

No. 11-1236

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**In the Supreme Court of the United States**

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DONNA L. NELSON, IN HER OFFICIAL CAPACITY AS  
CHAIRMAN OF THE PUBLIC UTILITY COMMISSION  
OF TEXAS, ET AL., PETITIONERS

*v.*

TIME WARNER CABLE INC., ET AL.

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

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**REPLY BRIEF FOR PETITIONERS**

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This case presents an important question concerning the applicable level of First Amendment scrutiny for a statute that happens to regulate a small number of speakers. The parties have joined issue as to whether certiorari review is in order, and petitioners are content, for the most part, to stand on the arguments they have already put forth. One new point, however, warrants this short reply.

Writing in support of the petition for a writ of certiorari, the Texas Coalition of Cities for Utility Issues (“TCCFUI”) curiously tries to undermine the second question presented. See TCCFUI Br. 4 n.1. Petitioners agree with respondents Time Warner Cable Inc. and Texas Cable Association that TCCFUI is “plainly wrong” on this point. BIO 12 n.2.

In connection with the second question presented, petitioners lament the Fifth Circuit’s having “condemn[ed] a state statute as unconstitutional

without first giving the State a chance to make a record in defense of its enactment.” Pet. 15. TCCFUI is more optimistic. On its view, the Fifth Circuit actually has given petitioners the desired opportunity to compile a record showing that Texas’s amended Act withstands intermediate scrutiny. TCCFUI Br. 4 n.1 (“Nothing in the court of appeals [sic] disposition of the case appears to preclude further development of the record in the district court on remand.”).

TCCFUI is mistaken, as the Fifth Circuit itself made clear in mandamus proceedings ancillary to the judgment sought to be reviewed. See *In re Time Warner Cable Inc.*, No. 12-50332, slip op. at 2 n.3 (5th Cir. May 18, 2012) (per curiam) (“Here, the mandate requires no additional fact finding.”). TCCFUI’s optimism cannot correct the Fifth Circuit’s 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.

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