Perspectives from FSF Scholars
March 30, 2011
Vol. 6, No.8

The AllVid Proposal's First Amendment Problem: Exploring the FCC's Constitutionally Defective Device Regulation

by

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There are significant policy reasons why the Federal Communications Commission should not adopt its "AllVid proposal" for expansively regulating the video services marketplace through intrusive video navigation device mandates. What has received less attention so far in the AllVid debate is that aspects of the FCC's proposal would likely violate the First Amendment free speech rights of multichannel video programming distributors (MVPDs), such as Verizon Communications, AT&T, Time Warner Cable, Comcast, and DirecTV. In particular, FCC's proposed requirements regarding content disaggregation and search menu and display functionalities constitute compelled speech mandates that appear to contravene First Amendment limits.

The FCC's AllVid proposal to require disaggregation or unbundling of MVPD video programming and related content undermines the speech selection and presentation choices of MVPDs. Undercutting the editorial discretion of MVPDs in their provision of a retail service, AllVid would force MVPDs into a wholesale role to enable third-party, unaffiliated consumer equipment manufacturers to rearrange and supplement MVPD content with their own content, displacing the content of MVPDs.

But FCC's AllVid proposal to compel consumer equipment manufacturers' access to MVPD video programming and related content fails First Amendment scrutiny under the U.S. Supreme Court's jurisprudence. AllVid regulation would not further any important government interest — let alone any compelling government interest. Government has no important interest in managing competitive markets in order to bring about what regulators speculate might be superior outcomes. The video market is already a dynamic one, characterized by competition and innovation that gives consumers abundant options for accessing video programming and information. And there is no substantial evidence that pervasive regulation of video navigation devices and aspects of MVPD services would provide consumers access to programming that is otherwise unavailable. Regulation requiring the disaggregation of MVPD content could undermine MVPD commercial dealings with video programmers and actually reduce available content.

Moreover, the burdens that AllVid would place on MVPDs would be substantial, especially when less intrusive alternatives are available for the FCC to consider regarding video navigation devices and the MVPD market. The AllVid proposal includes mandates extending to the hardware, logic, applications, and content layers of video navigation devices — all of which will involve implementation costs. And MVPDs' surrendering control of their commercial message targeted to consumers on account of AllVid's disaggregation requirement will undercut existing courses of dealing with programmers.

While questions also exist concerning whether the FCC's AllVid proposal exceeds the agency's delegated statutory authority, there is reason enough to conclude that even if the Commission does possess such authority, AllVid — or at least its compelled access restrictions on MVPD speech activities — likely violates the First Amendment.

AllVid: The FCC's Proposal for Device Design Regulation

The FCC's National Broadband Plan sets out in skeleton form a proposed set of regulatory mandates regarding video navigation devices. The FCC invokes Section 629 of the Telecommunications Act of 1996 as the claimed basis for its proposal.[1] Section 629 similarly forms the basis of existing cable set-top box regulation that its "AllVid" proposal will supplant. In place of the old set-top box regulation that applies only to cable companies, AllVid regulation will impose technical design and functionality mandates on all MVPDs regarding video navigation devices and related video services. AllVid includes a slate of intrusive regulatory controls that reach into the hardware, protocol, applications, and content layers that comprise video navigation devices.

Following the Plan, the FCC issued a Notice of Inquiry on April 21, 2010, that further fleshes out its AllVid proposal.[2] According to the Notice, all MVPDs must use and make available to subscribers a special "adapter." The AllVid adapter must operate as a "set-back" device containing certain functionalities (such as access, provision, decoding, and reception) to connect to all video navigation devices (including those manufactured by companies unaffiliated with MVPDs).[3] Or, in the alternative, MVPDs are required to

install a "gateway device or equivalent functionality" in homes using video navigation devices that allow all consumer electronic devices to access MVPD services.[4]

In the words of the Notice, AllVid will require placement of:

> the network-specific functions such as conditional access, provisioning, reception, and decoding of the signal in one small, inexpensive operator-provided adapter, which could be either (i) a set-back device – which today could be as small as deck of cards – that attaches to the back of a consumer's television set or set-top box, or (ii) a home gateway device that routes MVPD content throughout a subscriber's home network. The adapter would act as a conduit to connect proprietary MVPD networks with navigation devices, TV sets, and a broad range of other equipment in the home. The AllVid adapter would communicate over open standards widely used in home communications protocols … enabling consumers to select and access content through navigation devices of their choosing purchased in a competitive retail market.[5]

Despite the FCC's claims that its AllVid proposal is less intrusive than CableCARDs by allowing unique adapters or gateway alternatives, in its totality AllVid may actually be more onerous. Because AllVid embodies "the basic concept of separating operator-specific communications functions into a device that can then communicate with individual retail devices or a network of retail devices throughout a subscriber's home," it therefore mirrors the ban on integrating security and navigation functionality (or "integration ban") that is a hallmark of CableCARD.[6] And whereas set-top box regulations applied only to cable operators, AllVid would apply to all MVPDs, regardless of the technology platform used to deliver the content.

