1986 WL 727922 (U.S.) (Appellate Brief)
Supreme Court of the United States.

CITY OF LOS ANGELES, et al., Petitioners,
v.
PREFERRED COMMUNICATIONS, INC., Respondent.

No. 85-390.
October Term, 1985.
February 19, 1986.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Motion Picture Association of America, Inc., Amicus Curiae, in Support of Affirmance

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***1** The Motion Picture Association of America, Inc., *amicus curiae,* submits this brief in support of affirmance of the decision of the United States Court of Appeals for the Ninth Circuit in this case, 754 F.2d 1396 (9th Cir. 1985), and in support of the position of respondent, Preferred Communications, Inc. ("Preferred"). Written consent of all parties to the filing of this brief is on file with the Clerk of the Court.

INTEREST OF THE AMICUS

The Motion Picture Association of America, Inc. is a not-for-profit corporation, organized under the laws of the State of New York, whose purposes include the fostering of the common interests of those engaged in the ***2** motion picture industry in the United States. The Association represents producers and/or distributors of motion pictures in the United States. Its present membership consists of the following companies: Columbia Pictures Industries, Inc., DeLaurentiis Entertainment Group, Inc., Walt Disney Productions/Buena Vista Distribution Co., Inc., MGM/UA Entertainment Company, Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal City Studios, Inc., and Warner Bros. Inc.

The Association's members are also producers of filmed entertainment made especially for television, and they frequently license their products (both theatrical motion pictures and other filmed entertainment) for showing over both broadcast stations and cable systems. As set forth more fully below, the members of *amicus* have a vital interest in there being the largest possible number of broadcast and cable outlets for purchase and retransmission of the members' programming to the public.

SUMMARY OF ARGUMENT

From the perspective of the members of *amicus*, cable operators such as Preferred are middlemen, on whom producers of filmed entertainment are dependent for access to a substantial segment of the public. Not only the interests of cable operators, but also those of producers of programming are at stake in this case. The principal relevant interest of producers is that government not unduly restrict the multiplicity and diversity of middlemen who can transmit the producers' programming to the public.

The technological potential for greater multiplicity and diversity in the markets for television programming is being restricted by public policies such as those reflected in Los Angeles's franchising scheme. The scheme is a direct and severe restraint on those who seek to communicate ***3** programming by means of cable: programming that the one licensed cable operator refuses to show cannot and will not be shown to the cable audience in the South Central District of Los Angeles unless it is squeezed onto one of the two leased access channels.

The record does not support any factual justification for the Los Angeles franchising system. No legitimate interest asserted by the City is in principle beyond adequate protection through regulation of multiple, competing cable operators.

Whether or not the market for cable operators is a natural monopoly is irrelevant. The First Amendment right to speak includes the right to compete to become (or to displace) a natural monopolist, or to show that a medium is not, in fact, a natural monopoly.

ARGUMENT

This case was decided in the district court by the granting of a motion by the City of Los Angeles ("the City") to dismiss. The allegations of the Complaint are therefore taken as true. Among those allegations are (i) competition among cable systems within the City is technologically and economically feasible; *i.e.,* there is no natural or economic monopoly relevant to this case; and (ii) the franchising system operated by the City creates an artificial cable television monopoly. The district court's findings of fact (which relate principally to the contentions of the parties) are not to the contrary.

From the perspective of members of *amicus*, cable operators are middlemen, whose services are necessary for the members' speech--their filmed television programming--to reach the largest possible television audience.[1] ***4** In this respect, the relationship between producers of programming and cable operators is analogous to that between book publishers and bookstores, or that between theatrical companies and theatres. Newspapers, by contrast, are to a large extent vertically integrated:

they commonly hire not only editorial workers (reporters, photographers, editors) and production workers (printers and other craft workers), but also distribution and delivery personnel. Magazines typically are less integrated than newspapers; but, to the extent they are sold by subscription, their dependence is on a universally available common carrier, the Postal Service. To the extent that newspapers, magazines and other publications are distributed by newsstands, stores, and independent private delivery firms, the publishers are dependent on outside organizations that do not have the duties of common carriers, just as producers of television programming are. The First Amendment principles applicable to governmental regulation of such outside organizations that transmit speech to the public are vitally important to the speakers dependent on them, for the effectiveness and success of their efforts to communicate with the public (as well as the interests of the middlemen themselves) are at stake.

