the other hand, cannot similarly opt out for the statewide franchise, until after the expiration of the municipal license. § 66.004(a).[4]

B.

The day after S.B. 5 was signed into law, Texas Cable Association (TCA), a trade organization representing incumbent cable operators in Texas, filed suit against each of the PUC's commissioners. TCA alleged that S.B. 5 violates the First Amendment and the Equal Protection Clause and is preempted by federal anti-redlining law. TCA argued that S.B. 5 singled out five cable operators for discriminatory treatment, depriving them of the convenience of a statewide franchise. In addition, the plaintiff asserted that, because S.B. 5 allowed potential entrants to the cable market to define their own service footprint and required the PUC to grant

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[3] Specifically, S.B. 5 provides that any cable system that is "not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area may elect to terminate [its] municipal franchise and seek a state-issued certificate of franchise authority." § 66.004(b).

[4] "A cable service provider or a video service provider that currently has or had previously received a franchise . . . is not eligible to seek a state-issued certificate of franchise authority . . . until the expiration date of the existing franchise agreement." § 66.004(a).

the franchise, it conflicted with federal anti-redlining law.

Shortly thereafter, four additional parties intervened as defendants: (1) Grande Communications Networks, Inc., the largest overbuilder in Texas, which had terminated its municipal franchises after passage of S.B. 5 in favor of a state-issued franchise; (2) Verizon Southwest, a telephone company that obtained a franchise under S.B. 5 shortly after its enactment; (3) AT&T Texas, another telephone company that acquired a franchise under S.B. 5[5]; and (4) the Texas Coalition of Cities for Utility Issues (TCCFUI), which promotes the interests of Texas municipalities. The PUC defendants and intervenors moved for judgment on the pleadings.

The district court dismissed TCA's claims for lack of ripeness and Article III standing under Federal Rule of Civil Procedure 12(b)(6), determining that TCA failed to show "that the Act will inflict inevitable or even probable harm on its member cable operators at this time." We reversed and remanded, holding that "[d]iscriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable." *Hudson*, 265 F. App'x at 218 (internal quotation marks omitted).

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[5] Grande, Verizon, and AT&T filed a joint brief and will be referred to collectively as the industry defendants.

On remand, Time Warner Cable, an incumbent cable provider with numerous unexpired municipal franchises, joined TCA as a plaintiff. Each side moved for summary judgment. After determining that the plaintiffs had established sufficient injury to give them standing, the district court denied the plaintiffs' motion and granted the defendants' motion for summary judgment, determining that S.B. 5 survived intermediate scrutiny. The district court rejected the plaintiffs' argument that federal anti-redlining law in 47 U.S.C. § 541 preempts S.B. 5. This appeal followed.

After the district court granted summary judgment in favor of the defendants but before we heard oral argument, the Texas Legislature passed S.B. 1087. *See* Tex. Util. Code § 66.004(b-1)–(b-2). That bill modified S.B. 5 by authorizing cable incumbents to terminate their municipal franchises in favor of the statewide license, but only for municipalities with fewer than 215,000 people. *Id.*[6] As it currently stands, S.B. 5 allows certain incumbents the ability to apply for a statewide franchise, but the legislation continues to exclude

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[6] "[A] cable service provider or video service provider in a municipality with a population of less than 215,000 that was not allowed to or did not terminate a municipal franchise under Subsection (b) may elect to terminate not less than all unexpired franchises in municipalities with a population of less than 215,000 and seek a state-issued certificate of franchise authority. . . ." § 66.004(b-1).

Time Warner and one other TCA member from opting out of their remaining unexpired municipal franchise agreements with cities of over 215,000 people.[7]

II.

Before we address the plaintiffs' arguments on appeal, the industry defendants repeat a threshold argument that this court previously rejected at the motion to dismiss stage: namely, that the plaintiffs have not established Article III standing to complain of S.B. 5 but instead have offered only "speculations" of injury.[8] We review questions of standing *de novo*. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010). As the parties seeking federal court jurisdiction, TCA and Time Warner bear the burden of establishing their standing. *See Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011).

The standing requirement originates from the Constitution confining federal courts to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing "set[s] apart the

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[7] Time Warner Cable has unexpired franchise agreements with Dallas, Corpus Christi, and Irving, while another TCA incumbent retains a franchise with Lubbock. The municipal franchises expire in the following years: Irving in 2013, Lubbock in 2014, Dallas in 2015, and Corpus Christi in 2017.

[8] Neither the TCCFUI nor the PUC defendants contest the plaintiffs' Article III standing.

'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III"). The "irreducible constitutional minimum of standing contains three elements": injury-in-fact, causal connection, and redressability. *Id.* at 560–61.

The industry defendants concentrate primarily on the injury-in-fact element because plaintiffs allegedly failed to prove any concrete economic damages.[9] The injury-in-fact requirement helps ensure that courts resolve legal questions "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

As noted above, this court has already decided that TCA's pleadings alleged sufficient injury-in-fact to survive a motion to dismiss. Specifically, we held that TCA claimed sufficient economic *and* constitutional injury. As to the latter:

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[9] We can dispose briefly of the industry defendants' arguments that plaintiffs failed to show causal connection or redressability. S.B. 5 expressly prevents the plaintiffs from obtaining a statewide franchise, while conferring the benefit on other cable and video providers. Given this direct exclusion, there is "little question that the action or inaction has caused [their] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62.

> The [TCA] contends that the Act unlawfully discriminates against its membership by unjustifiably favoring non-incumbents over incumbents. Discriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable. And such injury is recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation. Here, the Act facially discriminates against the [TCA's] membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers. . . . [S]uch discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing.

Hudson, 265 F. App'x at 218 (internal quotation marks and citations omitted).

In their haste to insist on additional evidence, the industry defendants completely ignore this clear language. Instead, they emphasize the opinion's earlier observation that general allegations may suffice for a motion to dismiss, while specific facts must be adduced to survive summary judgment. *Id.* at 216 (quoting *Lujan*, 504 U.S. at 561). Nevertheless, "the nature and extent of facts that must be averred (at the summary judgment stage)

. . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561. There can be no dispute that the plaintiffs are the object of the government action here where S.B. 5 singles out certain incumbent operators as ineligible for the benefit of a statewide franchise.[10] When the government targets certain speakers for the exclusion of benefits bestowed on similar parties, "no further showing of suffering based on that unequal positioning is required for purposes of standing." *Hudson*, 265 F. App'x at 218; *see also Lujan*, 504 U.S. at 561–62.

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[10] *Compare* Tex. Util. Code § 66.004(a) (making incumbent operators ineligible for a statewide franchise until their existing municipal franchises expire) *with* Tex. Util. Code § 66.004(b) (allowing overbuilders "that [are] not the incumbent cable service provider" to terminate their existing municipal franchises and obtain a statewide franchise) *and* Tex. Util. Code § 66.004(b-1) (allowing incumbent operators in municipalities with less than 215,000 people to immediately terminate their existing municipal franchise) *and* Tex. Util. Code § 66.003(a) (allowing new entrants to obtain a state-level franchise immediately).