Significantly, the scope of AllVid's proposed regulation goes far beyond government-mandated device hardware specifications. AllVid regulation includes requirements for communications protocols, encryption and authentication standards, audio-visual codecs, as well as ordering and billing methods.[7] And if the FCC ultimately includes in AllVid the approach it took toward video device navigation in the Comcast-NBCU merger order, AllVid regulation will apply to MVPDs even if video navigation functionalities are provided in the network cloud and no video navigation device is even used.[8]

FCC Regulation of Content Display and Search Functionality Under AllVid

AllVid regulation would also extend to the video programming menu and guide display as well as video content search functionality. The FCC's Notice proposes that "the smart video device would perform navigation functions, including presentation of programming guides and search functionality."[9] According to the FCC, "[t]his approach would provide the necessary flexibility for consumer electronics manufacturers to develop new technologies, including combining MVPD content with over-the-top video services…manipulating the channel guide, providing more advanced parental controls,

providing new user interfaces, and integrating with mobile devices."[10] In its Notice the FCC also sought public comment on "whether the Commission should adopt rules governing the way in which MVPD content is presented."[11]

AllVid regulation would thereby require MVPDs to disaggregate MVPD programming and services. Disaggregation would enable unaffiliated electronic equipment manufacturers to rearrange, edit, and supplement MVPD programming and services for navigation and viewing with unaffiliated video navigation devices. Such regulation would inevitably reshape the relationships in the video service market by forcing MVPDs from their exclusive role as retailers to consumers into the equivalent of a wholesale or middleman role with respect to equipment manufacturers. In essence, MVPDs would be obligated to unbundle their content offerings and make them available for unaffiliated competitors to repackage for consumers.

AllVid's proposal for propping up a niche market and managing competition through intrusive regulatory controls is beset by significant policy problems and raises questions that have already been the subject of debate and discussion.[12] But leaving aside both policy considerations and questions about the scope of the FCC's statutory authority under Section 629, AllVid regulation of video programming menu display and search functionality raises substantial questions in light of the First Amendment's freedom of speech protections.

The FCC's AllVid's Proposal Triggers First Amendment Scrutiny

Substantial First Amendment free speech concerns are posed by the FCC's proposed AllVid regulation requiring disaggregation of MVPD programming and other content relating to the presentation of video programming guides and search functionality. Proposed AllVid requirements that MVPDs disaggregate programming, programming guide content, and other display menu content for reassembly, supplementing and redisplay by unaffiliated consumer equipment manufacturers are, in effect, compelled speech mandates that would likely violate the First Amendment. And any proposed AllVid "non-discrimination" or "neutrality" requirement for displaying video programming search results would likely violate the First Amendment for similar reasons.

The First Amendment's language is plain: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[13] As a matter of principle, the First Amendment's restrictions on government power apply equally to independent agencies – such as the FCC – that are created by acts of Congress and that only exercise powers delegated to it by Congress.

Significantly, MVPDs possess free speech rights against government abridgment in the same manner that newspaper reporters, film screenwriters, TV news anchors, or street protesters possess free speech rights. Regardless of the speech medium used by the speaker, all of them are speakers guaranteed constitutional protection. The fact that MVPDs use particular technologies to deliver commercial services does not negate their free speech protections. As the U.S. Supreme Court has declared: "There 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."[14]

In recent history, courts have occasionally looked to the medium or technological platform employed for speech communication to determine the particular standard for considering First Amendment protection from government abridgement. However, in *Turner Broadcasting System* v. FCC, the Supreme Court concluded that special restrictions on cable operators must be subjected to "heightened First Amendment scrutiny."[15] And the U.S. Court of Appeals for the District of Columbia Circuit has applied such heightened or "intermediate-level scrutiny" to government limits on cable operator ownership.[16]

One important implication of *Turner* and subsequent federal court decisions applying intermediate-level scrutiny to restrictions on MVPDs is that the Commission would be particularly hard-pressed to avoid constitutional scrutiny of AllVid regulation by characterizing MVPDs as mere "conduits of speech."[17] There is no doubt that MVPDs possess First Amendment rights as speakers, as courts have repeatedly recognized the editorial aspects of providing MVPD services. Moreover, a federal court will *not* readily allow an administrative agency to shrink the scope of constitutionally protected speech activity in order to lower the bar to regulating it. Any FCC attempt to escape constitutional scrutiny by relabeling speech and editorial activities that it seeks to restrict as mere transmission would be misguided. A federal court would look past the Commission's relabeling attempt and look instead at the regulation's burden on speech and editorial activity.