A fundamental purpose of the First Amendment is to ban undue governmental restraints on "the widest possible dissemination of information from diverse and an tagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). In the field of television, where both producers of programming and the public are dependent on middlemen--broadcast networks and stations and cable networks and operators--that purpose similarly should prevent undue governmental interference with the greatest multiplicity and diversity of middlemen reasonably possible. To the extent that the number and diversity of such middlemen is reduced, the opportunity ***5** of producers of programming to communicate with audiences is diminished.

In the field of broadcasting, technical characteristics of the airways necessitated at an early stage severe restrictions on the number of middlemen. Without such restrictions, broadcasters were threatened with ineffectiveness due to their own mutual interference. *NBC v. United States,* 319 U.S. 190 (1943). Consequently, restraints imposed on broadcasting middlemen by the government to make effective broadcast communication possible were held constitutionally permissible. 319 U.S. at 226-27. Moreover, because broadcasters thus came to enjoy a governmentally protected partial immunity from competition and a governmentally protected exclusive right to use certain airway frequencies, certain requirements imposed by government on broadcasters were also held to be constitutionally permissible. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

In the field of cable television, technical characteristics of the physical facilities of local cable systems plainly justify some governmental regulation of these middlemen. The installation of such systems typically involves some temporary disturbance of public streets and other public ways, and the use of poles and/or other facilities of public utilities. Thereafter, the operation of the cable systems typically involves the occupation of portions of such facilities and portions of public property (*e.g.,* below public streets or in the air). Regulation to protect the public interest with respect to the disruption and subsequent occupation of public or publicly regulated property may pass constitutional muster, even when restricting the activities of cable systems, if it satisfies the standards of *United States v. O'Brien,* 391 U.S. 367, 377 (1968), as the court below recognized, 754 F.2d at 1406. Similarly, where, due to such regulation cable operators enjoy some governmental protection from competition and some legal right to use public property to the exclusion of others, ***6** certain affirmative requirements may constitutionally be imposed on them. [2]

On the record in the instant case, however, the issue before the Court goes beyond regulation to protect that limited public interest. Los Angeles has, by law, restricted the number of cable operators in a govern-mentally-defined service area to one. From the perspective of the members of *amicus*, what Los Angeles has done is to restrict arbitrarily the number of middlemen legally permitted to distribute the members' programming to the public by means of cable connections in the South Central District of the City. The City's action is analogous to a restriction on the number of bookstores or theatres that could be established in commercial sections of that part of the City: under such restrictions, the opportunities of publishing houses and theatrical companies to reach the public would be governmentally restrained, just as the opportunities of producers of television programming are governmentally restrained by the City's scheme for restricting the licensing of cable operators.

In the marketplace for their ideas, the producers of television programming see technological potential for great multiplicity and diversity of middlemen, but public policies have restricted and continue to restrict that multiplicity and diversity. In broadcasting, there are three national networks, and in any television market few, if any, independent television stations. In advertiser- ***7** supported cable, there are a number of national networks and "superstations" that carry filmed programming. In pay cable, there are two dominant national network suppliers of filmed programming. In individual cable markets, the ultimate decision-makers over what advertiser-supported or pay programming will be offered to subscribers are the governmentally licensed cable operators. [3]