Consequently, the industry defendants' argument that the plaintiffs fail to establish that the disparate treatment "imposes any burden *at all* on incumbent cable operators" misses the point.[11] TCA and Time Warner need not prove that they will sustain a quantifiable economic injury. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 588 (1983) (observing that "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment" and "[t]hus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects"). S.B. 5 subjects the plaintiffs to disparate treatment by allowing their competitors to opt out of municipal franchises in favor of the convenience of a statewide license. Because the legislation targets the plaintiffs for exclusion from this benefit provided to similarly situated speakers, TCA and Time Warner have shown constitutional injury sufficient to establish standing.

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[11] Moreover, the fact that the industry defendants are Time Warner's competitors (AT&T, Verizon, and Grande), who vigorously oppose Time Warner's eligibility for the same statewide franchise that they currently enjoy, undermines their argument that the convenience confers no economic benefit. In other words, if the state franchise provided no competitive advantage, it is unlikely the industry defendants would invest so many resources in opposing its extension to Time Warner.

III.

On appeal, the plaintiffs contend that S.B. 5 is preempted by federal law and that it violates the First and Fourteenth Amendment. We begin with the preemption argument.

The plaintiffs rest their preemption attack on a conflict preemption claim. "Conflict preemption requires that it would be physically impossible for a private party to comply with both federal and state law, or that the law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 334 (5th Cir. 2007) (internal alteration and quotation marks omitted).

Specifically, the plaintiffs contend that the Federal Communications Act conflicts with and therefore preempts S.B. 5 because Congress requires that the franchising authority assure that redlining does not occur. *See* 47 U.S.C. § 541(a)(3) ("In awarding a franchise . . . a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."). According to the plaintiffs, S.B. 5 contradicts this clear anti-redlining command because it requires the PUC simply to approve franchise applications, rendering the agency powerless to protect against a perceived red-lining problem at the time of issuing the franchise. *See* Tex. Util. Code § 66.003(b) (providing that the PUC "shall issue a certificate of franchise authority" after receiving the necessary affidavits).

This argument mischaracterizes the law. Rather than conflicting with Congress's anti-redlining command, the Texas statute expressly prohibits income discrimination in terms that mirror the FCA. *See* § 66.014(b) ("A cable service provider or video service provider that has been granted a state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides."). When applying for a franchise, the applicant must submit an affidavit affirming that it "agrees to comply with all applicable federal and state statutes and regulations." § 66.003(b)(2). More to the point, *in awarding a franchise*, S.B. 5 requires the PUC to include language in the license expressly conditioning any grant of authority to the lawful operation of the cable service. § 66.003(c)(3). The PUC then retains the authority to monitor the deployment of cable services. § 66.014(e). Finally, S.B. 5 authorizes the PUC to hold proceedings to determine whether a provider is violating the anti-redlining provisions, § 66.014(c), and a court of competent jurisdiction may then invoke sanctions for noncompliance, including the revocation of the franchise authority. § 66.015(a).

Given this harmony between state and federal law, the plaintiffs present a conflict preemption claim without any conflict. The Texas statute prohibits income discrimination, commands an applicant to swear an affidavit that it will abide that standard, requires the state agency to condition the license to the continued compliance with that standard, and authorizes the agency to determine non-compliance, which may ultimately lead to revocation of the franchise. In doing so, S.B. 5 fully authorizes the PUC to fulfill the Congressional mandate that in awarding franchises, the agency "shall assure" that income discrimination does not occur. We therefore hold that the anti-redlining provisions of the Federal Communications Act do not preempt S.B. 5.

IV.

We turn now to the question of whether S.B. 5 violates the First Amendment. This court reviews the grant of summary judgment *de novo*, applying the same legal standard as the district court. *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Hous., Tex.*, 660 F.3d 235, 238 (5th Cir. 2011); *see also Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007) ("We review questions of constitutional law, including the constitutionality of a State statute, *de novo*.").

Our First Amendment analysis begins with determining the applicable level of scrutiny. Although together the various parties insist on all three possible levels,[12] "[t]here can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636. Here, S.B. 5 is not a law of general applicability as it excludes statewide franchises from certain incumbents and singles out elements of the press for special treatment. Therefore, we must determine which form of heightened scrutiny to apply. *See id.* at 641 ("Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.").

A.

The plaintiffs argue that S.B. 5 must endure strict scrutiny because it targets only a few incumbents. We agree.

Laws singling out a small number of speakers for onerous treatment are inherently suspect. For

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[12] TCA and Time Warner argue that we should apply strict scrutiny but that S.B. 5 is unconstitutional regardless of whether we apply strict or intermediate scrutiny. The industry defendants and the PUC assert that S.B. 5 is subject to, and fails, intermediate scrutiny. TCCFUI contends that S.B. 5 should be reviewed only under rational basis scrutiny because it does not implicate First Amendment interests.

example, the Supreme Court applied strict scrutiny to Minnesota's ink and paper tax because it not only singled out the press but also targeted a small number of newspapers. *Minneapolis Star*, 460 U.S. at 591 (holding that the practical effect of a $100,000 exemption "is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax."). "Whatever the motive of the legislature in this case," the Court held that a state's power to target a small selection of speakers "presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme" under strict scrutiny. *Id.* at 591–92. Indeed, selecting "such a narrowly defined group to bear the full burden of the tax" caused the law "to resemble more a penalty for a few of the largest newspapers." *Id.* at 592.

The Supreme Court subsequently followed *Minneapolis Star* to apply strict scrutiny to a state sales tax that exempted certain magazines in a way "that only a few Arkansas magazines pay any sales tax." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). Thus, "*Arkansas Writers' Project* . . . reaffirmed the rule" that differential treatment of the press "through the narrow targeting of individual members offends the First Amendment." *Leathers v. Medlock*, 499 U.S. 439, 446 (1991) (citing *Ark. Writers' Project*, 481 U.S. at 224–26). Indeed, the Court has reiterated this rule even in cases that did not require strict scrutiny because the laws at issue did not specifically target a small number of speakers. *See Turner*, 512 U.S. at 661–62 (applying only intermediate scrutiny to a federal regulation because it required "almost all cable systems in the country, rather than just a select few" to carry local stations and therefore "the provisions do not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star* and *Arkansas Writers' Project*"); *Leathers*, 499 U.S. at 448 (holding that the state law at issue "extended [the state] sales tax uniformly to the approximately 100 cable systems then operating in the State" so that it "hardly resembles a penalty for a few") (internal quotation marks omitted).

Here we are faced with a law that plainly discriminates against a small and identifiable number of cable providers.[13] As recently amended, S.B. 5 permits incumbents to terminate their municipal franchise in favor of a statewide franchise, unless the municipality in question has a population over 215,000. § 66.004(b-1). The plaintiffs represent, and the defendants do not dispute, that only Time Warner and one other incumbent have

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[13] At oral argument, the defendants pointed out that S.B. 5 does not mention the individual cable providers by name. As *Minneapolis Star* and *Arkansas Writers' Project* make clear, however, a law may target a small number of speakers without expressly identifying those singled out. Rather, legislation "targets a small group" by structuring its burdens in a way that apply to the few. *Minneapolis Star*, 460 U.S. at 591.

unexpired franchises with municipalities of that size. Even before the amendment limited the exclusion to these two incumbents, plaintiffs argued that S.B. 5's treatment of incumbents discriminated against five incumbents.[14] In response, defendants pointed only to deposition testimony that a few small "mom and pop" operators also exist and that the five incumbents represent 95 percent to 99 percent of those initially excluded by S.B. 5. In *Minneapolis Star*, however, the law "target[ed] a small group of newspapers" where thirteen publishers paid a tax, one of which paying two-thirds of the total burden, because "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Minneapolis Star*, 460 U.S. at 578–79, 591. Regardless, the current law removes any doubt that it impacts a small number of speakers as it focuses the exclusion on incumbents of a few large cities. Consequently, the exclusion of this handful of incumbents is structured "in a manner that carries the inherent risk of undermining First Amendment interests." *Turner*, 512 U.S. at 661.