Significantly, First Amendment jurisprudence recognizes that it is just as much a free speech infringement to compel a speaker to convey messages that the speaker does *not* wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. As the U.S. Supreme Court proclaimed in *Pacific Gas & Electric Company v. Public Utility Commission*, "[c]ompelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[18]

Similarly, in *Miami Herald Publishing Company v. Tornillo*,[19] the Supreme Court unanimously held that a Florida law requiring newspapers that publish editorials critical of political candidates to print the candidates' replies violated the First Amendment. As the Court explained, the scope of the First Amendment's protections against mandatory access requirements:

> Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.[20]

A Florida federal district court decision provides persuasive authority for the express application of compelled access principles in *Tornillo* to MVPD services. The court held unconstitutional a county ordinance requiring a cable operator to allow competitors access to its cable system on terms at least as favorable as those on which it provides such access to itself.[21] The district court declared: "Compelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[22]

For all practical purposes, AllVid would create a compelled access mandate regarding MVPD programming and related video content akin to the Florida right to access statute in *Tornillo*. It would require an MVPD to allow unaffiliated consumer equipment manufacturers to access disaggregated MVPD programming, programming guide content, and other menu display content. Although this aspect of AllVid would not literally "restrict" an MVPD from selecting and displaying video programming content that it chooses, it would nonetheless compel the MVPD to unbundle its content and offer to unaffiliated consumer equipment manufacturers such content that it otherwise might choose not to make available at a wholesale level. This would enable unaffiliated manufacturers to reassemble such programming and content, supplement it with their own content, and display the reassembled and supplemented service under their own branding. AllVid would thereby undermine an MVPD's ability to select, control, and identify its own unique message under its own branded service.

In addition, should the FCC ultimately adopt search functionality non-discrimination requirements through AllVid like the Commission adopted in the Comcast-NBCU order, such requirements would also be comparable to the compelled access law in *Tornillo*. In the order, the FCC imposed a regulatory condition requiring that "if Comcast-affiliated [set-top boxes] employ a search function to navigate programming on the public Internet, they must display results in a non-discriminatory manner," and that its search methodology must be "based on a non-discriminatory approach consistently applied (e.g., alphabetical, ratings)."[23] A non-discrimination rule for search functionality would (perhaps in the absence of MVPDs providing a reasoned explanation satisfactory to the FCC) prevent MVPDs from prioritizing or preferring some content over other content, even if in response to new perceived consumer demands or to differentiate their service from competitors' services.

While the Supreme Court's rulings in *Pacific Gas & Electric* and *Tornillo* demonstrate that the compelled access mandates are cognizable harms under the First Amendment, a reading of *Turner* suggests that under the Court's current jurisprudence the standard of strict scrutiny applied in those cases may not apply to some or all the FCC's AllVid proposal.[24] Nonetheless, for any compelled access mandates adopted by the FCC under the guise of its AllVid proposal to survive constitutional scrutiny, such regulation would at least have to satisfy intermediate-level First Amendment scrutiny standards applied in *Turner* and court decisions that follow *Turner*. It is unlikely, however, that proposed AllVid requirements would satisfy intermediate scrutiny. AllVid regulation of MVPDs' video programming and related content is *not* supported by any important

governmental interest and less burdensome means exist to achieve the FCC's ostensible purposes in adopting AllVid.

Proposed AllVid Compelled Access Mandates Regarding Content Disaggregation, Display and Search Functionalities Fail to Further Any Important Government Interest

In order for proposed AllVid regulation of MVPD programming and related guide contents to satisfy intermediate scrutiny under existing First Amendment jurisprudence, the FCC would have to establish, to a court's satisfaction, that AllVid compelled access mandates further "an important or substantial governmental interest."[25] However, there is little reason to think that proposed AllVid restrictions on MVPD speech further any substantial government interest.

The existence of a competitive, dynamic marketplace in video programming and delivery services itself undermines arguments that proposed AllVid compelled access mandates on MVPDs further a governmental interest in making more information available. Technological and competitive developments in recent years have given rise to a video market that today provides consumers with an abundance of choices for accessing video programming content. Aside from cable-affiliated video navigation devices that consumers lease from their respective cable providers, a growing variety of ready substitute devices and alternative services are available that allow consumers to access video programming. Today's video market includes two competing national direct broadcast (DBS) providers. Telecom MVPD entrants likewise offer competing service packages in many parts of the country. Consumers are increasingly using their PCs, video game consoles, and HD TVs, to download or stream video content via broadband connections. A growing number of consumers are using wireless smartphone devices to obtain access to video via wireless broadband. And MVPDs are already undertaking plans to deliver video services without using video navigation devices by using cloud-based approaches that place set-top box functionalities inside MVPDs networks.

The multiplicity of sources for obtaining access to video content in today's market is even made evident by the broad scope of the FCC's AllVid proposal. AllVid's compelled access mandates would sweep in not just cable providers but all MVPDs and such regulation would have implications not just for MVPD-provided content but broadband-delivered content. But the range of choices available to consumers in today's video market means regulation of MVPD-affiliated video navigation devices would not likely increase overall access to information. At best, such regulation might make it easier for certain consumer electronic equipment manufacturers to make their own content choices more convenient – in the FCC's view – for consumers to access through a video navigation device as opposed to other platforms.

