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Bellona v. Exurb Media Corp. Bench Memorandum 1982 Benton National Moot Court Competition, 16 J. Marshall L. Rev. 168 (1982)

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BELLONA v. EXURB MEDIA CORP. BENCH MEMORANDUM*

A. STATEMENT OF THE CASE

Exurb Media Corporation ("Exurb"), a privately owned Branwar cablevision corporation, entered into a non-exclusive franchise agreement ("Agreement") with Branwar's Cablevision Commissioner, Mary Bellona ("Commissioner"). The Commissioner proffered the Agreement pursuant to her plenary authority conferred by statute. To date, Exurb is the only cable television franchisee in Branwar. The Agreement provides a license to operate cablevision throughout the 3,600 square miles of Branwar by whatever technological means may be available. No limitation has been placed upon the number of channels Exurb can operate. Upon proper notice and hearing by the Cablevision Commission, Exurb may be disenfranchised should it be found to have breached the Agreement.

By statute and the Agreement, the Commissioner is empowered to promulgate additional provisions to the Agreement by which Exurb will be bound. The instant action arose when the Commissioner incorporated two new provisions into the Agreement. Exurb challenged both provisions, claiming unreasonable interference with its first amendment rights.

The challenged Agreement provisions are as follows:

> ¶ 112. If franchisee shall permit any person who is a legally qualified candidate for any State or local public office to use a cable channel, he shall afford equal opportunities to all other such candidates for that office in the use of a cable channel. Appearance by a legally qualified candidate on any
>
> (1) bona fide newscast;
> (2) bona fide news interview;
> (3) bona fide news documentary where the candidate's appearance is incidental to the subject matter of the documentary; or
> (4) on-the-spot coverage of bona fide news events
>
> shall not be deemed to be use of a cable channel within the meaning of this paragraph. A fran-

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> chisee shall not have the power to censor the material transmitted pursuant to this paragraph. No obligation is imposed upon a franchisee to allow use of a cable channel by any candidate except as provided in this paragraph.
>
> ¶ 113 The truth of the matter asserted shall not be a defense in a civil action for publicity of a private fact. In such a civil action, the franchisee may aver that the matter given publicity is of legitimate public interest when the matter concerns governmental action or conduct by public officials.

The language in ¶ 113 is taken from the Branwar Judiciary Act which creates the civil action for publicity of a private fact:

> § 6.24. (a) One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person.
>
> (b) The truth of the matter asserted shall not be a defense in a civil action for publicity of private fact unless the matter asserted pertains to governmental action or conduct by a public official.

10 Bran. Stat. § 6.24 (1978).

At a hearing, the Cablevision Commission found that the challenged provisions were a valid exercise of the State's police power. Before the challenged provisions became effective, Exurb filed a petition for declaratory relief in the United States District Court for the State of Branwar. The Commissioner's answer admits the facts contained in the petition but denies that the provisions unduly interfere with Exurb's first amendment rights. The Commissioner moved for summary judgment.

After the Commissioner's answer was filed, a member of the faculty at a local private law school, John Stewart, filed action in a Branwar state court alleging that Exurb violated his privacy by giving publicity to private facts. On a program Exurb produced and transmitted over its community access channel, Exurb's reporter announced that the plaintiff was denied tenure for plagiarizing scholarly writing. In its answer, Exurb admitted broadcasting the matter but averred truth as its defense. Mr. Stewart moved for summary judgment on the ground that truth is not permitted as a defense in Branwar.[1] Exurb responded to the motion, claiming that the Agreement provision denying truth as a defense violated its first and fourteenth amendment

1. Exurb's statute and the challenged provision provide a public interest defense where the matter pertains to governmental actions or the conduct of a public official. Neither exception applies to the *Stewart* case.

rights. Exurb moved to stay the proceedings of the *Stewart* case pending determination of the same issue in the instant case. The state court granted Exurb's motion.

The United States District Court for the State of Branwar denied Exurb's petition for declaratory relief and granted the Commissioner's motion for summary judgment on both issues. The court found that a state could regulate the content of cablevision transmissions because cablevision is an adjunct of the electronic media. Furthermore, Exurb could be regulated as a public utility because it uses public streets and rights-of-way for its cables. The state has a legitimate public interest in protecting its citizens from abuses of editorial discretion. The district court also held that Branwar could proscribe truth as a defense in an action for giving publicity to private facts, on the grounds that publicity is the gravamen of the action and truth is irrelevant to the protected interest.

The United States Court of Appeals for the Thirteenth Circuit reversed the district court on both issues. The appellate court found that cablevision technology removed the inherent limitations of electronic broadcasting, thus nullifying the purpose for the content regulations. Cablevision, like the print media, was held to be subject only to the operator's editorial discretion. Furthermore, the content regulation could not be supported as: (1) a reasonable time, place or manner restriction; (2) a mandate serving a compelling state interest; or (3) a subject matter regulation. The appellate court also held that a state could not proscribe a truth defense in actions for giving publicity to private facts. The court reasoned that because the Constitution shields some false statements, as when they refer to public officials or public figures, truth should be protected within the ambit of free speech. Branwar's public interest privilege pertaining to matters of governmental concern was held to be an affront to the first amendment.

The United States Supreme Court granted certiorari on the following questions:

(1) May a state regulate the content of a cable television transmission in such a manner as to mandate equal opportunity use of a cable channel by candidates for state and local political office?

(2) To what extent may a state proscribe truth as a defense in a privacy action for giving publicity to private fact?

A Preliminary Note:

The Federal Communications Commission ("FCC") recognizes that it does not have exclusive jurisdiction to regulate cablevision. *Duplicative and Excessive Over-regulation—CATV*, 54 FCC 2d 855 (1975). The FCC may promulgate rules

and regulations as public convenience, interest or necessity requires to carry out the provisions of the Communications Act of 1934, 48 Stat. 1082 as amended, 47 U.S.C. § 303(r) (1976). Federal regulations preempt inconsistent state or local regulations. *First Report and Order*, Docket 18397, 20 FCC 2d 201 (1969).

The FCC has promulgated an equal opportunity to political candidates regulation providing the same mandate as contained in the Agreement provision challenged here. 47 C.F.R. § 76.205 (1981). The provision specifically regulates cablevision operators. *Id.*

However, Exurb does not challenge the FCC provision here; it challenges the state's power to regulate the content of the cablevision programming. The FCC provision does not preempt the Agreement provision because it is not inconsistent with the federal regulation and the FCC does not have exclusive jurisdiction over cablevision operators.

B. DESCRIPTION: CABLEVISION

Cablevision was first developed as a method of relaying local television signals to rural areas that did not receive adequate reception by conventional methods. A master antenna, which was usually raised on a mountain peak, transmitted television signals via coaxial cables to homes in the vicinity. Soon, cable operators expanded cable service by adding microwave receivers to their antennas which allowed them to fill vacant channels with television signals from stations in distant cities.

Cablevision is like electronic broadcasting because it transmits signals to home receivers; cable's major difference is that its companies transmit over coaxial cables, while electronic broadcasting transmits over public airwave frequencies. Distribution through shielded cables protects the video signal from interference by weather and yields a more consistent, cleaner image than is possible with broadcast transmission to a home receiver.

All cable systems consist of three basic elements: the headend, the distribution system, and the subscriber terminal. The headend, the nerve center of the system, receives signals from many sources and transmits them to differing locations. It is usually built near the base of a master antenna where reception from television stations is good.

The sources of incoming signals to the headend are as follows: broadcast television antennas and microwave receivers picking up signals from local and distant television stations; satellite receivers picking up signals from communications satellites; cable interconnections bringing in signals from local

production studios; and, cable connections or microwave receivers providing linkages to other cable headends, in order that other systems can share signals which originated in one cable system.

Each signal represents one channel of programming. These incoming signals are then transmitted from the headend downstream through the coaxial cable to the subscriber. The coaxial cable must run along streets or other rights-of-way to be able to "drop" a service line to the subscriber. The cable can run through underground conduits, be buried in a trench, or hung on poles. Most cables are run overhead on poles belonging to existing utilities. Coaxial cables at present can carry 60-90 channels each, and an even greater load may be carried under technological improvements now being developed.

The subscriber terminal connects the drop line to a viewer's television set. Every subscriber has a small box called a converter that allows the receiver capacity of a television set to carry a vast number of channels.

Cable companies must have the permission of local authorities to put cables through public rights-of-way, so the companies sign franchise agreements which subject them to some control by local authorities. In exchange for the rights-of-way for a specified period of time, cable companies usually agree to pay the franchising authority an annual franchising fee. The companies may also be required to provide specific services, such as public or community access channels; however, the constitutionality of this requirement (not raised as an issue in the instant case) is subject to question, and will probably be tested in a case recently filed in New York.[2]

II.

MAY A STATE REGULATE THE CONTENT OF A CABLEVISION TRANSMISSION BY MANDATING EQUAL OPPORTUNITY USE OF A CABLE CHANNEL BY CANDIDATES FOR STATE AND LOCAL POLITICAL OFFICE?