Defendants protest that such a standard reduces the level of constitutional scrutiny to a counting exercise. In the arena of constitutional rights, however, there is often safety in numbers. *See*

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[14] These five incumbents include Time Warner Cable, Comcast, Charter, Suddenlink, and CableOne, all of which are members of the plaintiff TCA.

Minneapolis Star, 460 U.S. at 585 ("A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected."); *Ark. Writers' Project*, 481 U.S. at 228 ("We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.") (quoting *Minneapolis Star*, 460 U.S. at 585); *Leathers*, 499 U.S. at 448 ("The danger from a tax scheme that targets a small number of speakers is the danger of censorship."). Allowing the state to burden the few sets the stage for manipulation in the marketplace of ideas. *See Minneapolis Star*, 460 U.S. at 585 (observing that the mere threat of differential treatment "can operate as effectively as a censor to check critical comment"). Moreover, a law that targets a small handful of speakers for discriminatory treatment "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[15] *Id.* Therefore, "we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance" that cannot be achieved without the exclusion of certain incumbents from the statewide franchise. *Id.*

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[15] We emphasize that "[w]e need not and do not impugn the motives of the [Texas] legislature." *Minneapolis Star*, 460 U.S. at 592. "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Id.*

The defendants also argue that strict scrutiny is not warranted here because the problematic provisions are "justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660–61 (internal quotation marks omitted). They rely on *Turner* where the Supreme Court applied intermediate scrutiny to a law imposing must-carry obligations on cable operators only because the cable medium uniquely allowed for the bottleneck control that explained Congress requiring just cable operators, and not other video service providers, from carrying certain stations. *See id.* at 661. *Turner* made clear, however, that the must-carry requirement impacted "almost all cable systems in the country, rather than just a select few" and therefore, that statute did "not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star*." *Id.* Moreover, this case differs from *Turner* because there are no similar characteristics of the cable medium that would justify S.B. 5 excluding certain incumbent cable providers—and not other incumbents, overbuilders, and new entrants—from a statewide franchise.

Applying strict scrutiny, the exclusion of certain incumbents violates the First Amendment. The state fails to show that the exclusion "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ark. Writers' Project*, 481 U.S. at 231. Indeed, none of the defendants even argued that the relevant provisions of S.B. 5 would meet such an exacting standard. This is not surprising in this case where, as discussed in the following section, the discriminatory provisions would not survive the more relaxed standard of intermediate scrutiny. We therefore hold that S.B. 5's discrimination against a small number of speakers is unconstitutional.

B.

Even assuming the defendants are correct that intermediate scrutiny applies, the legislation's exclusion of incumbents would not survive. Under intermediate scrutiny, we would sustain the provisions if they "further 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." *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968). While the regulation need not be "the least speech-restrictive means" of advancing the state's interests, the means chosen must be narrowly tailored so they "do not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (internal quotation marks omitted).

The government emphasizes that creating the statewide franchise promotes its legitimate interest in facilitating competition. We do not question the significance of the state's interest in promoting competition. *See id.* at 664 ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."). However, promoting competition bears no relationship to the problematic exclusions at issue here. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (holding under intermediate scrutiny that the city's distinguishing between commercial and noncommercial speech "bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests."). The advantages of a statewide franchise explain why the state created this pro-competition benefit, but they do not justify the exclusion of other speakers from that same benefit.

The state also asserts an interest in protecting the reliance of municipalities who entered into contracts with cable providers. However, the plaintiffs argue persuasively that S.B. 5 already protects the reliance of municipalities on their franchise agreements because cable providers that opt out must still: 1) pay municipalities the maximum franchise fee allowed under federal law;[16] 2) provide the same number of public, educational, and governmental access channels;[17] and 3) furnish municipalities the same institutional network capacity, which supports services like traffic light coordination.[18] Moreover, the text of S.B. 5 casts to the wayside the agreements of most municipalities in Texas, indicating the actual unimportance of the state's asserted interest. The law allows

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[16] S.B. 5 requires licensees to pay a fee of 5% of gross revenue. Tex. Util. Code § 66.005(a) ("The holder of a state-issued certificate of franchise authority shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter."). Federal law caps the franchise fee at 5%. 47 U.S.C. § 542(b) ("[T]he franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues. . . ."). Indeed, plaintiffs point out that some municipal agreements have a lower franchise fee than the federal maximum.

[17] "The holder of a state-issued certificate of franchise authority shall provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005." § 66.009(b).

[18] This institutional network capacity provides a "private line" data network that cities may use for non-commercial purposes. *See* § 66.006(d) ("[I]nstitutional network capacity, however defined or referred to in the municipal cable franchise but generally referring to a private line data network capacity for use by the municipality for noncommercial purposes, shall continue to be provided at the same capacity . . . .").

overbuilders to renege on their contracts with municipalities in favor of a statewide franchise. Tex. Util. Code § 66.004(b). And although defendants initially insisted that S.B. 5 could still further municipal reliance by preserving the primary agreements with incumbents, the legislature amended the law to allow incumbents to terminate their arrangements with all municipalities with a population under 215,000. § 66.004(b-1). At oral argument, the state provided no logical explanation why the reliance interests of heavily populated municipalities should matter more than those of less populated municipalities. Finally, this same disregard for the reliance of most municipalities indicates a lack of "fit" between the asserted municipal reliance interest and the state's "choice of a limited and selective [number of municipalities to protect] as the means chosen to serve those interests." *Discovery Network*, 507 U.S. at 416. *See id.* at 417–18 (applying intermediate scrutiny to a ban on newsracks providing commercial handbills and agreeing that the "benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place" was "paltry" and "minute"); *Turner*, 512 U.S. at 664 ("That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests.") (plurality opinion); *Knowles v. City of Waco, Tex.*, 462 F.3d 430, 436–37 (5th Cir. 2006) (striking down parade ordinance allegedly justified by traffic control and safety interests because the city "is so willing to disregard the traffic problems" with exceptions to the ordinance) (internal quotation marks omitted). Thus, even under intermediate scrutiny, the provisions would not pass constitutional muster.

V.

We hold that the provisions excluding incumbents from a statewide franchise violate the First Amendment.[19] We consequently REVERSE the district court's grant of summary judgment on behalf of the defendants and REMAND for proceedings consistent with this opinion. Acknowledging that the plaintiffs have waited long to validate rights that are time-sensitive, we trust the district court will handle the matter expeditiously.

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[19] In light of this holding, we do not reach the plaintiff's claim that S.B. 5 violates the Equal Protection Clause of the Fourteenth Amendment.