To the extent that the proliferation of information sources was considered by the Supreme Court as a partial justification for its upholding cable must-carry requirements in *Turner*, that partial justification is *not* an absolute principle for the FCC to rely on in imposing AllVid regulation. As the Supreme Court has observed: "That 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons.'"[26] This means that the First Amendment does not give the Commission free-wheeling power to balance its abridgment of MVPDs' free speech rights on the grounds that it is enabling the speech rights of others.

In *Tornillo* the Supreme Court expressly rejected government-compelled speech access mandates based on arguments that "[t]he First Amendment interest of the public in being informed is said to be in peril because 'the marketplace of ideas' is today a monopoly controlled by the owners of the market."[27] For purposes of First Amendment protection, the Court said:

> However much validity may be found in these [concentration of control] arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.[28]

The district court in *Broward County* similarly observed that the mandated access provision applicable to cable operators "distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology."[29] The AllVid proposal's compelled access requirements regarding MVPD programming and related content as well as any conceivable anti-discrimination mandate regarding video content search functionality would have the same effect and suffer the same defect.

Moreover, key differences between the cable must-carry regime and the AllVid proposal torpedoes any legitimate claims that AllVid regulation could provide a means of proliferating access to information. Cable must-carry regulation – requiring cable operators to carry the content of electing TV broadcasters – was based on Congressional policy favoring over-the-air TV broadcasting in "the public interest" and the government's unique regulatory treatment of broadcasting.[30] Also in *Turner*, the Supreme Court deemed outcome determinative the government's assertion that cable operators served as a bottleneck for consumer access to video content and that in the absence of must-carry that congressional policy toward broadcast TV could be undermined. The must-carry provisions, concluded the Supreme Court in *Turner*, "are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[31]

But concerns unique to congressional broadcast TV policy are simply not present in the AllVid context. And significant differences between the video programming market of 1996 and 2011 undermine any reliance on supposed cable bottleneck rationales for regulation. As pointed out earlier, consumers today benefit from DBS and telco MVPD competition in video services and are increasingly adopting broadband delivery platforms for access to video content.

Of course, Section 629 may be claimed as the basis for asserting a substantial government interest in an even more competitive video navigation device market. But even assuming for the sake of argument that Section 629 supplies a substantial government interest justifying some kind of regulation, in order to satisfy constitutional scrutiny the FCC would have to provide some kind of additional support or evidence that the AllVid proposal would actually further that interest. Although courts routinely accord deference to independent agency predictions and policy judgments, that deference is typically curtailed when freedom of speech rights are implicated. As the Supreme Court made clear in *Turner*, "we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'"[32] The reason courts undertake that kind of independent review "is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[33]

When it comes to the FCC's proposed AllVid regulation, it becomes difficult to put stock in policymaking predictions from 1996 about the dynamic video navigation device market. In a sense, the future envisioned in Section 629 has already come to pass and has arguably confounded policymakers' expectations. DBS and telcom MVPD video services did not exist in 1996, but now supply vigorous competition to cable operators. Similarly, downloadable and streaming video content via broadband connections hardly existed in 1996 in comparison to today. The years since 1996 have shown that consumers prefer leasing set-top boxes from cable operators and other MVPD providers, saving themselves special trips to the store and allowing them to obtain more advanced devices without having to purchase them. Future movement of set-top box functionalities from hardware to software suggest that another (expanded) generation of video device navigation is likely to become obsolete or otherwise distort development in a market that will decreasingly rely on such devices.

The admitted inability of the CableCARD regulatory regime – conceded by the FCC itself – to spur the kind of set-top box competition that the Commission desires is also relevant to First Amendment inquiry into whether the agency's judgment regarding AllVid is based on substantial evidence and entitled to any heightened deference.[34] The FCC's unsuccessful CableCARD experience suggests the practical limits to government-managed competition to prop up a particular market segment by mandating how advanced technological devices are to be designed and operate. That experience should also raise questions regarding the FCC's credibility in seeking to impose AllVid – a broader regulatory framework that builds off CableCARD.

It is also nonsensical for a court to inquire into predictive judgments made by Congress regarding unaffiliated consumer equipment manufacturers' ability to access disaggregated MVPD content for repackaging and supplementing. The statute was not addressed to that purpose. Rather, Section 629 focused on consumers' ability to access *MVPDs' services* using unaffiliated manufacturers' equipment. To the extent the FCC now seeks to expand the scope of its regulation under Section 629, it raises threshold questions about the scope of the Commission's delegated authority under the statute. But jurisdictional issues notwithstanding, the extent to which the FCC may attempt to justify AllVid regulation as a means of serving purposes and based on predictions extraneous to anything ever contemplated by Congress, it may also serve to undermine the FCC's claim that its proposed regulation is backed by substantial evidence and in reliance on agency expertise deserving deference.