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974), teaches that where the effect would be to restrain the editorial freedom exercised over the last two hundred years by the print media, First Amendment doctrine will not be modified to respond to the erosion of multiplicity and diversity of middlemen through market forces. [4] But where, as here, multiplicity and diversity are curtailed through governmental action, no modification of First Amendment Joctrine is needed to uphold a requirement that the curtailment meet at least the *O'Brien* standards. *See, e.g., Kovacs v. Cooper,* 336 U.S. 77 (1949), where all the Justices who joined an opinion recognized state power at least "to regulate [soundtrucks'] abuse in reasonable accommodation, by narrowly drawn statutes, to ***8** other interests concerned in use of the streets and in freedom from public nuisance," 336 U.S. at 105 (Rutledge, J., dissenting), but seven Justices (all but Frankfurter and Jackson, JJ.) in effect denied state power to suppress the use of soundtrucks without adequately demonstrated justification.

What is involved here is a direct and severe restraint on those who seek to disseminate their programming by means of cable in the South Central District of Los Angeles. Programming that the single franchised operator declines to carry will not be carried on any cable system serving that area, unless it is squeezed onto one of the two leased access channels. Apart from the limited leased access option, the producers of such programming are barred from access to the cable audience in that area, and that audience is denied access to that programming. [5] Local television stations that carry programming produced by members of *amicus* but that are unwilling or unable to pay the carriage fees that may be charged by a cable operator with a monopoly created and protected by law are denied access to the cable audience. Producers of programming--*i.e.*, speakers--and audiences are among the losers under the City's market entry restriction. Such a restriction, unless adequately justified on a factual record, violates the core right to speak protected by the First Amendment, [6] and at the dismissal stage the particular restriction at issue in this case was not so justified. The holding by the court of appeals below goes no further than that.

***9** As this case was framed by the pleadings, the City cannot defend its restriction by arguing that the available facilities in the South Central District cannot accommodate Preferred's system. There is no evidence or finding to that effect. The Court of Appeals noted that the facilities available were physically limited "to an undetermined extent." 754 F.2d at 1404.

Nor can the City defend by reference to visual blight or disruption or occupation of public property or of the property of public utilities or danger to public safety, for there is in this record no evidence or finding as to the nature, scope, or magnitude of any visual blight or disruption or occupation or danger to public safety that would result from the establishment and operation of a second cable system by Preferred. [7] The record also contains no evidence that justifies the exclusion of Preferred in the interest of the City's plans for future use of utility poles and other facilities. Nor does any other consideration that the City can put forward justify its restriction against a First Amendment challenge, as a matter of law and in the absence of evidence. Nothing in the decision below addresses the permissibility of the various affirmative obligations the City imposes on franchisees--*e.g.*, the obligation to serve an entire district, or the obligation to provide various forms of access. *See* 754 F.2d at 1401. The decision deals only with the City's quite separable refusal to franchise any competing operators. No interest asserted by the City is in principle beyond adequate protection through regulation of multiple, competing cable operators; none justifies the extreme approach of totally excluding competitors. [8]

***10** Whether cable systems are natural (or economic) monopolies is irrelevant. [9] A showing that a particular communication medium is a natural monopoly would not justify governmental restrictions on entry into the medium. An economic showing that a particular market for bookstores is a natural monopoly would not justify a State in setting up an auction process to award a franchise to the firm that it found would operate the "best" bookstore, and thereafter excluding from the market all potential competitive bookstores. It may turn out that the submarket for national pay cable networks showing filmed entertainment is a natural monopoly. From such a determination it would not follow that the FCC could constitutionally restrict entry into that market. In this respect, speech (in its many forms) differs from electricity, natural gas and water. The First Amendment right to speak includes, for example, the right to compete ***11** to become (or to displace) a natural monopolist, or to show that a medium is not, in fact, a natural monopoly. [10]

The members of *amicus* have a vital interest in the maximum multiplicity and diversity of cable operators reasonably possible. [11] Operation by Preferred in the South Central District of Los Angeles, subject to whatever regulations the City may constitutionally impose, would increase the opportunities for the members to transmit their programming to the public. Preferred may choose to carry television stations (with the members' programming) that the single franchised operator, Sun Cable, Inc., refuses to carry; Preferred may also use the members' programming as part of its own initiated programming. By excluding Preferred from the market, Los Angeles injures the First Amendment interests of programmers and of the public.