APPENDIX B

Texas Cable Ass'n v. *Hudson*,
No. 1:05-cv-721 (W.D. Tex. Oct. 29, 2010)
(unreported order available via PACER)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

F I L E D
2010 OCT 29 PM 4:41
Clerk, US District Court
Western District of Texas
By ______s/_______
Deputy

CAUSE NO. A-05-CA-721-LY

TEXAS CABLE ASSOCIATION AND	§
TIME WARNER CABLE, INC.,	§
PLAINTIFFS,	§
	§
V.	§
	§
PAUL HUDSON, IN HIS OFFICIAL	§
CAPACITY AS CHAIRMAN OF THE	§
PUBLIC UTILITY COMMISSION OF	§
TEXAS; JULIE PARSLEY, IN HER	§
OFFICIAL CAPACITY AS	§
COMMISSIONER OF THE PUBLIC	§
UTILITY COMMISSION OF TEXAS;	§
AND BARRY SMITHERMAN, IN HIS	§
OFFICIAL CAPACITY AS	§
COMMISSIONER OF THE PUBLIC	§
UTILITY COMMISSION OF TEXAS,	§
DEFENDANTS,	§
	§

TEXAS COALITION OF CITIES FOR	§
UTILITY ISSUES,	§
INTERVENOR-DEFENDANT,	§
	§
GTE SOUTHWEST INC. D/B/A	§
VERISON SOUTHWEST,	§
INTERVENOR-DEFENDANT,	§
	§
SOUTHWESTERN BELL TELEPHONE,	§
L.P. D/B/A SBC TEXAS,	§
INTERVENOR-DEFENDANT,	§
	§
GRANDE COMMUNICATIONS	§
NETWORK, INC.,	§
INTERVENOR-DEFENDANT.	§

MEMORANDUM OPINION AND ORDER

Before the Court are the Motion for Summary Judgment by Defendant State PUC Officials and Defendant-Intervenor Texas Coalition of Cities for Utility Issues (Doc. #157); Plaintiffs' Motion for Summary Judgment (Doc. #159); Intervenor-Defendants' (AT&T, Verizon, and Grande) Joint Motion for Summary Judgment (Doc. #160); Response by Defendant State PUC Officials and Defendant-Intervenor Texas Coalition of Cities for Utility Issues to Plaintiffs' Motion for Summary Judgment (Doc. # 168); Intervenor-Defendants' Joint Opposition to Plaintiffs' Motion for Summary Judgment (Doc. #170); Plaintiffs' Opposition to Defendants' Motions for Summary Judgment (Doc. #171); Reply by Defendant State PUC Officials and Defendant-Intervenor Texas Coalition of Cities for Utility Issues to Plaintiffs' Opposition to Defendants'

Motions for Summary Judgment (Doc. #175); Intervnor-Defendants' Joint Reply in Support of Motion for Summary Judgment (Doc. #178); and Reply Brief in Support of Plaintiffs' Motion for Summary Judgment (Doc. # 179).

Also before the Court are Defendant and Intervenor-Defendants' Joint Motion to Strike Portions of Plaintiffs' Summary Judgment Evidence (Doc. #169); Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike (Doc. #180); and Defendants and Intervenor-Defendants' Joint Reply in Support of their Motion to Strike Portions of Plaintiffs' Summary Judgment Evidence (Doc. #185). Having considered the motion to strike, response, and reply the Court is of the opinion that the motion to strike should be denied.

IT IS THEREFORE ORDERED that Defendant and Intervenor-Defendants' Joint Motion to Strike Portions of Plaintiffs' Summary Judgment Evidence (Doc. #169) is **DENIED**.

The Court conducted a hearing on the summary-judgment motions on November 14, 2008. Following the conclusion of the hearing, the parties filed the following post-hearing letter briefs: Plaintiffs' Letter dated January 18, 2010 (Doc. #190); Response Letter dated January 21, 2010 by AT&T Texas, GTE Southwest Inc., and Grande Communications Networks, Inc. (Doc. #191); Plaintiffs' Letter dated March 8, 2010 (Doc. #194): and Response Letter dated March 9, 2010 by AT&T Texas and Texas Coalition of Cities for Utility Issues (Doc. #195). Having reviewed the motions, responses, replies, as well as all evidence submitted by the parties, and the arguments of counsel at the hearing, the Court determines that summary judgment should be granted in favor of Defendant PUC Officials and Intervenor-Defendants for the reasons to follow.

I. Background

Plaintiff Texas Cable Association ("Texas Cable")[1], a trade organization representing incumbent cable operators in Texas, filed this lawsuit challenging the "Act Relating to Furthering Competition in the Communications Industry," S.B. 5, 79th Leg., 2d Sess. (Texas 2005) (the "Act"), an act of the Texas Legislature that went into effect on September 7, 2005. The Act amends Subtitle C, Title 2, of the Texas Utilities Code by adding a new Chapter 66 entitled "State-Issued Cable and Video Franchise." *See* TEX. UTIL. CODE ANN. § 66.003(b),(c) (West Supp. 2006). According to Texas Cable, the Act allows new entrants to obtain Texas Public Utility Commission ("PUC")-issued franchises and allows overbuilders to obtain PUC-issued franchises after renouncing their municipal franchises. At the same time, Texas Cable argues, the Act locks incumbent cable operators into existing municipal franchises. Even after incumbent cable operators become eligible for PUC-issued franchises, Texas Cable contends, the Act subjects them to more onerous franchising terms.

On September 8, 2005, the day after the Governor of the State of Texas signed the Act, Texas Cable filed this action against the Governor and each of the

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[1] Texas Cable Association was formally known as Texas Cable & Telecommunications Association.

PUC Commissioners, alleging the following four counts: (1) Count I charged that the Act's disparate treatment of, on the one hand, new entrants and overbuilders, and, on the other hand, incumbent cable operators, lacks any appropriate justification and therefore violates applicable protections under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the United States Constitution; (2) Count II charged that the same disparate treatment conflicts with Title VI of the Federal Communications Act ("FCC Act") and is therefore preempted in violation of the Supremacy Clause of the United States Constitution; (3) Count III charged that Section 66.004(b) of the Act, which renders incumbents ineligible for a state-issued franchise, is preempted as conflicting with Section 621(a)(1) of the FCC Act, 47 U.S.C. § 541(a)(1), in violation of the Supremacy Clause of the United States Constitution; and (4) Count IV charged that, insofar as the Act prohibits the PUC from imposing anti-redlining assurances, it is preempted by Section 621(a)(3) of the FCC Act, 47 U.S.C. § 541(a)(3), in violation of the Supremacy Clause of the United States Constitution.[2] Four parties subsequently intervened as Defendants: (1) Grande Communications Networks, Inc. ("Grande"); (2) GTE Southwest Inc. d/b/a Verizon Southwest ("GTE Southwest"); (3) Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC Texas"); and (4) the Coalition of Cities for Utility Issues.

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[2] Plaintiffs' complaint has been amended twice; however, the substantive allegations of the complaint have not changed.

The Texas PUC Defendants and Intervenor-Defendants GTE Southwest, SBC Texas, and Grande moved to dismiss. Intervenor-Defendant the Coalition of Cities for Utility Issues moved for judgment on the pleadings. Plaintiff Texas Cable moved for summary judgment. The Court granted SBC Texas's motion to dismiss, dismissing Texas Cable's complaint without prejudice. The Court further dismissed all remaining motions. On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded for further proceedings. *Texas Cable & Telecommunications Ass'n v. Hudson*, 265 Fed. Appx. 210, 219, WL 344757, *7 (5th Cir. Feb. 7, 2008).