A. IS STATE REGULATION BASED UPON CABLEVISION AS AN ADJUNCT OF ELECTRONIC MEDIA OR PRINT MEDIA?

While the Constitution guarantees the freedom of expression, freedom of utterance is abridged to many who wish to use

2. *Comax Telcom Corp. v. State of New York Comm'n on Cable Television*, No. 82 Civ. 746 (N.D.N.Y. July —, 1982).

the limited facilities of radio and conventional television. Congress first imposed a general regulation of radio communication in the Radio Act of 1912, 37 Stat. 302. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service, while the frequencies within each band were assigned to broadcast stations. As the number of stations increased, there were fewer frequencies available, so that the Secretary of Commerce limited the power and hours of operation of stations in order that several stations might use the same channel.

This regulation, which led to the enactment of the Radio Act of 1927, 44 Stat. 1162, and subsequently, the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 *et seq.* (1970),

> was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.

National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943). "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Id.* at 226.

In *National Broadcasting Co.*, two network organizations challenged FCC chain broadcasting (simultaneous broadcasting of an identical program by two or more connected stations) licensing regulations. They contended that the FCC's refusal to grant licenses to persons engaged in specified network practices went beyond the FCC's regulatory powers conferred on it by the Communications Act of 1934. They likewise contended that the regulations abridged their first amendment right to free speech. The Court held that the FCC acted within its authority in promulgating regulations that allowed the maximum utilization of radio facilities in the public interest. Furthermore, the Court stated,

> with the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest.

Id. at 218.

The terms of the Communications Act of 1934 provided the FCC with the power to regulate "broadcast services" which in

1934 principally included radio. Television became an apparent object of the Commission's power in the 1940's. Broadcasting is defined by statute as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1970). By way of clarification, "radio communications" are further defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." *Id.* § 153(b). Television is broadcasting because it relies on radio waves, specifically the VHF and UHF portions of the electromagnetic spectrum.

The Supreme Court has consistently upheld the power of the FCC to regulate, under congressional authority, the content of broadcast media. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the FCC ordered a radio station operator to grant reply time to an individual political candidate who was criticized in its editorial. The radio station operator refused. The Court sustained the FCC requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage in order to insure the public's right to access (this is known as the "fairness doctrine"). 47 U.S.C. § 315(a) (1970).

The Court held that if broadcast media were not regulated, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." *Red Lion*, 395 U.S. at 392.

Furthermore, the Court said that the order did not violate first amendment rights: "[T]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." *Id.* at 392. *Red Lion* illustrates that content regulation is constitutional where it insures public access to a limited public resource.

Unlike broadcast media, the Supreme Court has consistently upheld broad protection under the first amendment to print media. The content of print media has been held to be under the exclusive control of and subject to the judgment and discretion of the editor; it is not the province of the government to exercise journalistic judgment with respect to what is printed.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a candidate for local political office sought to force the Miami Herald to print his personal reply to editorials critical of his candidacy. The candidate based his cause of action on a Florida statute which provided for a right of reply in the event that a newspaper assailed a candidate's personal character or fitness for office. A newspaper or editor who failed to comply

with a proper request was subjected to criminal and civil liability.

The Circuit Court of Dade County held that the statute was an unconstitutional infringement of first amendment press rights. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973). The Florida Supreme Court reversed the lower court's decision and held that the statute did not violate constitutional guarantees but furthered the "broad societal interest in the free flow of information to the public. . . ." *Id.* at 82. The newspaper appealed to the Supreme Court which reversed the Florida Supreme Court in a unanimous decision.

The candidate argued that the press no longer represents the broad views and interests of the public because of the communications revolution. Advanced technology and economic pressures have caused the dissolution of many newspapers, and those that remain are controlled by big business interests. This concentration of control, he argued, has diminished public access to vigorous debate on issues of interest while increasing the ability of those few to manipulate popular opinion and course of events. The candidate urged the Court to hold the press accountable as public trustees of a valuable resource.

The Court rejected the candidate's arguments and held

> the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald, 418 U.S. at 258.

1. *Petitioner's Argument.*

The Petitioner (Branwar's Cablevision Commissioner) will contend that cablevision is an adjunct of electronic broadcasting. Both cablevision and electronic broadcasting transmit signals to home receivers. The major difference between them is that electronic broadcasting transmits over public airwave frequencies, while cable television companies transmit over coaxial cables. Because of cablevision's use of electronic technology, it might be regulated as electronic media, in which case, regulation of a cablevision transmission would be constitutionally permissible.

2. *Respondent's Argument.*

The Respondent (Exurb Media Corporation) will contend that cablevision does not rely on conventional broadcast equipment, *i.e.*, the transmission of signals over the air to a receiver by use of a frequency on the electromagnetic spectrum. Rather, cablevision companies transmit signals over coaxial cables that enable them to have a capacity to program over a vast number of channels. Unlike electronic broadcasting, there are no technical limitations in the potential number of channels available in a given locale. Cablevision can no longer be considered a limited public resource. Consequently, cablevision, like print media, should be subject only to the editor's "editorial discretion."

B. MAY A STATE'S POLICE POWER EXTEND TO REGULATION OF THE CONTENT OF A CABLEVISION BROADCAST AS A PUBLIC UTILITY OR COMMON CARRIER?

The federal government, through the FCC, has never defined broadcasters as common carriers under the Communications Act of 1934, as amended. Common carriers are defined elsewhere as

> [A]ny person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(h) (1970).

In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Court, in applying this cablevision statute, struck down several FCC rules of a common carrier character holding they were beyond the statutory authority of the Commission. One rule required cable operators to develop minimum channel capacities by 1986, while others required operators to make facilities, equipment, and channels available for use by third parties.

Although the federal government cannot regulate cablevision as a common carrier under present federal law, perhaps a state may regulate cable companies as public utilities because they use public streets and rights-of-way for their cables. A state, pursuant to the tenth amendment and its police power, may determine its own standards to secure and protect the health, safety and morals of its citizenry. *Munn v. Illinois*, 94 U.S. 113 (1876).

The Supreme Court in *Consolidated Edison v. Public Service Commission of New York*, 447 U.S. 530 (1980), addressed the issue of whether a state may regulate the free speech of a public

utility by regulating the content of written material placed in the utility's billing envelopes.

In *Consolidated Edison*, the Public Service Commission of New York prohibited the utility from using bill inserts that discussed controversial issues of public policy. The Court held that the prohibition was invalid because it did not meet three constitutionally mandated requirements. The standards imposed on a state's regulation of a public utility's free speech require that the restriction: (1) must be a reasonable time, place, or manner restriction; (2) must be a permissible subject matter regulation; and (3) it must serve a compelling state interest. *Id.* at 536, 538, 540.

For a time, place, or manner regulation to be reasonable, the restriction must serve some legitimate governmental interest and leave open ample alternative channels for communication. *Linmark Assoc. v. Willingboro*, 431 U.S. 85 (1977). However, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of speech. *Id.* at 93-94.

> Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

Consolidated Edison, 447 U.S. at 540.

The Court has held that there is a legitimate public interest in allowing candidates the "opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions . . . before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52, 53 (1976) (*per curiam*). Nevertheless, a compelling state interest must be demonstrated and the restriction must be reasonable.

1. *Petitioner's Argument.*

The Petitioner (Branwar's Cablevision Commissioner) will contend that the provision mandating equal time to political candidates is a reasonable exercise of the state's police power to regulate a public utility. Without this content regulation, citizens could be subject to a cable company's programming decisions, *e.g.*, a unilateral presentation of political views.

Therefore, the equal time provision could serve a compelling state interest because the public's right to hear opposing political viewpoints during a campaign is a legitimate public concern.

2. *Respondent's Argument.*

The Respondent (Exurb Media Corporation) will contend that although the challenged provision appears to regulate the time that a cablevision company must allow for a candidate to make a reply, the provision regulates the content of a cablevision broadcast. Since the provision would interfere with the cable company's editorial discretion, it is invalid.

Likewise, the provision is not a subject matter regulation. The state is not prohibiting a species of unprotected speech such as obscenity or fighting words. Instead, it is requiring an equal opportunity to political candidates to be heard over the cable channels. This state mandate would abridge the right of editorial discretion; and this would, in effect, subvert the company's first amendment rights.

Since alternative means are available to insure that political candidates reach the voters during a campaign (newspaper, radio and TV advertisements, handbills), the state does not demonstrate a compelling interest to warrant abridging the cable company's first amendment rights.

III.

TO WHAT EXTENT MAY A STATE PROSCRIBE TRUTH AS A DEFENSE IN A PRIVACY ACTION FOR GIVING PUBLICITY TO PRIVATE FACT?

A. BACKGROUND

Injurious communications may provoke an action in tort for defamation, invasion of privacy, or both, although the personal interests which these causes protect differ. Defamation actions protect the individual's reputation in the community from the publication of untruthful facts; privacy actions protect the individual's personal right to be free from unwarranted intrusions by others. When words are expressed that injure either of these protected interests and lie outside the constitutional privilege of the first amendment, they are actionable.

1. *Privacy and Defamation.*

The eminent torts scholar, Dean William Prosser, concluded that four distinct forms of invasion of privacy exist:

(a) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
(b) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

(c) Publicity which places the plaintiff in a false light in the public eye.

(d) Public disclosure of embarrassing private facts about the plaintiff.

See Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960). The American Law Institute has adopted this division. Restatement (Second) of Torts § 652A. Most states have adopted all or some of the four forms by common law or by statute.

The first two forms are not based upon publicity of information. The third form does address such publicity and requires an examination of the truthfulness of the information published. This cause of action is similar to defamation.