*12 CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Footnotes

1 Filmed entertainment is, of course, speech protected by the First Amendment. *See, e.g.,* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

2 Cable systems are also subject to some regulation by reason of their relationship to broadcasting. United States v. Midwest Video Corp., 406 U.S. 649 (1972); *but cf.* FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (statutory limit on permissible regulation). Appropriate "must carry" rules could be upheld under either of these approaches. *Cf.* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *petition for cert. filed sub nom.* National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 54 U.S.L.W. 3336 (U.S. Sept. 23, 1985) (No. 85-502). *See also* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2703-04 (1984).

3 The fact that a cable system has many channels does not assure diversity because, in the absence of "must carry" rules, the single cable operator controls access to those channels. Mandatory setasides of channels for governmental, educational and public access purposes provide no added opportunities for the members of *amicus.* Leased access channels might provide some such opportunities to those engaged in the operation of cable channels (though not necessarily to those who are solely producers of programming), but the record does not reflect the competing demand for use of those channels; and, therefore, no judgment can be made on their adequacy as an alternative mode for reaching the public. Moreover, two leased access channels do not match an alternative cable system offering many times that number of channels. Finally, the constitutionality of governmentally mandated leased access has not been determined.

4 There, the Miami Herald could be viewed as a potential middleman vis-a-vis Tornillo.

5 As cable hookups spread in a community, cable increasingly becomes the sole effective means to reach households through their television sets. If only one cable system is permitted to operate, exclusion from that one system then means, to a large extent, exclusion from the television screens in the community.

6 Professor Dworkin would go further and hold such a restriction unjustifiable in principle. *Cf.* R. Dworkin, A Matter of Principle 381-97 (1985).

7 Mere speculation about disruption or other harms to governmental interests is not a sufficient basis to reject a First Amendment claim. *See, e.g.,* Healy v. James, 408 U.S. 169, 191 (1972).

8 The City's interest in requiring universal service and in protecting the profitability of Sun Cable, Inc., the one approved franchisee, does not justify excluding Preferred and all other potential cable operators from the market. If the City's demand for universal service would disadvantage Sun in competition with other cable operators, remedies other than exclusion should be considered--including a reduction in the City's licensee fee or outright municipal subsidy to support the municipal demand for service beyond what the market would provide. It is difficult to see why some parties should be denied the right to speak in order that the City avoid paying for the service that it demands be provided by other parties. Moreover, if protection of the profitability of Sun justifies exclusion of Preferred, it is difficult to see why it would not also justify exclusion by law of other television technologies that would compete with Sun by engaging in "cream-skimming"--*e.g.,* multi-point distribution systems, satellite master antenna television, low power television, subscription television, direct broadcast satellite.

9 Where a monopoly is physical or technological rather than economic, exclusion of competitors may be necessary in order to permit any communication at all. *See* p. 5, *supra.* Economic factors do not physically interfere with communication in any analogous way.

10 In Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), two publishers were competing to become the natural newspaper monopolist in Haverhill, Massachusetts. It would have been a violation of the First Amendment for any governmental agency to have sought to resolve the competition through an auction-franchising procedure similar to Los Angeles's procedure for cable systems.

11 The strength of that interest is shown by the fact that *amicus* asserts it in this case even though Preferred and other future beneficiaries of an affirmance in this case would potentially also be in a position to enjoy, pursuant to 17 U.S.C. § 111 (1982), compulsory licenses to carry the members' copyrighted programming. *Amicus* and its members believe that the compulsory license is an inappropriate and unfair coerced subsidy from the members of *amicus* for the benefit of the cable television industry.

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