Following remand, Texas Cable filed a Second Amended Complaint on May 15, 2008, joining Time Warner Cable Inc. as Plaintiff. The parties subsequently filed the summary-judgment motions now before the Court. At the hearing on the motions, the parties informed the Court that Plaintiffs no longer seek relief on Counts II and III. Therefore, the Court will dismiss Counts II and III without prejudice and address the summary-judgment motions with regard to Counts I and IV only.

II. Analysis

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to all material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue is material if its resolution could affect the outcome of the action." *Commerce & Indus. Ins. Co. v. Grinell Corp.*, 280

F.3d 566, 570 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding whether fact issues exist, the Court "must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* Further, the Court, in determining whether there is a genuine dispute as to any material fact, must consider all of the evidence in the record, but does not make credibility determinations or weigh the evidence. *See Austin v. Will-Burt Co.*, 361 F.3d 862, 866 (5th Cir. 2004). The movant can meet its burden of demonstrating that there is no genuine issue of material fact on an element of the nonmovant's claim if it "point[s] out to the district court [] that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

"The nonmovant must respond to the motion for summary judgment by setting forth particular facts indicating that there is a genuine issue for trial." *Caboni v. General Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The nonmovant may not rely on mere allegations in the pleadings. *Id.* Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *See Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Rather, the nonmoving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). If the record as a whole could not lead a rational jury to find for the nonmoving party, there is no genuine issue for trial and summary judgment is warranted. *See Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir. 1999).

Count I: Disparate Treatment

Plaintiffs assert that the Act subjects incumbent cable operators to disparate treatment in violation of the First Amendment because it allows nonincumbents to apply for state-issued franchises immediately and excludes incumbents from the process for the municipalities in which they operate and remain bound to their previous franchise agreements. Further, they argue that the disparate treatment is impermissible because it is not substantially related to an important governmental objective.

In response, the PUC and Intervenor-Defendants argue that Plaintiffs' disparate-treatment claim, without evidence of concrete harm, does not violate the First Amendment. They further assert that any impact Plaintiffs could prove would be solely economic, which does not trigger heightened First Amendment scrutiny. Thus, they assert, the Court needs only to evaluate Plaintiffs' claim under the highly deferential rational-basis test. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14

(1993). In assessing Plaintiffs' First Amendment claim, the Court must determine what level of scrutiny must be applied in reviewing the Act. If the Act has no substantial impact on any fundamental interest and does not "affect with particularity any protected class", the Court need only determine whether the Act "is rationally related to a legitimate [governmental] interest." *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 489 (1977). If the Court determines that the Act does place special obligations or burdens on a certain class, then a heightened scruity of review must be applied.

The PUC and Intervenor-Defendants argue that in order to trigger heightened First Amendment scrutiny, Plaintiffs would have to show that the Act disrupts their delivery of content and, the PUC and Intervenor-Defendants assert, Plaintiffs have not only failed to present evidence of any such disruption but have instead expressly stated that no such impact has occurred. Finally, the PUC and Intervenor-Defendants contend that even if heightened scrutiny under the First Amendment were applied, the classifications established in the Act are narrowly tailored to advance substantial state issues while affording incumbents alternative channels of communication and would therefore survive a heightened-scrutiny review.

The PUC and Intervenor-Defendants first argue that the Act does not implicate the First Amendment because Plaintiffs have failed to show any burden placed on them by the special treatment imposed on them under the Act; namely, that the Act locks incumbent cable operators into existing municipal franchises while allowing new entrants to obtain PUC-issued franchises and overbuilders to obtain PUC-issued franchises after renouncing their municipal franchises. The United States Supreme Court, however, has held otherwise.

> [T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions."

Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 588 (1983) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). "[L]aws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*") (internal citations omitted). *See also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force"). Because the Act imposes special obligations upon incumbent cable operators as opposed to new entrants and overbuilders, the Court finds that some measure of First Amendment scrutiny is required. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 583.

Laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to the most "exacting [First Amendment] scrutiny". *Turner I*, 512 U.S. at 642 (internal citations omitted). On the other hand, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id* at 643. Such regulations that are unrelated to the content of speech are subject to a lesser heightened First Amendment scrutiny, or intermediate level of scrutiny. *Id.* at 642 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Because the Act in this instance imposes obligations on incumbent cable operators without reference to the content of speech, the Court finds that the appropriate standard by which to evaluate the constitutionality of the Act is the intermediate level of First Amendment scrutiny applicable to content-neutral restrictions that impose incidental burden on speech. *See Turner I*, 512 U.S. at 662.

A content-neutral regulation will be sustained if

> it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free 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). *See also Turner I*, 512 U.S. at 662. To satisfy this standard the regulation need not be the least speech-restrict means of advancing the government's interest, but may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In other words, the Act will withstand intermediate scrutiny if it: (1) advances significant governmental interests; (2) is narrowly tailored to serve those interests; and (3) leaves open alternative channels for communication. *See id.* at 791.

The PUC and Intervenor-Defendants contend that the Act enhances competition in the video marketplace in Texas and protects the reliance interests of Texas municipalities on existing franchises. They argue that the Act is narrowly tailored to advance the State's interests because the Texas Legislature's decision to enable new video providers to obtain franchises on a streamlined basis encourages video competition. The PUC and Intervenor-Defendants further argue that grandfathering existing incumbent franchise agreements also advances the State's interests because incumbents do not need state-issued franchises to compete and municipalities have reliance interests on existing incumbent franchises that would be upset if incumbents were allowed to abrogate those agreements.

Additionally, the PUC and Intervenor-Defendants argue that the Texas Legislature made a reasonable decision to classify overbuilders as new entrants rather than incumbents in order to balance the interest of promoting competition with the interest in protecting municipal reliance. They contend that classifying overbuilders as new entrants promotes competition because overbuilders possess competitive characteristics resembling new entrants in that they have not succeeded in challenging the dominant position of the cable incumbents. Moreover, they assert, allowing overbuilders to opt out of municipal franchises has only a modest effect on municipalities' reliance interests.

Finally, the PUC and Intervenor-Defendants assert that the Act leaves incumbent cable operators with ample channels of communication. They argue that incumbent cable operators' ability to speak remained the same both before and after the Act was enacted, and thus the Act in no way impedes incumbents from speaking. Further, the PUC and Intervenors assert, Plaintiffs' failure to point to any concrete burden, including any burden on First Amendment rights, resulting from being required to adhere to the terms of franchise agreements they voluntarily negotiated with the municipalities, confirms that the Act leaves incumbents sufficient alternative channels of communication.

Plaintiffs contend that the Act's requirement that incumbents fulfill the terms of their existing municipal franchises cannot be justified by the State's interest in promoting competition. This provision of the Act, however, serves only as a safeguard for municipal requirements during the transition to state-level franchising. Incumbent cable operators voluntarily negotiated municipal franchises that served to cement their dominant market position in Texas. These municipal franchises included provisions that are not replicated by the Act and upon which the municipalities have come to rely. The Court finds that the municipalities' reliance interest in the provisions of the existing incumbent franchises is valid and supports the regulatory scheme established by the Act. Thus, the Legislature's goal of safeguarding municipal reliance interests plainly supports its decision to require incumbents to fulfill the terms of franchises they freely negotiated.