The last form, publicity given to private fact, is the notion Samuel Warren and Louis Brandeis contemplated in their seminal law review article from which the American right of privacy was born. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis compared the right to privacy to the laws of defamation and copyright as they existed in the nineteenth century, and suggested some general rules limiting the right to privacy: (a) publications of matters in the general or public interest shall not be prohibited; (b) communications privileged under the law of slander and libel would also be privileged as against privacy actions; (c) no cause of action exists where the publication was made by the individual concerned or with the individual's consent; and (d) *truth of the matter published shall not be a defense*. *Id.* at 214-18. Outside of these general restrictions, publicity given to private facts about an individual is actionable as an unwarranted intrusion into the individual's private life.

2. *Constitutional privilege and public policy.*

In 1964 the Supreme Court found that the application of state tort law of defamation to determine liability and award damages was "state action" within the scope of the fourteenth amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). The Court had already established that "[t]he freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider v. State*, 308 U.S. 147, 160 (1939).

The State cannot impose illegitimate restrictions on the exercise of free speech. In *New York Times Co.*, Alabama civil libel law had been applied to find the New York Times liable for publishing false matters in a newspaper advertisement against a Montgomery, Alabama police supervisor. Alabama applied a "libel per se" standard to comments against public officials, *i.e.*, general damages would be presumed without any proof of pecu-

niary loss. Once the plaintiff showed that the allegedly defamatory words were of and concerning him, the only defense available to the defendant was to prove the truth of the matter asserted. The Court found that the state law violated the first amendment. The Court required that a public official who is a plaintiff must prove not only that the publication was false but also that it was made with knowledge of its falsity or in reckless disregard for the truth. In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), the *New York Times Co.* test was extended to apply to public figures as well as public officials. The plaintiff, John Stewart, in the Branwar privacy suit is neither a public figure nor public official.

The scope of the knowing or reckless falsity was broadened to include all matters of public or general interest. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). This "public interest" test was adopted in a plurality opinion written by Justice Brennan.

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event
> . . . .

Id. at 43. Thus, even though the injured party was a private individual rather than a public official, the Court required the *New York Times Co.* standard of knowing or reckless falsity.

The Branwar statute creating a cause of action for publicity given to private fact proscribes truth as a defense, but it allows a defendant to assert as a defense that the matter publicized was of legitimate public interest. Yet the Branwar statute narrowly defines matters of legitimate public interest to be matters which "pertain to governmental action or conduct by a public official."

At the opposite end of the spectrum of "public interest" definitions is the American Law Institute's "newsworthiness" standard:

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm.

Restatement (Second) of Torts, § 652D, comment g (1977).

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), was another landmark case involving defamation and the first amendment privilege. The plaintiff, Elmer Gertz, was a reputable attorney who had been retained to represent in civil litigation the family of a boy who had been shot and killed by a Chicago policeman.

The respondent, publisher of a magazine for the John Birch Society, published an article concerning the criminal trial of the police officer. This article contained numerous serious and defamatory statements concerning Gertz, and the federal district court entered a judgment notwithstanding the verdict for the publisher. The Court of Appeals for the Seventh Circuit affirmed, agreeing that the respondent could assert the *New York Times Co.* constitutional privilege because the article concerned a matter of public interest. The Supreme Court reversed and remanded.

The *Gertz* Court expressed its disagreement with *Rosenbloom*'s "public or general interest" test.

> [W]e conclude that the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* [*Co.*] test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" . . . . We doubt the wisdom of committing this task to the conscience of judges.

Gertz, at 345-46. This decision limited the requirement of the *New York Times Co.* test of knowing or reckless falsity to actions brought by public figures or public officials.

3. *Privacy cases and the constitutional privilege.*

The United States Supreme Court has extended the first amendment protections to actions for invasion of privacy. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Hill and his family brought a "false light" action for invasion of privacy under a New York statute. In 1952, Hill and his family had been held hostage by three escaped convicts. The defendant's magazine published an article linking a broadway play to the incident. The magazine's defense was that the article was "a subject of legitimate news interest" and "published in good faith." *Id.* at 378-79.

The Supreme Court held that the standard of knowing or reckless falsehood applied to the statute. The *Hill* case was decided after *Rosenbloom* had extended the *New York Times Co.* test to matters of public interest but before the *Gertz* case had withdrawn that requirement.

The constitutional privilege under the first amendment for publication of information applies whether the cause of action is brought for defamation or invasion of privacy.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court confronted this issue in a privacy action for publicity given to private fact, but held that where information is in a public record it is no longer a private fact. A reporter for a Cox Broadcasting Corporation television station had announced the name of a deceased rape victim during a news report, having obtained the name from indictments which were public records. The victim's father brought action under a Georgia statute making it a misdemeanor to broadcast a rape victim's name, claiming that his right to privacy had been invaded by announcing his daughter's name. The Georgia Supreme Court upheld the trial court's summary judgment for the father under common law invasion of privacy, and, on a motion for rehearing, sustained the statute as constitutionally valid.

Rather than address the broad issue

> whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press . . . ,

the United States Supreme Court addressed the narrow issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records . . . ." *Id.* at 491. The Court found that the state could not do so. *Id.* "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Id.* at 495. Where the information has been entered into a public record, available for inspection by the public, that information is no longer a private fact.

In his concurring opinion, Justice Powell expressed his view that *Gertz* largely resolved the issue of truth regarding defamatory statements. *Cox Broadcasting Corp.*, at 497-98 (Powell, J., concurring). However, Justice Powell recognized that the interests protected may affect the application of the constitutional privilege.

> [C]auses of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions. But in cases in which the interests sought to be protected are similar to those considered in *Gertz*, I view that opinion as requiring that the truth be recognized as a complete defense.

Cox Broadcasting Corp., at 500 (Powell, J., concurring).

One problem with the *Cox Broadcasting Corp.* majority opinion is its discussion throughout the opinion of "defamatory

statements" when the action was based upon privacy for publicity given to private facts, not defamation. These two actions protect different interests. Allowing truth as an absolute defense would eliminate the cause of action for the privacy tort involved here.

The Ninth Circuit recognized similar problems in an action for public disclosure of private facts brought by a California body surfer against *Sports Illustrated* magazine. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). Plaintiff had freely disclosed to a reporter for the magazine some rather bizarre and embarrassing facts about himself, knowing that the reporter was doing an article on body surfers. The plaintiff later revoked all consent upon learning that these private facts would appear in the article. The article was published anyway. Plaintiff admitted the truth of the matter publicized. Upon defendant's motion for summary judgment, the district court denied the motion and granted an interlocutory appeal.

The court of appeals found that the manner in which the information is obtained does not determine whether it is public or private. *Virgil*, *supra*, at 1126-27. The court dismissed the magazine's contention that truthful publicity is privileged under the first amendment. Rather, the court concluded that "unless it be privileged as newsworthy . . . the publicizing of private facts is not protected by the First Amendment." *Id.* at 1128. The court accepted the Restatement (Second) of Torts standard of "newsworthiness" to determine what matters are of legitimate public interest and remanded for a determination whether the facts publicized were newsworthy.

In adopting the newsworthiness test, the *Virgil* court found that it did not offend the first amendment:

> By the extreme limits it imposes in defining the tort it avoids unduly limiting the breathing space needed by the press for the exercise of effective editorial judgment. . . . The definition of the "line to be drawn" is not as clear as one would wish, but it expresses the distinction between that which is of legitimate public interest and that which is not as well as we could do.

Id. at 1129 (footnotes and citation omitted).

B. MAY A STATE DENY A DEFENSE OF TRUTH IN ACTIONS FOR GIVING PUBLICITY TO PRIVATE FACT?

The Court must determine whether the Constitution affords an absolute privilege to any true statement, even though the interest protected is privacy rather than reputation.

1. *Petitioner's Argument.*

The Petitioner (Cablevision Commissioner for Branwar) will contend that truth is irrelevant to the protected interest in a privacy action. Truth, historically, has been a defense in defamation actions where the plaintiff's reputation in the community was the protected interest, but not in privacy actions where a publisher has disclosed personal information about the plaintiff to the community. If truth were allowed as a defense to actions for publicity given to private facts, the cause of action would be all but annihilated.

2. *Respondent's Argument.*

The Respondent (Exurb Media Corporation) will contend that since the Constitution protects some false statements under the *New York Times Co.* standard, the Constitution protects all true statements. The Branwar statute involved here attempts to proscribe truth as a defense against disclosures of private information. If the media is required to not only verify what it publishes, but also to anticipate whether a judge or jury might find the true information to be a private fact, a chilling effect on the free press will surely result. True information perpetuates the free exchange of ideas and self-government, and should be protected by the first amendment.

C. IF TRUTH AS A DEFENSE MAY BE LIMITED IN A PRIVACY ACTION FOR GIVING PUBLICITY TO PRIVATE FACTS, IS THE BRANWAR LIMITATION FOR MATTERS OF LEGITIMATE PUBLIC CONCERN CONSTITUTIONALLY REASONABLE?

A spectrum of definitions is presented. At one end is Branwar's narrow definition of matters of legitimate public interest: matters pertaining to governmental action or conduct by a public official. At the opposite end is the American Law Institute's "newsworthiness" standard; a similar test was first adopted in *Rosenbloom* and later rejected by the Supreme Court in *Gertz*. Counsel may also suggest a new standard, between these ends of the spectrum, protecting the values at stake.