Alternative arguments that AllVid regulation would support a substantial government interest in increasing broadband adoption would also likely prove unsuccessful. Such arguments must first assume that the FCC has authority to impose AllVid regulation pursuant to Section 706 of the Telecommunications Act – and perhaps the FCC's recent broadband deployment report in which the agency (controversially) declares that broadband is not being deployed in a timely fashion.[35] The D.C. Circuit's ruling against the agency in *Comcast v. FCC* as well as previous agency interpretations of Section 706 renders such a grant of authority unlikely.[36] But even assuming, for the sake of argument, that the agency has plausible authority to adopt AllVid regulation pursuant to Section 706, it still begs the question of whether increasing broadband adoption is itself a government interest that can plausibly be relied upon to impose speech-restrictive AllVid compelled access mandates on MVPDs.

There is no evidence that the FCC's proposed AllVid regulation will further broadband adoption. As indicated in *Turner*, courts considering government restrictions on speech communications make their own "independent judgment of the facts bearing on an issue of constitutional law," ensuring such restrictions are based on "reasonable inferences based on substantial evidence."

However, the National Broadband Plan provides little more than the following assertion as the basis for its AllVid proposal:

> By any measure, innovation is thriving in mobile and computing devices…The same is not true for set-top boxes, which are becoming increasingly important for broadband as video drives more broadband usage …Further innovation in set-top boxes *could* lead to…Unlimited choice in the content available—whether from traditional television or the Internet—through an integrated user interface…More video and broadband applications for the TV, possibly in conjunction with other devices, such as mobile phones and personal computers (PCs)…[and] Higher broadband utilization.[37]

Similarly, in the Commission's subsequent Notice proposing AllVid it asserted:

> We believe that [AllVid] *could* foster a competitive retail market in smart video devices to spur investment and innovation, increase consumer choice, allow unfettered innovation in MVPD delivery platforms, and encourage wider broadband use and adoption.[38]

These assertions fail to adequately supply an evidentiary or inferential link between its AllVid proposal and broadband adoption.

Also, to the extent that the AllVid proposal is claimed to encourage innovation and investment in a more robust video navigation device market or in increased broadband utilization for video and that might eventually result in increased adoption, an equal and perhaps stronger argument can be made that the proposal creates disincentives for MVPDs to invest in video services. Where government requires MVPDs to disaggregate their video programming and related content in order to provide it at wholesale for their regulation-enabled competitors to repackage, supplement, and sell at retail, such regulation constitutes a form of unbundling regulation that in other contexts has been recognized to deter investment.

In discussing the FCC's older UNE-P regulations applied to incumbent voice carriers, for instance, Senior Judge Stephen F. Williams of the D.C. Circuit acknowledged the opportunity costs that accompany such regulation, writing that "the existence of investment of a specified level tells us little or nothing about incentive effects. The question is how such investment compares with what would have occurred in the absence of the prospect of unbundling."[39] On that point, Judge Williams explained: "Each unbundling of an element imposes costs of its own, spreading disincentive to invest in innovation and creating complex issues of managing shared facilities."[40]

Unique characteristics of the MVPD retail market likewise suggest that AllVid regulation requiring MVPDs to disaggregate their content to make available to unaffiliated consumer equipment manufacturers at retail could deter investment and in the long run reduce choices of available content. As FSF President Randolph May has observed regarding past proposals to force the disaggregation of MVPD content through cable "*a la* carte" regulation: "[T]he current system of packaging programming in tiers that subscribers, on the whole, find attractive allows cable operators to subsidize new program networks while they try to gain a foothold and maintain existing networks that have a narrow appeal, such as to minority interests."[41] In other words, video content is often offered by programmers in bundles to MVPDs. In turn, MVPDs add other content to its channel line-up based upon their judgments about what will be most popular with consumers, and then offer their bundled line-ups to consumers.

But regulation that requires the unbundling or disaggregation of such content at the wholesale or retail levels undermines the economic underpinnings of MVPD operations as well as the commercial expectations of both MVPDs and programmers. FSF President May concluded that "[m]andatory a la carte almost certainly will diminish the

amount and diversity of programming available to cable subscribers, a result at odds with First Amendment values."[42] Because an AllVid requirement that MVPDs must disaggregate their content to make it available to unaffiliated manufacturers to repackage, supplement, and redisplay would also undermine current MVPD practices for packaging and retailing programs and thereby reduce the amount and diversity of programming offered to consumers, AllVid would similarly run counter to First Amendment values.

In addition, the ability of MVPDs to pursue many types of innovative engineering and other technical approaches to video navigation device functionality would also be curtailed by the AllVid proposal's requirement that such functionalities be provided either through a gateway device or with an adapter that separates out certain functions from others.