Plaintiffs further assert that the overbuilder exception undermines the legislature's rationale for requiring incumbent cable operators to fulfill the terms of their existing municipal franchises. The Court disagrees. The overbuilder exemption necessarily balances the interest underlying the regulation—promoting competition for the benefit of consumers—with a separate, competing interest in preventing disproportionate harm to the small cable operators. In the Act, the Texas Legislature sought to safeguard municipal-reliance interests, but, in light of the modest reliance interests of municipalities on overbuilders' franchises and the public interest in promoting competition, determined that the commpetition-versus-reliance balance favored granting overbuilders a limited opt-out right to afford them some relief from the substantial barriers to meaningful competition imposed on them by local franchising over the years. The Supreme Court has held that the First Amendment does not prevent legislatures from making accommodations to reconcile competing interests. *See Turner Broad Sys., Inc. v. FCC*, 520 U.S. 180, 224 (1997) ("*Turner II*"). "Those judgments 'cannot be ignored or undervalued simply because [Plaintiffs] cas[t] [their] claims under the umbrella of the First Amendment.'"

Id. (quoting *Columbia Broad v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)).

The Court agrees with the PUC and Intevenor-Defendants' contention that the motivation behind the overbuilder exception is reasonably inferred from the language and regulatory scheme of the Act itself. *See Turner I*, 512 U.S. at 642 ("The purpose, or justification, of a regulation will often be evident on its face."). The First Amendment does not require that legislative history reinforce what can be inferred from the statute itself. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment require legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.").[3] Therefore, the Court finds that Plaintiffs' First Amendment claim fails.

Count IV: Preemption

In their motions for summary judgment, the PUC and the Defendant-Intervenors assert first that Plaintiffs lack standing to bring their preemption claim. The PUC and the Defendant-Intervenors further argue that Count IV lacks any basis or merit because the Act does not conflict with the federal

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[3] The legislative record indicates that the Act's transition mechanism was intended to ensure that the conversion to state-level franchising would proceed more slowly so that the transition would have no initial fiscal impact to units of local government.

prohibition on redlining as it incorporates antiredlining protections that mirror those found in federal law.[4] In response, Plaintiffs argue that the Act strips the PUC of its franchising authority, thereby causing the conflict that triggers preemption.

Federal law requires franchising authorities to assure service is not denied on the basis of income. *See* 47 U.S.C. § 541(a)(3). Section 621 of the FCC Act provides that "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential subscribers because of the income of the residents of the local area in which such group resides." *Id.* Pursuant to this antiredlining requirement, local franchising authorities are required to ensure that cable operators' franchising applications do not purposely avoid low-income neighborhoods. In Texas, the local franchising authority is the PUC. *See* Tex. Util. Code Ann. § 66.001. Thus, Plaintiffs contend, the FCC directs the PUC to assure that cable operators do not implement redlining in their municipal service areas.

Plaintiffs assert in their Second Amended Complaint that the Act is preempted because "it does not permit the PUC" to fulfill its obligation as a franchising authority to assure that access to cable

[4] Redlining occurs when franchise holders refuse service to a potential group of residential subscribers because of the low income of the residents in the local area in which that group resides.

service is not denied to any group of potential residential subscribers. Plaintiffs argue that the Act renders the PUC powerless to comply with the FCC's direction because it (1) permits franchise applicants to define their own service-area footprint within the municipality and (2) prohibits the PUC from requiring applicants to alter their footprints by requiring the PUC to issue a franchise upon request. *See id.* at § 66.003(b). Plaintiffs additionally argue that the Act specifically prohibits the PUC from imposing build-out requirements on the franchise applicants' service area, which Plaintiffs assert may be necessary to protect against redlining. *See id.* § 66.007 ("The holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions."). Thus, Plaintiffs contend, the Act directs the PUC *not* to do what the PUC is required to do to comply with federal law, resulting in "conflict preemption." *See AT&T Corp. v. Public Util. Comm'n of Texas*, 373 F.3d 641, 645 (5th Cir. 2004).

The PUC and Defendant-Intervenors assert that Plaintiffs lack "prudential standing" to bring their preemption claim. "[T]he term standing subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). To meet the constitutional requirements, a plaintiff must have suffered an injury in fact caused by the challenged government conduct and likely to be redressed by the relief sought. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition to the constitutional requirements, the Supreme Court also has applied certain prudential principles in determining whether litigants have standing. *See Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.* 987 F.2d 1174, 1176 (5th Cir. 1993) (citing *Valley Forge*, 454 U.S. at 474-75). A plaintiff must assert his legal rights and interests, and his complaint must fall within "the zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. *Id.* (quoting *Valley Forge*, 454 U.S. at 474-75).

The PUC and Defenant-Intervenors argue that the underlying antiredlining provisions are not within Plaintiffs' "zone of interest" and are therefore not protected by the allegedly preempted statute. *See Self-Insurance Inst. of Am., Inc. v. Korioth*, 993 F.2d 479, 484 (5th Cir. 1993). They argue that Section 621 of the FCC Act is designed to protect the interests of the consuming public, not those of the competing cable-service providers such as Plaintiffs. *See* 47 U.S.C. § 541(a)(3); *American Int'l, Inc. v. United States Dep't of Navy*, 931 F. Supp. 1, 3 (D.D.C. 1996), *aff'd in part, rev'd in part on other grounds*, 129 F.3d 1271 (D.C. Cir. 1997). Because Plaintiffs' interest is in protecting incumbent cable operators from competition, the PUC and Defendant-Intervenors contend, Plaintiffs do not fall within the class that the law was designed to protect and therefore lack prudential standing to pursue their preemption claim. *See Gore, Inc. v. Espy*, 87 F.3d 767, 771-72 (5th Cir. 1996).

In response, Plaintiffs argue that because they are pursuing a preemption-based challenge under the Supremacy Clause of the United States Constitution and not the preempting statute, they do not need standing to invoke the protections of the Supremacy Clause and can invoke the statute's preempted force regardless of whether the statute's redlining provisions are designed to benefit them. *See Pharmaceutical Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003). *See also Taubman Realty Group, Ltd P'ship v. Mineta*, 320 F.3d 475, 481 n.3 (4th Cir. 2003) (plaintiff "does not have to meet the additional standing requirement involving the zone of interests test with respect to its Supremacy Clause claim"). The Court agrees. As noted in the Fifth Circuit's opinion in this cause, Plaintiffs allege that the Act is incompatible with various sections of the FCC Act, and thus violates the Supremacy Clause. *See Texas Cable & Telecomms. Ass'n v. Hudson*, 265 Fed. Appx. 210, 213, 2008 WL 344757, 2 (5th Cir. 2008). Plaintiffs do not need prudential standing to invoke the protection of the Supremacy Clause. *See Concannon*, 249 F.3d at 73. Given that Plaintiffs have prudential standing grounded in the Supremacy Clause, we think they may fairly assert the rights of consumers under Section 621 of the FCC Act for purposes of this action. Having determined that Plaintiffs have standing to challenge the Act on preemption grounds, we now turn to the merits of their argument.

The Act includes its own antiredlining provision, which provides:

> A cable service provider or video service provider that has been granted state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income

> of the residents in the local area in which such group resides.

Tex. Util. Code Ann. § 66.014(b). Under this same provision, the PUC is granted "authority to monitor the deployment of cable services, video services, or alternate technology." *Id.* at § 66.014(e). All franchise applicants must provide an affidavit affirming "that the applicant agrees to comply with all applicable federal and state statutes and regulations." *Id.* at § 66.003(b)(2). These state statutes and regulations include Section 66.014(b) and 47 U.S.C. § 541(a).