1. *Petitioner's Argument.*

Petitioner (Branwar's Cablevision Commissioner) will contend that the narrow definition of matters of legitimate public concern confers first amendment protection to the press to publish information in furtherance of the values of the public's right

to know, self-government, and the full exchange of ideas. The press is afforded first amendment protection by permitting a "legitimate public concern" defense in such actions.

The Branwar definition of matters of legitimate public concern presents a clear standard for publishers. Publicity may be given to private facts about individuals where those facts pertain to governmental action or conduct by a public official. Outside of this context the individual's privacy rights supercede any public interest in publicizing private information.

2. *Respondent's Argument.*

Respondent (Exurb Media Corporation) will contend that the Branwar definition of matters of legitimate public concern is too narrow. If the state is allowed to proscribe truth as a defense, publishers in Branwar will be unduly restricted by the narrow definition. The cable television station will advocate a broader definition such as the American Law Institute's newsworthiness test.

The Branwar statute does not present enough latitude for the press to exercise its first amendment rights. The narrow definition restricts editorial discretion and will have a chilling effect upon the press. News about conduct between private individuals, outside any governmental relationship, does not lose its public interest merely because the government or a public official is not involved. The narrow definition should be declared unconstitutional as it unduly restricts the press' freedom of expression under the first and fourteenth amendments.

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a state regulation creating an equal opportunity for legally qualified, state or local political candidates to use a cable channel, where such opportunity has been provided their opponent, constitutes an unreasonable abridgment of a cable franchisee's editorial discretion, where that franchisee has been granted the privilege of using valuable and limited public resources to communicate in a medium not open to all citizens?
2. Whether a state regulation creating an equal opportunity for legally qualified, state or local political candidates to use a cable channel, where such opportunity has been provided their opponent, strikes an impermissible first amendment balance between the right of the public to receive access to

an uninhibited marketplace of ideas, the right of candidates to express their political views and the interest of cable operators in exercising exclusive control over all cable programming?

3. Whether the Court of Appeals contravened the constitutional requirements of federalism and separation of powers by applying too exacting a standard of judicial review?
4. Whether a state's proscription of truth as a defense in a civil action for public disclosures of highly offensive facts concerning the private lives of private individuals unconstitutionally abridges a cable television broadcaster's first amendment rights of free speech and free press?

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STATEMENT OF THE CASE

Petitioner in this action is the Cablevision Commissioner of the State of Branwar ("Commissioner"). In 1976, pursuant to its power to regulate public utilities, the Branwar General Assembly enacted legislation creating a State Cablevision Commission and the office of Cablevision Commissioner. 13 Branwar Statutes § 27.03 (1976). Under this statute, the Commissioner is vested with plenary authority to grant and regulate non-exclusive cable television franchises in a manner she deems to be in the best interest of the state. In addition, all regulations promulgated by the Commissioner are statutorily incorporated into the provisions of all franchise agreements, including those executed prior to the date of formal adoption.

On August 8, 1980, Respondent, Exurb Media Corporation ("Exurb"), executed a franchise agreement ("Agreement") in return for its promise to abide by all regulations issued by the Commissioner. Under the terms of this agreement Exurb was granted a license to operate cable television throughout the state for a period of fifteen years. To date Exurb is the sole owner of a cable television franchise in Branwar.

The agreement incorporates § 27.06(5) of the Public Utilities Act, thus authorizing the Commissioner to promulgate additional provisions into the Agreement by which Exurb will be bound. Pursuant to this authority the Commissioner promul-

gated two provisions which were duly incorporated into the Agreement, effective April 1, 1981.

The first provision, Paragraph 112, provides that if Exurb allows channel access to one legally qualified candidate for state or local office, it must provide such access to other qualified candidates for the same office. The regulation expressly exempts from its operation bona fide newscasts, news interviews, and documentaries where the candidate's appearance was incidental to the subject matter of the documentary as well as any on the spot coverage of a bona fide news event.

The second provision, Paragraph 113, proscribes truth as a defense in a civil action for Exurb's publications of private facts. The language of this provision was taken from the Branwar Judiciary Act in which the Branwar legislature created a civil action for publicity of a private fact. 10 Bran. Stat. § 6.24 (1978). In such an action truth is a complete defense when the matter publicized pertains to conduct by a public official or any action of a governmental nature.

Upon receipt of notice of these provisions, Exurb sought review by the Commissioner and the Cablevision Commission, on the grounds that the provision violated its first amendment rights. Following a full hearing on the merits, the Commission upheld the challenged provisions as valid exercises of the State's police power.

On March 20, 1981 Exurb sought declaratory relief pursuant to 28 U.S.C. § 2201 (Supp. II 1978). On April 30, 1981 the District Court granted the Commissioner's motions for summary judgment upholding the constitutionality of both provisions. The District Court found that Paragraph 112 is a valid exercise of the State's power to regulate cable television in a manner consistent with other forms of electronic media. The court further found that the provision was a valid exercise of the State's power to regulate public utilities. Finally, the court concluded that Paragraph 113 was a constitutional exercise of the State's power to protect the privacy interests of Branwar's citizens.

On appeal, the Thirteenth Circuit Court of Appeals reversed the District Court. The Circuit Court found that both provisions were an unconstitutional abridgement of Exurb's first amendment rights. The court concluded that regulations which are constitutional when applied to other electronic media, are inappropriate when applied to cable television. The court further found that the provision was not a valid exercise of the State police power to regulate public utilities. Finally, the Court concluded that the proscription of truth as a defense in a civil action

for publication of private fact constituted an unconstitutional abridgement of Exurb's first amendment rights.

In an order dated August 30, 1982, this Court granted a writ of certiorari so that it might consider the issues raised in the court below.

SUMMARY OF ARGUMENT

This case presents this Court with an opportunity to clarify the first amendment status of cable television. Previous decisions of this Court establish that government may create a limited right of reasonable access to the broadcast media, but that access regulations may not be constitutionally applied to newspapers. The Thirteenth Circuit Court of Appeals held that the first amendment standard applied to newspapers also governs cable, thereby invalidating the Branwar cable access provision. This result is inconsistent with the tradition of regulating electronic media, including cable television, in the public interest.

The two constitutional principles which permit government regulation of broadcasting apply equally to cable systems. First, where the government must initially determine who may and who may not communicate in a particular medium, the person granted the privilege of exercising his first amendment rights may be required to share this privilege with other citizens. Therefore, because government regulates entry into both the broadcast and cable forums, both should have the same first amendment responsibilities. Secondly, where a media operator utilizes limited and valuable public resources for his private gain, this Court has held that the operator incurs a corresponding public obligation. Cable operators use the airwaves to receive programming for retransmission, and public rights-of-way to string cables, each a valuable and limited public resource. Thus, cable operators may be required to accommodate the public interest.

Further, where first amendment rights are in conflict, this Court has stated that the competing interests must be balanced. The Cablevision Commissioner's provision strikes a permissible first amendment balance between Exurb's asserted right to monopolize a medium of communication, the rights of candidates to political expression, and the rights of the public to receive access to an uninhibited marketplace of ideas; a right which this Court has declared paramount.

In this case, this Court is also presented with the problem of a federal court straying into the domain of the state legislature,

in violation of the tenth amendment. By requiring that the Branwar provision be necessary to the achievement of a "compelling state interest," the Court of Appeals effectively denied states the freedom to develop a variety of solutions to the problem of insuring that the public's right to receive diverse political viewpoints is protected, while also preserving desired private control over the electronic media.

The fourth issue presents this Court with its first opportunity to establish the level of protection which states may constitutionally provide their citizens against truthful publications of highly offensive facts concerning their private lives. This court should reaffirm its long-established principle that where the exercise of speech results in harm to other important societal interests, it may be regulated by the states.

Branwar's interest in providing a remedy to individuals for the publications of private facts is to protect its citizens from invasions of privacy caused by such disclosure. As this Court has stated, protection of individual privacy is a valid exercise of the State's powers under the ninth and tenth amendments of the United States Constitution.

Preclusion of truth in an action for disclosures of highly offensive facts does not affect Exurb's first amendment right to publish matters of legitimate public interest. Since Paragraph 113 only proscribes truth as a defense in an action for harmful and humiliatory publications of facts concerning the intimate lives of private individuals, the public's interest in learning of private facts concerning action by government or conduct by public officials is not impaired. Exurb must merely refrain from publicizing those facts designed solely to gratify the prurient interests of the public.

Thus, the district court properly concluded that the unavailability of truth as a defense in an action for publicity of private facts does not unconstitutionally abridge Exurb's first amendment rights.

ARGUMENT

I. *THE LIMITED RIGHT OF REASONABLE ACCESS TO A CABLE CHANNEL CREATED BY THE CABLEVISION COMMISSIONER'S EQUAL OPPORTUNITY RULE IS CONSTITUTIONALLY PERMISSIBLE BECAUSE, FOR FIRST AMENDMENT PURPOSES, CABLE TELEVISION IS TANTAMOUNT TO BROADCASTING IN THAT IT UTILIZES VALUABLE AND LIMITED PUBLIC RESOURCES TO COMMUNICATE IN A MEDIUM NOT OPEN TO ALL.*

Since virtually its inception, the electronic media has been subject to regulation in the public interest. In 1927, in response to the problem of signal interference, Congress established the Federal Radio Commission to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity." Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163. With the introduction of television, the Federal Communications Act was passed in 1934, and while the Commission's name changed, its duty to protect the public interest remained the same. Communications Act of 1934, Tit. III, ch. 56, 48 Stat. 1081, *as amended*, 47 U.S.C. §§ 301-395 (1970).