Increasing broadband adoption is a laudable policy goal. Absent a stronger factual and inferential showing that its AllVid proposal would actually increase broadband adoption, it is unlikely a court would conclude that AllVid's restrictions on MVPD speech activities furthers any substantial government interest in increasing broadband adoption.

Proposed AllVid Compelled Access Mandates Regarding Content Disaggregation, Display and Search Functionalities Impose Overly-Broad Burdens on Speech

Compelled access mandates regarding MVPD programming and related content that are contained in the FCC's AllVid proposal would also likely fail First Amendment intermediate scrutiny because FCC objectives could be better attained through less restrictive alternative policy approaches. As the Supreme Court described its less-restrictive means standard for intermediate scrutiny in *Turner*, "[n]arrow tailoring in this context requires…that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[43]

In enacting Section 629, Congress addressed the availability of MVPDs' programming on competing video navigation devices – *not* the availability of unaffiliated consumer electronics manufacturers' repackaging of MVPD content with supplemental content and menus. The scope of Section 629 presents threshold legal questions regarding whether the FCC's AllVid proposal exceeds the agency's delegated statutory authority. But the constitutional analysis of whether the AllVid proposal substantially burdens more speech than necessary would likely be informed by the scope of Section 629. To the extent that the AllVid proposal is intended to make unaffiliated consumer electronics manufacturers' repackaging of MVPD content with supplemental content and menus available at retail, AllVid would likely be found to burden substantially more speech than necessary to further Section 629's more limited aims regarding availability of MVPD programming.

One obvious and less-restrictive approach would be for the FCC to adopt a regulatory framework that enables unaffiliated consumer electronics manufacturers to navigate MVPD programming through their devices. Elimination of AllVid's disaggregation

requirement would maintain the integrity of the programming "message" of MVPDs. At the same time, the FCC could also allow unaffiliated manufacturers to supplement MVPD programming with their own content, menus, and search functionalities through their devices.

Proposed AllVid Compelled Access Mandates Regarding Content Disaggregation, Display and Search Functionalities Might Warrant Strict Scrutiny, and Would Likely Fail to Satisfy That Standard

While the foregoing analysis presumed the Court would treat AllVid's compelled access mandates as content-neutral regulations subject to intermediate scrutiny, there is also a likelihood that such mandates would be characterized as content regulation and therefore subject to strict scrutiny. This means the FCC would bear an even heavier burden in proving that speech-restricting measures further a compelling governmental interest and are narrowly tailored to further that purpose using the least restrictive means necessary.[44] It is highly doubtful that the FCC's proposed AllVid would satisfy a stricter form of scrutiny under the First Amendment.

As the Supreme Court observed in *Turner*: "Deciding whether a particular regulation is contentbased or content neutral is not always a simple task."[45] The Supreme Court's jurisprudence recognizes that "even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."[46] The District Court in Broward County, for instance, concluded that the compelled access ordinance at issue "forces the cable operators to alter their content to conform to an agenda they do not set."[47] Depending on the details of any AllVid regulation that the Commission might ultimately adopt, there is plausibility to the idea that a court could find that at least some of its requirements are content-based and should be subject to strict scrutiny under the First Amendment.

In *Turner* the Supreme Court concluded that the extent of cable must-carry regulation's interference with cable operators' editorial discretion "does not depend upon the content of the cable operators' programming," and that "an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers."[48] However, should the FCC adopt AllVid requirements regarding how MVPDs' search retrieval and display functionalities operate – including what kind of content is displayed and how it is displayed – a court might likely find that such requirements constitute content-based regulation. Such a conclusion is rendered more likely if prospective AllVid regulation is addressed not to lack of access to search results but as to how such content is presented. Mandates that MVPD deliver video navigation search results of online or other content in a "neutral," or "non-discriminatory" manner – similar to one of the regulatory conditions that the FCC imposed in its Comcast-NBCU merger order – might be deemed content-based regulation by a court reviewing AllVid.[49]

If the Supreme Court Recognizes Recent Trends in the MVPD Market or Adopts a Technology-Neutral First Amendment Jurisprudence, Proposed AllVid Compelled Access Mandates Might Warrant Strict Scrutiny, and Would Likely Fail to Satisfy That Standard

Whenever the constitutionality of any existing or new regulatory restraints on MVPD speech activities are under consideration, it is important to recognize that Supreme Court standards could conceivably become more demanding in the near future. And it is highly doubtful that the FCC's proposed AllVid would satisfy a stricter form of scrutiny under the First Amendment.

There is reason to believe that as the Supreme Court will eventually recognize – as some lower courts have recognized – that competition and innovation in the dynamic video marketplace has rendered less tenable prior regulations of cable operators that were once premised on perceived cable "bottlenecks." In a 2009 ruling of the D.C. Circuit regarding FCC limits on cable operator subscribership, for instance, the Circuit Court concluded that the so-called cable bottleneck that justified cable regulation under the 1992 Cable Act no longer exists.[50] And absent supposed cable monopoly rationales that factored into judicial review of cable regulations under intermediate scrutiny, the Supreme Court and lower courts could prove more willing in future cases to subject existing cable regulations and new MVPD regulations to strict scrutiny.