Plaintiffs' objection to the antiredlining provisions of the Act centers on the use of the term "assure" in the federal statute. *See* 47 U.S.C. § § 541(a)(3) ("a franchising authority shall assure that access to cable service is not denied to any group of potential residential subscribers because of the income of the residents of the local area in which such group resides."). Plaintiffs contend that in order to assure access to cable services is not denied, the PUC must be expressly required "to review [franchising] applicants' proposed service 'footprints', ensure that applicants are not purposely avoiding low-income neighborhoods, and (where necessary) require cable operators to extend their facilities to particular neighborhoods" (impose build-out requirements). However, Plaintiffs cite to no authority interpreting the language of the federal statute to require the PUC or other franchising authorities to meet such requirements in order to "assure" that access to cable service is not denied. Indeed, the Court finds that the anti-redlining provisions of the Act do assure that access to cable service is not denied through its requirements. *See* Tex. Util. Code Ann. §§ 66.003(b)(2), 66.014(e).

With regard to Plaintiffs argument that the Act's absolute prohibition of build-out requirements, *see* Tex. Util. Code Ann. § 66.007, conflicts with the federal statute, *see* 47 U.S.C. § 541(a)(3), which Plaintiffs assert "requires franchise authorities to impose build-out requirements where doing so is necessary to avoid redlining," the Court once again finds Plaintiffs' broad-sweeping interpretation of the federal statute unsupported by any authority. Because Plaintiffs can identify nothing in federal law requiring that the antiredlining prohibition be enforced through mandatory build-out requirements, the Court finds that the Act is not preempted for prohibiting mandatory build-out. Accordingly, the Court will deny Plaintiffs' motion for summary judgment and grant the PUC and Defendant-Intervenors' motion for summary judgment on Count IV.

III. Conclusion

IT IS THEREFORE ORDERED that Counts II and III in Plaintiffs' Second Amended Complaint are **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. #159) is **DENIED**.

IT IS FURTHER ORDERED that the Motion for Summary Judgment by Defendant State PUC Officials and Defendant-Intervenor Texas Coalition of Cities for Utility Issues (Doc. #157) is **GRANTED**.

IT IS FURTHER ORDERED that Intervenor-Defendants' Joint Motion for Summary Judgment (Doc. #160) is **GRANTED**.

IT IS FINALLY ORDERED that Plaintiffs Texas Cable Association and Time Warner Cable, Inc. **TAKE NOTHING** by the claims raised in their Second Amended Complaint.

A Final Judgment shall be filed separately.

SIGNED this 29th day of October, 2010.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

Chapter 66 of the Texas Utilities Code provides in pertinent part:

§ 66.001. Franchising Authority

The commission shall be designated as the franchising authority for a state-issued franchise for the provision of cable service or video service.

§ 66.002. Definitions

In this chapter:

* * * * *

(7) "Incumbent cable service provider" means the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005.

* * * * *

§ 66.003. State Authorization to Provide Cable Service or Video Service

(a) An entity or person seeking to provide cable service or video service in this state shall file an application for a state-issued certificate of franchise authority with the commission as required by this section. An entity providing cable service or video service under a franchise agreement with a municipality is not subject to this subsection with respect to such municipality until the franchise agreement is terminated under Section 66.004 or until the franchise agreement expires.

(a-1) The commission shall notify an applicant for a state-issued certificate of franchise authority whether the applicant's affidavit described by Subsection (b) is complete before the 15th business day after the applicant submits the affidavit.

(b) The commission shall issue a certificate of franchise authority to offer cable service or video service before the 17th business day after receipt of a completed affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming:

(1) that the applicant has filed or will timely file with the Federal Communications Commission all forms required by that agency in advance of offering cable service or video service in this state;

(2) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(3) that the applicant agrees to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service, including the police powers of the municipalities in which the service is delivered;

(4) a description of the service area footprint to be served within the municipality, if applicable, otherwise the municipality to be served by the applicant, which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of cable service or video

service to a previously undesignated service area and, upon such expansion, notice to the commission of the service area to be served by the applicant; and

(5) the location of the applicant's principal place of business and the names of the applicant's principal executive officers.

(c) The certificate of franchise authority issued by the commission shall contain:

(1) a grant of authority to provide cable service or video service as requested in the application;

(2) a grant of authority to use and occupy the public rights-of-way in the delivery of that service, subject to the laws of this state, including the police powers of the municipalities in which the service is delivered; and

(3) a statement that the grant of authority is subject to lawful operation of the cable service or video service by the applicant or its successor in interest.

(d) The certificate of franchise authority issued by the commission is fully transferable to any successor in interest to the applicant to which it is initially granted. A notice of transfer shall be filed with the commission and the relevant municipality within 14 business days of the completion of such transfer.

(e) The certificate of franchise authority issued by the commission may be terminated by the cable service provider or video service provider by submitting notice to the commission.

§ 66.004. Eligibility for Commission-issued Franchise

(a) A cable service provider or a video service provider that currently has or had previously received a franchise to provide cable service or video service with respect to such municipalities is not eligible to seek a state-issued certificate of franchise authority under this chapter as to those municipalities until the expiration date of the existing franchise agreement, except as provided by Subsections (b), (b-1), (b-2), (b-3), and (c).

(b) Beginning September 1, 2005, a cable service provider or video service provider that is not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area may elect to terminate that municipal franchise and seek a state-issued certificate of franchise authority by providing written notice to the commission and the affected municipality before January 1, 2006. The municipal franchise is terminated on the date the commission issues the state-issued certificate of franchise authority.

(b-1) Beginning September 1, 2011, a cable service provider or video service provider in a municipality with a population of less than 215,000 that was not allowed to or did not terminate a municipal franchise under Subsection (b) may elect to terminate not less than all unexpired franchises in municipalities with a population of less than 215,000 and seek a state-issued certificate of franchise authority for each area served under a terminated municipal franchise by providing written notice to the commission and each affected municipality before January 1, 2012. A municipal franchise is terminated on the date the commission issues a state-issued certificate of franchise authority to the provider for the area served under that terminated franchise.

(b-2) A cable service provider or video service provider in a municipality with a population of at least 215,000 may terminate a municipal franchise in that municipality in the manner described by Subsection (b-1) if:

(1) the cable service provider or video service provider is not the incumbent cable service provider in that municipality; and

(2) the incumbent cable service provider received a state-issued certificate of franchise authority from the commission before September 1, 2011.

(b-3) A municipality with a population of at least 215,000 may enter into an agreement with any cable service provider in the municipality to terminate a municipal cable franchise before the expiration of the franchise. To the extent that the mutually agreed on terms and conditions for early termination of the unexpired municipal cable franchise conflict with a provision of this chapter, the agreed on terms and conditions control.

(c) A cable service provider that elects under Subsection (b), (b-1), or (b-2) to terminate an existing municipal franchise is responsible for remitting to the affected municipality before the 91st day after the date the municipal franchise is terminated any accrued but unpaid franchise fees due under the terminated franchise. If the cable service provider has credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality, either directly or through the comptroller.

(d) For purposes of this section, a cable service provider or video service provider will be deemed to have or have had a franchise to provide cable service or video service in a specific municipality if any affiliates or successor entity of the cable or video provider has or had a franchise agreement granted by that specific municipality.