A. THE COURT OF APPEALS ERRED IN APPLYING THE FIRST AMENDMENT STANDARD FOR NEWSPAPERS TO CABLE TELEVISION BECAUSE TRADITIONALLY, CABLE TELEVISION HAS BEEN REGULATED THE SAME AS BROADCASTING.

In its cursory opinion below, the Court of Appeals ruled that cable television is subject to the same regulation as print media. As a result, the court struck down the Branwar access provision because, under the first amendment standard applied to print media, the content of the communication is subject only to the operator's editorial discretion. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a state statute requiring newspapers to provide equal space to political candidates attacked in their columns). In contrast, reasonable access regulations are constitutionally permissible when applied to broadcasters. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding an FCC regulation requiring that political opponents of candidates who were endorsed in a broadcaster's editorial be given equal time). Examination of the decisions of this Court, and the actions of Congress and the FCC, demonstrate that cable television is subject to the same first amend-

ment standard as broadcasting, and that the finding of the Court of Appeals is erroneous.

Understandably, when Congress passed the Communications Act in 1934 it could not have foreseen the development of cable television. But, because it wished to maintain appropriate agency control over the dynamic evolution of the electronic media, Congress conferred broad authority to the FCC to regulate "all interstate . . . communication by wire or radio." *Id.* Thus, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1966), this Court recognized that cable is but an adjunct to broadcasting, and upheld the Commission's jurisdiction over cable, at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of broadcasting." *Id.* at 178.

Although FCC jurisdiction over cable is termed "ancillary," its authority is nevertheless broad. For example, in *Southwestern*, this Court upheld Commission promulgated regulations that require cable systems to carry the signals of broadcast stations into whose service area they brought competing signals; avoid duplication on the same day of local television programming; and refrain from bringing new distant signals into the 100 largest television markets except upon a prior showing that such service would be in the public interest. *Id.*

Further, FCC jurisdiction over cable programming is not limited to preventing harmful impact on local broadcasting services, but extends also to requiring that cable systems undertake affirmative commitments to serve the public interest. Thus, in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), this Court sustained the Commission's authority to require that cable systems originate their own local programming; holding that the rule was reasonably ancillary to the performance of the FCC's duty to increase local outlets for community self-expression and augment the public's choice of programming. *Id.* at 667-68.

In fact, the FCC has extended broadcasting regulations to cable, thereby creating uniform standards applicable to all electronic media. *See* 47 C.F.R. §§ 76.209-.215 (1980) (broadcast rules concerning right to reply to personal attack, lotteries, and obscenity applied to cable); § 76.201 (1980) (fairness doctrine requiring reporting of important issues, and fair coverage of such issues, applied to cable); § 76.205 (1980) (right of candidate to respond to political endorsement of opponent extended to cable).

In addition, cable is subject to regulation by state and local governments, resulting from its use of public rights-of-way and

public easements over private property. Miller & Beals, *Regulating Cable Television*, 57 Wash. L. Rev. 85, 89 (1981) (hereinafter cited as Miller).

In sum, it was clear error for the Court of Appeals to hold that cable television is subject to the same first amendment standard as newspapers. Unlike newspapers, cable has traditionally been regulated in the public interest. Congress, through the Federal Communications Commission, and with the approval of this Court, has asserted sweeping jurisdiction over the cable industry to harness its "unregulated explosive growth." *Southwestern, supra*, 392 U.S. at 178. Because cable is clearly not synonymous with newspapers for first amendment purposes, the judgment of the Court of Appeals should be reversed.

B. CABLE TELEVISION SHOULD BE GOVERNED BY THE SAME FIRST AMENDMENT STANDARDS APPLIED TO BROADCASTING BECAUSE THE ELECTRONIC MEDIA SHARE THE SAME FIRST AMENDMENT CHARACTERISTICS.

Having determined that cable is not subject to the same first amendment standard as newspapers, it is nevertheless necessary to establish that cable should instead be governed by the same first amendment standard applied to broadcasting. In its opinion below, the Circuit Court held that access regulations such as those upheld in *Red Lion* are constitutionally permissible only in the broadcast area, because broadcasters utilize a scarce public resource—the airwaves. Because Exurb transmits its signal to subscribers over coaxial cables, the appeals court erroneously assumed that the *Red Lion* rationale was inapplicable to cable television, and access regulation impermissible.

However, a more considered study of *Red Lion* demonstrates that the decision stands for more than the myopic reading given it by the Court of Appeals. The two constitutional principles underlying the *Red Lion* decision are not limited to broadcasting, but apply equally to cable: (1) Where all citizens possess an equal right to use a means of communication, but physical limitations require that government license but a few, licensees may be required to share that medium with fellow citizens; and (2) Where a media utilizes valuable and limited public resources, it may be required to serve the public interest.

1. *Because all Branwar citizens possess an equal first amendment interest in communicating by cable television, but Exurb has been granted the privilege of doing so, Exurb may be required to share its programming time with other citizens, in a limited and reasonable manner.*

In *Red Lion, supra*, this Court declared that "[n]o one has a First Amendment right to a license or to monpolize a radio frequency. . .as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." 395 U.S. at 389. Consequently, the Court observed:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others.

395 U.S. at 389.

This constitutional principle is equally applicable to cablecasting. A broadcaster may communicate over the airwaves only if the government grants the broadcaster a license to use the radio spectrum. Because the number of applicants outstrips the number of frequencies, some persons are denied the exercise of their first amendment rights. In such a case, nothing in the first amendment prevents the government from requiring that a licensee share his frequency with others. *Id.* Similarly, a cable operator can speak only if the state grants the operator a franchise and the privilege of using the limited resource of the public right-of-way. Because the exercise of the cable operator's first amendment right is at the expense of other citizens, who possessed the same interest in using limited public resources to communicate, nothing in the first amendment prevents the state from requiring that a franchisee share cable transmission time with his fellow citizens.

In sum, because government must initially determine who may and who may not communicate in both broadcasting and cablecasting, the electronic media should be governed by a uniform first amendment standard. Thus, the judgment of the Court of Appeals should be reversed, and the judgment of the district court reinstated.

2. *Because Exurb has been granted the privilege of using limited and valuable public resources, including the airwaves, public rights-of-way, and public easements, Exurb has a corresponding constitutional obligation to operate in the public interest.*

In *Red Lion*, this Court held that because broadcasters use the airwaves, a scarce public resource, they may be required to operate in the public interest. 395 U.S. at 385. The "public interest in broadcasting," said the Court, "clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public." *Id.* In *CBS, Inc. v. FCC, supra*, 453 U.S. 367 (1981), this Court indicated that the "scarcity" rationale of *Red Lion* is not limited to broadcasting, but applies to any situation where a media operator is granted "use of a limited and valuable part of the public domain." 101 S. Ct. at 2829. Use of public resources, said this Court, "is burdened by enforceable public obligations." *Id.*

In the instant case, Exurb has been granted the privilege of using three valuable and limited parts of the public domain: the airwaves, public rights-of-way, and public easements over private land. As a result, Exurb's franchise is burdened with an obligation to operate in the public interest.

Exurb, like most cable operators, relies primarily on the public airwaves to convey its programming from a broadcast source to the cable "head-end" or studio, where it is retransmitted through the cable system to subscribers' homes. *See* Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 Urban L. Ann. 179, 181-182 (1981) (hereinafter Stern). Cable operators use antenna to intercept local broadcast signals to retransmit through the cable network. If a desired broadcast signal is beyond the reach of even the most sophisticated antenna, cable operators construct an antenna closer to the broadcast source and transmit the signal to the head-end by means of microwave relay towers. As one legal commentator has observed, this practice "smacks of broadcasting." D. Pember, *Mass Media Law* 430 (1979). Cable systems also utilize the airwaves by use of communication satellites which beam communications signals to cable head-ends. *Southern Satellite System*, 62 F.C.C.2d 153 (1976). As Chief Justice Burger stated in *United States v. Midwest Video*, 406 U.S. 676 (1972) (concurring opinion):

> Those who exploit the existing broadcast signals for private commercial surface transmission by [cable] to which they make no contribution are not exactly strangers to the stream of broadcasting. The essence of the

> matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation. . . .

In addition to using the public airwaves, Exurb utilizes public rights-of-way and utility easements for its private profit. No less than the broadcasting spectrum, these prerequisites to cable communication constitute limited and valuable public resources.

A cable operator, like the telephone and electric power companies, must string cable on utility poles or use underground cables or ducts to provide service to its subscribers. Miller, *supra* at 99. Generally, these facilities are located in a public right-of-way or street, or traverse private property under public utility easements. *Id.* As a rule, there is intense competition among cable operators for the privilege of utilizing these resources to operate a franchise. *See, e.g.*, Thomas, "16 Cable TV Systems Vying for Rights in Four Boroughs," N.Y. Times, Sept. 30, 1980, at B3, col. 3. However, an FCC study has established that the limited availability for pole attachments or underground ducts precludes the existence of more than one cable system in most communities. *Pole Attachments*, 72 F.C.C.2d 59, 71 (1979) (the study documents that a typical 35-foot utility pole has 17 feet of usable space, which considering electrical interference, placement, and safety space requirements, permits the attachment of three cables: one telephone, one electric, and one cable television). Thus, because of physical limitations, the cable franchisee possesses a *de facto* monopoly over a medium of electronic communication in the same manner that a broadcast licensee is entrusted with the use of a broadcast frequency. Therefore, both broadcasting and cable should be held accountable to the public interest.