Factoring changing video market circumstances into First Amendment jurisprudence could also coincide with the views of those Supreme Court justices who have voiced their disapproval of the manner in which the Court has subjected different speech restrictions to different levels of scrutiny depending on the underlying technology that is implicated. As I pointed out in an *FSF Perspectives* paper titled "The Deregulatory First Amendment: How Video Competition and Free Speech Will Reduce Regulation":

> Four of the nine Justices on the Supreme Court when *Turner* I and II were decided would have subjected must-carry to strict scrutiny, requiring a compelling governmental interest and a narrow tailoring to uphold such a forced-speech mandate. And the *Turner* I & II majorities conceded that factual conditions might require a scrutiny level reevaluation at a future time.[51]

In fact, the Supreme Court could begin to subject cable and MVPD regulation on speech activities to strict scrutiny as part of a broader reformation of its jurisprudence that would subject speech-restricting regulation of all speech communications technologies to the same standard. FSF President Randolph May advocates a technology neutral approach, as articulated in his 2007 *Charleston Law Review* article, "Charting a New Constitutional Jurisprudence for the Digital Age." Justice Clarence Thomas cited to the article in a concurring opinion in the *Fox v. FCC* (2009) case, questioning the Court's treating First Amendment claims of broadcasters less favorably than speakers using other technological media.[52]

And the Court even hinted at a technologically neutral approach to First Amendment claims in the political speech context. In *Citizens United v. FEC* (2010) Justice Anthony Kennedy wrote for the Court that it "must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker,"[53] since "[t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."[54]

It remains an open question as to when the Supreme Court might revisit its technologically non-neutral approach to speech regulation under the First Amendment. But the possibility of the Court directly taking up the matter and definitively adopting a technologically neutral approach may only be one case away. Should that case come before the Court and be so decided, the constitutional validity of AllVid would be highly doubtful.

Conclusion

The FCC's AllVid proposal calls for regulatory intrusion into several important aspects of video navigation devices and MVPD services. It is a flawed attempt to prop up and protect a narrow view of how the video navigation device market and a segment of the MVPD services market should operate. AllVid involves government design of technological devices for a market that is already undergoing rapid innovation. And the AllVid proposal principally relies upon a statutory provision regarding cable set-top boxes from the mid-1990s that has outlived its ostensible purpose. If anything, the Commission should invoke Section 629's unique sunset provision to further unleash innovation and competition in the dynamic video market.

Policy considerations aside, aspects of the FCC's AllVid proposal likely violate the First Amendment free speech rights of MVPDs. Most especially, the FCC's proposed requirements regarding disaggregation of content and search menu and display, constitute compelled access mandates that are most likely prohibited by the First Amendment. Given conditions in today's dynamic video market, there is solid reason to believe that courts will not be as receptive to the FCC's AllVid proposal to regulate MVPDs and video navigation device functionality as they have previously been to earlier generations of regulation imposed on cable operators grounded in concerns over perceived cable monopolies. AllVid fails to advance any substantial – let alone compelling – governmental interest, and less onerous options are available to the Commission to achieve the objectives it claims that AllVid will further. Assuming but by no means accepting that the FCC's AllVid proposal is not first found by a court to exceed the Commission's statutory authority, AllVid will have difficulty surviving First Amendment scrutiny.