(e) The terms "affiliates or successor entity" in this section shall include but not be limited to any entity receiving, obtaining, or operating under a municipal cable or video franchise through merger, sale, assignment, restructuring, or any other type of transaction.

(f) Except as provided in this chapter, nothing in this chapter is intended to abrogate, nullify, or adversely affect in any way the contractual rights, duties, and obligations existing and incurred by a cable service provider or a video service provider before the date a franchise expires or the date a provider terminates a franchise under Subsection (b-1) or (b-2), as applicable, and owed or owing to any private person, firm, partnership, corporation, or other entity including without limitation those obligations measured by and related to the gross revenue hereafter received by the holder of a state-issued certificate of franchise authority for services provided in the geographic area to which such prior franchise or permit applies. All liens, security interests, royalties, and other contracts, rights, and interests in effect on September 1, 2005, or the date a franchise is terminated under Subsection (b-1) or (b-2) shall continue in full force and effect, without the necessity for renewal, extension, or continuance, and shall be paid and performed by the holder of a state-issued certificate of franchise authority, and shall apply as though the revenue generated by the holder of a state-issued certificate of franchise authority continued to be generated pursuant to the permit or franchise issued by the prior local franchising authority or municipality within the geographic area to which the prior permit or franchise applies. It shall be a condition to the issuance and continuance of a state-issued certificate of franchise authority that the private contractual rights and obligations herein described continue to be honored, paid, or performed to the same extent as though the cable service provider continued to operate under its prior franchise or permit, for the duration of such state-issued certificate of franchise authority and any renewals or extensions thereof, and that the applicant so agrees. Any person, firm, partnership, corporation, or other entity holding or claiming rights herein reserved may enforce same by an action brought in a court of competent jurisdiction.

§ 66.005. Franchise Fee

(a) The holder of a state-issued certificate of franchise authority shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter. That same franchise fee structure shall apply to any unincorporated areas that are annexed by a municipality after the effective date of the state-issued certificate of franchise authority.

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§ 66.006. In-kind Contributions to Municipality

(a) Until the expiration or termination of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service the same cash payments on a per subscriber basis as required by the incumbent cable service provider's franchise agreement. All cable service providers and all video service providers shall report quarterly to the municipality the total number of subscribers served within the municipality. The amount paid by the holder of a state-issued certificate of franchise authority shall be calculated quarterly by the municipality by multiplying the amount of cash payment under the incumbent cable service provider's franchise agreement by a number derived by dividing the number of subscribers served by a video service provider or cable service provider by the total number of video or cable service subscribers in the municipality. Such pro rata payments are to be paid quarterly to the municipality within 45 days after the end of the quarter for the preceding calendar quarter.

(b) On the expiration or termination of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues, as defined by this chapter, or at the municipality's election, the per subscriber fee that was paid to the municipality under the expired or terminated incumbent cable service provider's agreement, in lieu of in-kind compensation and grants. Payments under this subsection shall be paid in the same manner as outlined in Section 66.005(b).

(c) All fees paid to municipalities under this section are paid in accordance with 47 U.S.C. Sections 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law; further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter.

(c-1) The holder of a state-issued certificate of franchise authority shall include with a fee paid to a municipality under this section a statement identifying the fee.

(c-2) A municipality that receives fees under this section:

(1) shall maintain revenue from the fees in a separate account established for that purpose;

(2) may not commingle revenue from the fees with any other money;

(3) shall maintain a record of each deposit to and disbursement from the separate account, including a record of the payee and purpose of each disbursement; and

(4) may not spend revenue from the fees except directly from the separate account.

(d) The following services shall continue to be provided by the cable provider that was furnishing services pursuant to its municipal cable franchise until the expiration or termination of the franchise and thereafter as provided in Subdivisions (1) and (2) below:

(1) institutional network capacity, however defined or referred to in the municipal cable franchise but generally referring to a private line data network capacity for use by the municipality for noncommercial purposes, shall continue to be provided at the same capacity as was provided to the municipality prior to the date of expiration or termination, provided that the municipality will compensate the provider

for the actual incremental cost of the capacity; and

(2) cable services to community public buildings, such as municipal buildings and public schools, shall continue to be provided to the same extent provided immediately prior to the date of the termination. On the expiration or termination of the franchise agreement, a provider that provides the services may deduct from the franchise fee to be paid to the municipality an amount equal to the actual incremental cost of the services if the municipality requires the services after that date. Such cable service generally refers to the existing cable drop connections to such facilities and the tier of cable service provided pursuant to the franchise at the time of the expiration or termination.

§ 66.007. Build-out

The holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions.

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§ 66.009. Public, Educational, and Governmental Access Channels

(a) Not later than 120 days after a request by a municipality, the holder of a state-issued certificate of franchise authority shall provide the municipality with capacity in its communications network to allow public, educational, and governmental (PEG) access channels for noncommercial programming.

(b) The holder of a state-issued certificate of franchise authority shall provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005.

(c) If a municipality did not have the maximum number of PEG access channels as of September 1, 2005, as provided by Subdivisions (1) and (2) based on the municipality's population on that date, the cable service provider or video service provider shall furnish at the request of the municipality:

(1) up to three PEG channels for a municipality with a population of at least 50,000; and

(2) up to two PEG channels for a municipality with a population of less than 50,000.

(d) Any PEG channel provided pursuant to this section that is not utilized by the municipality for at least eight hours a day shall no longer be made available to the municipality, but may be programmed at the cable service provider's or video service provider's discretion. At such time as the municipality can certify to the cable service provider or video service provider a schedule for at least eight hours of daily programming, the cable service provider or video service provider shall restore the previously lost channel but shall be under no obligation to carry that channel on a basic or analog tier.

(e) In the event a municipality has not utilized the minimum number of access channels as permitted by Subsection (c), access to the additional channel capacity allowed in Subsection (c) shall be provided upon 90 days' written notice if the municipality meets the following standard: if a municipality has one active PEG channel and wishes to activate an additional PEG channel, the initial channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day. In addition, at least 40 percent of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. Nonrepeat programming shall include the first three video-castings of a program. If a municipality is entitled to three PEG channels under Subsection (c) and has in service two active PEG channels, each of the two active channels shall be considered to be substantially utilized when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours of programming for each business day on average over each calendar quarter is nonrepeat programming for three consecutive calendar quarters.

(f) The operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such channel, and the holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of such channel. The holder of a state-issued certificate of franchise authority shall be responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

(g) The municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued certificate of franchise authority are provided or submitted to the cable service provider or video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the cable service provider or video service provider, which is compatible with the technology or protocol utilized by the cable service provider or video service provider to deliver services.

(h) Where technically feasible, the holder of a state-issued certificate of franchise authority that is not an incumbent cable service provider and an incumbent cable service provider, including an incumbent cable service provider that holds a state-issued certificate of franchise authority issued under Section 66.004(b-1), shall use reasonable efforts to interconnect their cable or video systems for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. The holder of a state-issued certificate of franchise authority and the incumbent cable service provider shall negotiate in good faith, and the incumbent cable service provider may not withhold interconnection of PEG channels.

(i) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section.

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Tex. Util. Code Ann. 66.001 to 66.017 (Vernon 2007 & Supp. 2011) (codifying S.B. 5, § 27, 79th Leg., 2d C.S. (2005), and S.B. 1087, 82d Leg. (2011)).