Indeed, the means of cable communication are in reality scarcer resources than broadcast frequences. By maximum utilization of the 82 channel television broadcast spectrum, a given community could receive the views of scores of broadcasters. In contrast, an alarming 99.9 percent of American communities with cable television receive programming from a single franchisee. Miller, *supra* at 95 (in only about six of more than 6,000 cable systems in the United States does one operator compete against another operator for the same subscribers). Thus, if the Court of Appeals is affirmed and Exurb's position sustained, cable operators will be free to inflict their political biases on the public on not just one broadcast frequency, but rather on potentially a hundred cable channels. Therefore, the multiplicity of cable channels indicates a greater, not lesser, need for government regulation.

It is no answer to say that the shortage of public rights-of-way may be remedied by foresting the street with utility poles and condemning more private property to serve the interests of

cable entrepreneurs. This Court has "consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places." *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967). State and local governments possess a strong interest in not being compelled to condemn private property, or mar the aesthetic value of the land, to profit a handful of cable operators. In any event, massive expansion of the public rights-of-way would not result in competition in the cable industry because cable operators themselves prefer to compete for a monopoly franchise, and once a cable franchise is awarded, the heavy capital investment and initial construction costs make the prospect of a second cable system in the same community remote. Miller, *supra* at 95.

Thus, in the instant case, because Exurb has been granted the privilege of using limited and valuable public resources, it should be required to accept its corresponding responsibility to serve the public interest.

C. THE CONSTITUTION PERMITS THE GOVERNMENT TO CREATE A LIMITED RIGHT OF REASONABLE ACCESS TO THE ELECTRONIC MEDIA, SUCH AS THE RIGHT CREATED BY THE BRANWAR PROVISION.

Because cable should be governed by the same first amendment standard as broadcasting, this Court's decisions recognizing the constitutionality of regulations creating a limited right of reasonable access to broadcasting apply equally to cablecasting.

In *Farmers Ed. & Coop. Union v. WDAY*, 360 U.S. 525 (1959), this Court considered the application of a congressional statute virtually identical to the Branwar equal opportunity provision. See 74 U.S.C. § 315(1) (Appendix A). That decision did not directly consider the constitutionality of the statute. However, a subsequent decision of this Court stressed that the Court could have done so, but found the constitutionality of the equal opportunity rule "unquestioned." *Red Lion Broadcasting, supra*, 395 U.S. at 391. Having implicitly recognized the constitutionality of an equal opportunity rule in *Farmers Ed.*, this Court should reinstate the judgment of the district court upholding the validity of the Branwar version of this rule.

Similarly, in its seminal decision in *Red Lion, supra*, this Court unanimously upheld the constitutionality of FCC regulations requiring that broadcasters offer reply time to an individual personally attacked during a broadcast, or to political opponents of those candidates for public office who were endorsed in a broadcaster's editorial. This Court noted that "these obligations differ from the [FCC's] general fairness requirement

that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself. . . ." 395 U.S. at 378. However, the Court found this to be "not a critical distinction" because "the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response. . . ." *Id.* at 379. The Branwar provision vests candidates with a similar right to respond, in this case resulting from a self-endorsement by their political opponent rather than editorial endorsement.

In its recent decision in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), this Court upheld, against first amendment challenge, a federal statute granting legally qualified candidates for federal office a special right of access to broadcasting on an individual basis. The Court noted that prior to the statute "an individual candidate could claim no personal access *unless his opponent used the station*," in which case "no distinction was drawn between federal, state, and local elections," but found that in addition to this reply right, 47 U.S.C. § 312(a)(7) singles out candidates for federal elective office and grants them a right of reasonable access to, or the opportunity to purchase, broadcast time. *Id.* at 379 (emphasis added).

Critical to resolution of the instant case, *CBS* defines when a government created, individual right of access to the electronic media is and is not constitutionally permissible. While this court "has never approved a *general* right of access to the media," it has sanctioned "a *limited* right of reasonable access." 453 U.S. at 396 (emphasis by the Court). This standard clearly distinguishes the case at bar from those decisions relied upon by the respondent.

For example, in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Court struck down an FCC regulation requiring that cable operators dedicate open channels for use by the public, thereby rejecting "a *broad* right of public access" to cable. 404 U.S. at 709 (emphasis added). Importantly, the Court did not strike down the regulation on first amendment grounds, but only held that the rule was not "reasonably ancillary" to the FCC's authority over television broadcasting, absent express legislation by Congress. *Id.* at 689, 709.

Similarly, this Court's decision in *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), which held that neither the first amendment nor the Communications Act requires broadcasters to accept paid editorial advertisements from citizens, also merely stands for the proposition that there is no *gen-*

eral right of access to the media. *See CBS, Inc. v. FCC, supra*, 453 U.S. at 396.

In contrast to those decisions, this Court has stated that it is constitutionally permissible for the government to create "a *limited* right of reasonable access" to the electronic media. *Id.* The Branwar provision at issue in the instant case creates only a limited right of reasonable access and therefore should be upheld. First, the provision applies only to legally qualified candidates for state or local office, and then requires access only after an opponent has been given cable time. Thus, the provision is more limited in scope than the statute upheld in *CBS, Inc. v. FCC* which granted federal candidates a right of access regardless of whether an opponent was given transmission time. Secondly, the reasonableness of the Branwar regulation was implicitly recognized in *Farmers Ed. & Coop. Union, supra*, where this Court detected no constitutional fault in a virtually identical federal statute. Further, the Branwar equal time provision is indistinguishable in principle from the editorial endorsement rule upheld in *Red Lion*. Just as reasonableness requires that a political candidate be given an opportunity to respond to an editorial indorsement of his opponent, so should that candidate have the right to reply where his opponent is permitted media time to personally promote his candidacy.

Consistent with this Court's prior decisions, the constitutionality of the Branwar equal opportunity provision should be upheld, and the judgment of the Court of Appeals reversed.

ARGUMENT

II. *THE LIMITED RIGHT OF ACCESS TO A CABLE CHANNEL CREATED BY THE BRANWAR PROVISION DOES NOT UNDULY CIRCUMSCRIBE EXURB'S EDITORIAL DISCRETION, BUT INSTEAD PROPERLY BALANCES THE FIRST AMENDMENT RIGHTS OF THE PUBLIC, STATE AND LOCAL POLITICAL CANDIDATES, AND CABLE OPERATORS.*

Where there is a conflict of the first amendment rights of the media, political candidates, and the public, it must be resolved by "a delicate balancing of the competing interests." *CBS, Inc. v. FCC, supra*, 453 U.S. at 395. Because the Cablevision provision strikes an appropriate constitutional balance between conflicting first amendment interests, it should not have been disturbed by the Court of Appeals.

A. THE CONSTITUTION DOES NOT RECOGNIZE EXURB'S ALLEGED "RIGHT" TO MONOPOLIZE A MEDIUM OF COMMUNICATION.

In the instant case, Exurb's claim fails to raise a cognizable constitutional issue. In Exurb's franchise agreement with the State—freely entered into by both parties for mutual benefit—Exurb expressly agreed to limit the exercise of any first amendment interest it might possess in exercising exclusive programming control in return for the benefits of a franchise. Without a franchise, Exurb would have had no opportunity to exercise any first amendment rights whatever. Thus, in exchange for the privilege conferred by the franchise, Exurb should be permitted to voluntarily agree to allocate some channel time in the public interest, as determined by the Cablevision Commissioner, so that the first amendment rights of others will be enhanced.

It is well established that contracts limiting the exercise of one party's first amendment rights are valid. In *Snepp v. United States*, 444 U.S. 507 (1980), this Court upheld the validity of Central Intelligence Agency contracts with prospective employees requiring that they submit any proposed publication for review. Further, even if Exurb has not bargained away its alleged right to control all programming, its acceptance of a public benefit—the cable franchise—operates as an implied waiver of that "right." *See CBS, Inc. v. FCC, supra*, 453 U.S. at 395. The Court has recognized that a similar implied waiver occurs when a person accepts public employment. *United States Civil Serv. Comm'n v. National Association of Letter Carriers*, 413 U.S. 548 (1973) (restrictions on political activity otherwise protected by the first amendment may be imposed on federal employees); *Brown v. Glines*, 444 U.S. 348 (1980) (military personnel may be restricted in the exercise of their right to petition the government). Therefore, in light of decisions of this Court upholding the validity of express and implied waivers of first amendment rights, Exurb's franchise agreement is constitutional, supported by ample consideration, and should be enforced.

Assuming, *arguendo*, that Exurb has not bargained away or waived its asserted first amendment interests, Exurb's claim nevertheless fails because the first amendment does not recognize the validity of Exurb's "right" to monopolize programming in a limited medium of communication. Such a "right" is premised upon an erroneous assumption that in being awarded a franchise, Exurb also received the right to monopolize that medium to the exclusion of all others. However, this Court has declared that "there is no sanctuary in the first amendment for unlimited private censorship in a medium not open to all." *Red*

Lion, supra, 395 U.S. at 392. Because cable is a limited medium of communication, the Constitution does not protect the alleged right of Exurb to exercise unlimited private censorship.