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[1] *See* FCC, National Broadband Plan ("Plan"), Chapter 4, Recommendation 4.12, at 51-52 (March 16, 2010), available at: http://download.broadband.gov/plan/national-broadband-plan-chapter-4-broadband-competition-and-innovation-policy.pdf.
[2] *See* FCC, Notice of Inquiry ("AllVid Notice"), *In the Matter of Video Device Competition*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (April 21, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-60A1.pdf.
[3] AllVid Notice, at 1, para. 2.
[4] AllVid Notice, at 1, para. 2.
[5] AllVid Notice, at 9, para. 22.
[6] AllVid Notice, at 9, para. 23, fn. 44. *See also* 47 C.F.R. § 76.1204(a)(1).
[7] *See* AllVid Notice.
[8] *See* FCC, Memorandum Opinion and Order ("Comcast-NBCU Order"), *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, at 40, para. 99 (January 20, 2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.
[9] AllVid Notice, at 2, para. 2.
[10] AllVid Notice, at 8, para. 17.
[11] AllVid Notice, at 16, para. 43.
[12] For policy critiques of the FCC's AllVid proposal, *see, e.g.*, Seth L. Cooper, "FCC's 'AllVid' Regulation of Video Devices All Wrong," *FSF blog* (January 26, 2011), available at: http://freestatefoundation.blogspot.com/2011/01/dynamic-market-makes-fcc-regulation-of.html; Seth L. Cooper, "Government Shouldn't Design Devices in Dynamic Markets," *FSF blog* (September 23, 2010), available at: http://freestatefoundation.blogspot.com/2010/09/government-shouldnt-design-devices-in.html.
[13] U.S. Const., Amend. I.
[14] *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner I*"), 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).
[15] Turner I, at 641.
[16] *See, e.g., Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C.Cir. 2010); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1129 (D.C.Cir. 2001).
[17] In adopting its network neutrality regulatory framework, the FCC claimed in response to First Amendment criticisms of its proposed rules that broadband ISPs are *not* speakers receiving heightened protections under the Supreme Court's First Amendment jurisprudence, but are merely "conduits of speech" that can be subject to more intrusive regulation than Internet content providers and end-users who presumably are to be considered speakers. *See* FCC, Report and Order, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-91, WC Docket No. 07-52 (December 23, 2010), at 78, para. 141, available at: http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf.
[18] 475 U.S. 1, 9 (1975). This section and the one that follows draws on First Amendment and technology insights from Randolph J. May, "Net Neutrality: Neutering the First Amendment in the Digital Age," *Perspectives from FSF Scholars*, Vol. 1, No. 4, (September, 2006), available at: http://www.freestatefoundation.org/images/Net_Neutrality_Mandates-Neutering_the_First_Amendment.pdf; and Comments of the Free State Foundation, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52 (January 14, 2010), at 16-20, available at: http://www.freestatefoundation.org/images/Comments_-_Preserving_the_Open_Internet_-_GN_Docket_No._09-191.pdf.
[19] *Tornillo*, 418 U.S. 241 (1974).
[20] *Tornillo*, 418 U.S. at 256.
[21] *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 125 F.Supp. 2d 685 (S.D. Fl. 2000).
[22] *Broward County*, 125 F.Supp. at 694.
[23] Comcast-NBCU Order, at 40, para. 99.
[24] *Turner I*, at 655-656.
[25] *Turner I*, at 662 (quoting *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)).
[26] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 114 (1973) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952).

[27] *Tornillo*, 418 U.S. at 251.
[28] *Tornillo*, 418 U.S. at 254.
[29] Broward County, 125 F. Supp.2d at 694.
[30] *Turner I*, at 662-667.
[31] *Turner I*, at 661.
[32] *Turner* I, at 666 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) and citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).
[33] *Turner I*, at 666 (citing *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C.Cir. 1987) ("When trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures").
[34] *See* AllVid Notice at 4, para. 10.
[35] *See* 47 U.S.C. §§ 1302 (a), (b); FCC, Sixth Broadband Deployment Report ("706 Report"), *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, GN Docket No. 09-51, at 3, para. 2 (released July 20, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A1.pdf.
[36] *See Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010); Report and Order, GN Docket No. 09-91, at 64-65, para. 118 (discussing the Commission's *Advanced Services Order*).
[37] Plan,, at 49-50 (emphasis added).
[38] AllVid Notice at 1, para. 1 (emphasis added).
[39] *U.S. Telecom. Assoc. v. FCC*, 290 F.3d 415, 425 (D.C.Cir. 2002).
[40] *U.S. Telecom*., 290 F.3d at 427.
[41] Randolph J. May, "The Constitution *a La* Carte," *Perspectives from FSF Scholars*, Vol. 2, No. 14 (May 22, 2007), at 3, available at: http://www.freestatefoundation.org/images/The_Constitution,_A_La_Carte.pdf.
[42] May, "The Constitution *a La* Carte," at 3.
[43] *Turner I,* at 662, quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989).
[44] *See, e.g., Sable*, 492 U.S. at 126 ("The Government may…regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"); *id.* ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends").
[45] *Turner I*, at 642.
[46] *Turner I*, at 645 citing *U.S. v. Eichman*, 496 U.S. 310, 315 (1990) (other cites omitted).
[47] *Broward County*, 125 F.Supp. at 694.
[48] *Turner I*, at 644.
[49] Comcast-NBCU Order, at 40, para. 99.
[50] *Comcast v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).
[51] Seth L. Cooper, "The Deregulatory First Amendment: How Video Competition and Free Speech Will Reduce Regulation," *Perspectives from FSF Scholars*, Vol. 5, No. 7, at 6 (March 25, 2010), available at: http://www.freestatefoundation.org/images/The_Deregulatory_First_Amendment.pdf.
[52] *See Fox v. FCC*, 129 S. Ct. 1800, 1822 (2009) (Thomas, J., concurring).
[53] *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010).
[54] *Citizens United*, 130 S. Ct. at 891. For further discussion of this case and its implications, see Seth L. Cooper, "What Citizens United Means for Free Speech in the Digital Age," *Perspectives from FSF Scholars*, Vol. 5, No. 3 (January 22, 2010), available at: http://www.freestatefoundation.org/images/What_Citizens_United_Means_for_Free_Speech_in_the_Digital_Age.pdf.