Further, Exurb's claim that reasonable access provisions impermissibly "chill" its editorial discretion is "at best speculative" and similar to claims which have been consistently rejected by this Court. *Id.* at 393; *CBS, Inc. v. FCC, supra*, 453 U.S. at 396. Under the Branwar provision, the discretion of Exurb to permit the candidate of its choice to present his views is unimpaired. All that is required is fairness.

B. THE IMPORTANCE OF POLITICAL DEBATE AND THE PARAMOUNT RIGHT OF THE PUBLIC TO RECEIVE ACCESS TO AN UNINHIBITED MARKETPLACE OF IDEAS CLEARLY PREVAILS OVER EXURB'S SPECIOUS FIRST AMENDMENT CLAIM.

In contrast to the tenuous first amendment interest asserted by Exurb, this Court has recognized that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualifications and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976). "Indeed, [t]he First Amendment has its fullest and most urgent application precisely to campaigns for public office." *CBS, Inc. v. FCC, supra* 453 U.S. at 396. If Exurb's first amendment interest in dictating the content of all cable channels is deemed to outweigh the rights of political candidates to make their views known, the existing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" will be perverted into a principle permitting debate which is constrained, anemic, and privately-censored. *New York Times v. Sullivan*, 376 U.S. 254 (1976).

More importantly, Exurb should not prevail because, under the first amendment "[i]t is the right of the viewers and listeners. . .which is paramount." *Red Lion, supra* 395 U.S. at 389. This Court has stated that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . ." *Id.* Thus, if an uninhibited marketplace of ideas is to remain the first article of our constitutional faith, in promoting reasonable access to that marketplace, the Branwar provision would appear to comport well with that objective. Conversely, if the judgment of the Court of Appeals is not reversed by this Court, the very purpose of the

first amendment, and the rights of the many, will be sacrificed for the economic and psychological gratification of the few.

In this case, the Court stands at a critical first amendment crossroads. As it recognized in *Miami Herald Publishing Co. v. Tornillo, supra*, the traditional forum of free expression, the competitive daily newspaper, is faced with economic extinction. 418 U.S. 241. For better or worse, this nation has entered an Orwellian age where by 1990, a projected twenty-eight million American homes will be wired for two-way cable communication and countless more for cable reception. Miller, *supra* at 87. Due to its vast channel capacity, cable has the *potential* to make widely available a diversity of ideas, opinions and information. However, absent reasonable governmental regulation, access to every channel of communication will be at the sufferance of a single cable operator. The emerging ownership structure of cable systems further suffocates free expression. In 1980, the largest twenty-five cable operators controlled 68 percent of the cable systems in the United States, and their concentration of power is increasing. *Id.* at 97.

Therefore, unless the Court of Appeals is reversed, the ultimate result will be that a handful of cable operators will possess the unfettered power to communicate only their own views on public issues, people and candidates, and to permit transmission time only to those with whom they agree. In sum, the uninhibited marketplace of ideas will be irrevocably closed. Because this result is repugnant to the first amendment, the judgment of the court below should be reversed, and the decision of the district court reinstated.

ARGUMENT

III. *THE COURT OF APPEALS VIOLATED THE CONSTITUTIONAL MANDATES OF SEPARATION OF POWERS AND FEDERALISM BY IMPOSING TOO SEVERE A STANDARD OF JUDICIAL REVIEW ON THE BRANWAR EQUAL OPPORTUNITY PROVISION.*

The judgment below should be reversed because it is based on the Court of Appeals' erroneous assumption that for the Branwar equal time provision to pass constitutional muster, it must be necessary to the achievement of "a compelling state interest." Such an intrusive standard of review is contrary to the decisions of this Court and impermissibly strays into the exclusive province of the Branwar General Assembly.

Where a legislative body or administrative agency is charged with the unenviable task of striking a balance between competing first amendment interests, such as in the instant case, this Court has stated that its determination is "entitled to judicial deference unless there are compelling indications that it is wrong." *Red Lion, supra*, 395 U.S. at 381. The Court has recognized that an agency responsible for regulating the dynamic processes of the electronic media "must be allowed to remain in a posture of flexibility to chart a workable middle course in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *CBS, Inc. v. FCC, supra*, 101 S. Ct. at 2827. Because the rigid "compelling state interest" test precludes the exercise of desirable agency flexibility, this Court has held that agency regulations which balance conflicting first amendment rights should be affirmed unless they are "arbitrary and capricious." *Id.* The Branwar Cablevision provision is not arbitrary and capricious because it "represents a reasoned attempt" to give cable operators "room to exercise their discretion, [while] demanding that they act in good faith." Therefore, its constitutionality should be affirmed. *Id.*

Further, the standard of review applied by the Court of Appeals essentially strips the states of the power reserved to them under the tenth amendment. Allowing states and their instrumentalities to establish reasonable access requirements to the cable media comports with the concept of federalism. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). The "compelling state interest" standard frustrates the operation of federalism by imposing a single judicially-determined solution to a problem which would better be resolved by permitting state experimentation to seek an optimum solution.

For these reasons, the judgment of the Court of Appeals should be reversed.

ARGUMENT

IV. *A STATE'S PROSCRIPTION OF TRUTH AS A DEFENSE IN A CIVIL ACTION FOR PUBLIC DISCLOSURE OF HIGHLY OFFENSIVE FACTS CONCERNING THE PRIVATE LIVES OF PRIVATE INDIVIDUALS DOES NOT UNCONSTITUTIONALLY ABRIDGE A CABLE TELEVISION BROADCASTER'S FIRST AMENDMENT RIGHTS OF FREE SPEECH AND FREE PRESS.*

In the past ninety years the American legal system has witnessed a momentous rise in the recognition of a right to privacy. *See*, W. Prosser, *Law of Torts*, 802-818 (4th ed. 1971). Currently, all but four states permit civil actions for tortious invasions of privacy. *Id.*

The State of Branwar has recognized a need to protect its citizens' rights to privacy. In 1978, the State legislature enacted the Branwar Judiciary Act which created a civil action for publicity of a private fact:

> § 6.24 (a) One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person.
>
> (b) The truth of the matter asserted shall not be a defense in a civil action for publicity of private fact unless the matter asserted pertains to governmental action or conduct by a public official.

10 Bran. Stat. § 6.24 (1978).

Subsequent to its enactment, the Cablevision Commissioner adapted the Judiciary Act into a cable television provision. The provision was incorporated into the Exurb Agreement as Paragraph 113 on April 1, 1981:

> ¶ 113. The truth of the matter asserted shall not be a defense in a civil action for publicity of a private fact. In such a civil action, the franchisee may aver that the matter given publicity is of legitimate public interest when the matter concerns governmental action or conduct by public officials.

Both the Judiciary Act and Paragraph 113 are statutory versions of the common law tort of public disclosure of private facts. *See*, Restatement (Second) of Torts § 652 D (1977). The creation of the concept of a right to privacy is uniformly attributed to the landmark 1890 *Harvard Law Review* article by

Samuel Warren and Louis Brandeis. Warren and Brandeis, *The Right to Privacy* (hereinafter cited as Warren and Brandeis), 4 Harv. L. Rev. 193 (1890). The article is so credited in Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law and Contemp. Prob. 326, at 327 (1966). Alarmed by the persistent gossip mongering by the press about Mr. Warren's private life, the authors argued that the common law's recognition of the "inviolate personality," permitted legal recognition of the concomitant right to be free from undesirous and harmful publicity by the press, or as they stated, "the right to be let alone." Warren and Brandeis, *supra*, at 205.

Since Warren and Brandeis wrote their article the need for protection of individual privacy has become even more pressing. The population of our cities has increased greatly, thus making one's search for solitude extremely difficult. Moreover, technological advances have enabled the electronic media to bring vast amounts of the world news into our living rooms. In this realm, Exurb may feel compelled to find material to publish which will enable it to compete with the other long established media of Branwar. By providing a remedy for unwanted publicity of a private fact the Commissioner is attempting to insure that Exurb's desire to increase its patronage, does not result in exploitative exposure of the intimate lives of Branwar's citizens.

A. THE CONSTITUTION DOES NOT REQUIRE UNCONDITIONAL PROTECTION OF THE FREEDOMS OF SPEECH AND PRESS TO THE EXCLUSION OF OTHER IMPORTANT SOCIETAL INTERESTS.

Exurb's basic contention is that the first amendment guarantees of free speech and a free press, as applied to the states by the fourteenth amendment, prevent Branwar from proscribing truth as a defense in an action for publicity of a private fact. However, it is clear that the right to engage in free speech is not absolute. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Numerous decisions by this Court have upheld state laws which regulate or abridge speech in order to preserve competing societal values.

For example, in *Chaplinsky v. New Hampshire, supra*, the Court sustained a state criminal statute which imposed sanctions on the use of "fighting words" as a legitimate exercise of the state's police powers to prevent breaches of the peace. Similarly, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court held that this same interest enabled the state to sanction "advocacy of the use of force . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. On other occasions the Court held that the states may impose liability on speech in or-

der to protect their citizens from the harms of group libel, *Beauharnais v. Louisiana*, 343 U.S. 250 (1972); individual libel, *New York Times v. Sullivan*, 376 U.S. 255 (1964); obscenity, *Miller v. California*, 413 U.S. 415 (1973); and neighborhood deterioration, *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

Each of these cases represents an accommodation of first amendment rights and the state's interests in protecting public safety and welfare. As the Supreme Court explained in *Thornhill v. Alabama*, 310 U.S. 88 (1940), "It is imperative that, when the effective exercise of . . . [First Amendment] rights is claimed to be abridged, the courts should weigh the circumstances and appraise the substantiality of the reasons advanced in support of the challenged regulations." *Id.*, at 96, citing *Schneider v. State*, 308 U.S. 147, 161 (1939).

Accordingly, in order to determine whether Branwar's proscription of truth as a defense for publication of a private fact under Paragraph 113 is unconstitutional, it is necessary to evaluate and weigh the competing interests of individual privacy and free speech.

B. IT IS VALID FOR THE STATE TO COMPENSATE INDIVIDUALS FOR UNWANTED DISCLOSURES OF PRIVATE FACTS.

The right of individuals to control the release of information concerning their private affairs is based on the fundamental principles of individualism and human dignity. *See generally*, V. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.L. Rev. 962 (1964) (hereinafter cited as Bloustein).

Inherent in the concept of privacy is a division between the self and the collective. By protecting a right to privacy we are assuring the individual a zone in which "he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world." T. Emerson, *The System of Freedom of Expression*, 545 (1970). Protection of the privacy zone is a necessary part of the democratic process. In order for the individual to add his voice to the "marketplace of ideas" it is essential that he be able to withdraw from the market. As Professor Bloustein explains,

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy, or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. . . . His opinions being public, tend never to be different; his aspirations, being known tend always to be

> conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

Bloustein, *supra*, at 1003.

By providing a remedy to plaintiffs who have suffered invasions of privacy through unwanted disclosure of private facts, the state is insuring that the concept of a right of privacy is not meaningless. Essential to the retention of a zone of privacy is the ability to control the release of information concerning one's personal life, and protection of this ability is crucial to preserving human dignity. By saying that we are individuals, we are essentially making a claim to autonomy and a right to determine the personality we present to the world. As the California Supreme Court has explained, disclosure by the press of our private lives is the antithesis of this right: "Loss of control over which 'face' one puts on may result in a literal loss of self identity . . . and [such disclosure] is humiliating beneath the gaze of those whose curiosity treats a human being as an object." *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971).

The primary intent of Paragraph 113 is to protect the core privacy interests which are essential to a healthy democracy. Private facts as used in the provision, are those facts delineated in the Judiciary Act as ones concerning the private life of an individual which are "highly offensive to a reasonable person." 10 Bran. Stat. § 6.24(a) (1978). Implicit in this definition of a private fact is a dual recognition that "exposure of the self to others in varying degrees is a concomitant of life in a civilized community," as well as that some "revelations may be *so intimate* and *so unwarranted* in view of the victim's position as to outrage the community's notions of decency." *Time, Inc. v. Hill*, 385 U.S. 374, at 383 n.7, 388 (1967), quoting with approval, *Sidis v. F-R Publishing Pub. Corp.*, 113 F.2d 806, at 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (emphasis added). Thus, in limiting the availability of an action for public disclosure to publicity of highly offensive private facts, Branwar is insuring that damages will be available only when substantial privacy interests are affected.

Furthermore, in order for the State to effectively provide individuals with a remedy for invasions of privacy by Exurb, it is essential that truth not be available as a defense. As the Court of Appeals for the Ninth Circuit has observed:

> To hold that the privilege [to publish] extends to all true statements would seem to deny the existence of 'private facts,' for if facts be facts—that is, if they be true—they would not be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then

> would . . . be based not on rights bestowed by law, but on the taste and discretion of the press.

Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975).

This Court has long recognized the importance of preserving individual zones of privacy against intrusions by the government. As early as 1866, the Court held that the fourth and fifth amendments "apply to all invasions on the part of the government and its employees on the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616 (1886). In the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court held that privacy is a fundamental right existing in the penumbras of rights guaranteed by the Bill of Rights. *Id.* at 484, 485. In subsequent cases, this Court characterized the right of privacy as one protecting individual autonomy and free choice. See *Roe v. Wade*, 410 U.S. 113 (1973), protecting individual autonomy in the area of child bearing; *Zoblocki v. Redhail*, 434 U.S. 374 (1978), protecting autonomy in marriage; and *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), autonomy in sexual conduct.

Moreover, in *Whalen v. Roe*, 429 U.S. 589 (1977), this Court held that in addition to protecting individual autonomy, the right to privacy enunciated in *Griswold* embraced the more specific right of individuals to protection against "disclosure of personal matters" by the government. *Id.*, at 589. At issue in *Whalen*, was a New York statutory scheme for identifying legitimate users of dangerous drugs. The Court sustained the petitioner's claim that the disclosure of the information would constitute an invasion of privacy, but nonetheless found that by providing protection to avoid such disclosure, the regulation did not "pose a sufficiently grievous threat . . . to establish a constitutional violation." *Id.* at 600. *See also, Doe v. McMillan*, 412 U.S. 306 (1973).

In contrast to the facts in *Whalen*, the privacy interests of Branwar's citizens are significantly threatened by Exurb's disclosures of private facts. Since Exurb has a state-wide franchise, disclosures by it could be heard by everyone in the State. Furthermore, unlike the plaintiffs' fear of the potential of disclosure in *Whalen*, individual privacy interests involved in Paragraph 113 are premised on the publication itself.

The fact that in the case at bar the right to privacy is threatened by the media rather than the government does not relegate it to any less constitutional protection. As Justice Stevens has stated, "the protection of private personality, like life itself, is left primarily to the States under the ninth and tenth amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (concurring opinion).

In recognition of the states' legitimate interests in protecting the privacy of their citizens, the Supreme Court has upheld various state provisions that regulated speech which threatened to invade rights of privacy. For example, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), this Court sustained a municipal ordinance regulating the use of sound trucks on public streets as a valid exercise of the state's police power to protect individual privacy and repose.

Similarly, in *Breard v. City of Alexandria*, 341 U.S. 622 (1951), this Court upheld a municipal ordinance prohibiting uninvited merchants from soliciting at private residences. As the Court explained, "opportunists for private gain cannot be permitted to arm themselves with an accepted principle, such as that of a right to . . . free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose." *Id.* at 625-626.

More recently, this Court has recognized a legitimate state interest in creating civil actions for individuals whose privacy has been invaded by others. In *Time, Inc. v. Hill, supra*, the Court found a legitimate state interest in providing individuals with a remedy for publications which fictionalize the victim's personality or experiences, thus putting him in a false light in the public eye. *Id.* at 384-387. In *Time* the publication concerned a matter which was of legitimate public interest, thus the first amendment required that the individual establish knowing or reckless falsehood. *Id.* at 387-88. *See also Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974).

In the single case in which this Court considered the legitimacy of a state's interest in providing a remedy for public disclosure of a private fact, the Court expressly noted the importance of the privacy claim: "In this sphere of collision between claims of privacy and those of free press, the interests on both sides are plainly noted in the traditions and significant concerns of our society." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 467, 469 (1976).

It should be noted that in neither *Time* nor *Cox* did this Court reach the question of whether the state could base liability on *truthful* disclosures of highly offensive private facts concerning private individuals. Since the issue in *Time* involved *false* disclosures, this Court left open the question of whether "truthful publication of . . . [private facts] could be constitutionally proscribed." 385 U.S. 383, n.7.

Similarly, since *Cox* involved the narrow issue of "whether the state may impose sanctions on the accurate publication of the name of a rape victim obtained from public records," this Court expressly refrained from addressing the broader issue of "whether truthful publications may ever be subjected to . . . [civil liability] consistently with the First and Fourteenth Amendments." 420 U.S. at 469.

In contrast to Georgia's public disclosure law involved in *Cox*, Paragraph 113 expressly excludes from its scope names obtained from public records, since by necessity they involve conduct by the government or public officials. Hence, the Court's conclusion in *Cox* that the speech was constitutionally protected, is not determinative of the issue of whether the Constitution also protects publication of highly offensive private facts concerning private individuals.

In sum, these cases display that the state has a compelling interest in providing its citizens with a remedy for Exurb's publications of highly offensive private facts. Just as the Supreme Court must protect individuals from unconstitutional invasions of privacy caused by unwarranted public disclosures of private facts by the government, the ninth and tenth amendments enable, and indeed require, the states to protect their citizens from these same types of invasions by the media.

C. PARAGRAPH 113 DOES NOT UNCONSTITUTIONALLY ABRIDGE EXURB'S FIRST AMENDMENT RIGHTS.

Arrayed against Branwar's compelling interest in protecting the privacy of its citizens is Exurb's first amendment right to publish matters of legitimate public interest. Initially, it should be noted that Paragraph 113 does not affect Exurb's ability to publish facts concerning actions by the government or public officials. In allowing Exurb to assert the defense of truth for these publications, Paragraph 113 comports with holdings by the Supreme Court that in these areas, first amendment rights are paramount over individual privacy interests. *See Garrison v. Louisiana*, 379 U.S. 64 (1964); *Cox Broadcasting v. Cohn, supra*.

However, as this Court noted in *Time, Inc. v. Hill, supra*, there is also a legitimate public interest in non-governmental affairs. *Id.* at 388. Subsequent to its decision in *Time*, the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), recognized that use of a public interest standard was an unsatisfactory means of protecting competing speech and other individual interests. *Id.* at 343. As in the area of libel, there is great difficulty and danger in determining on an *ad hoc* basis what private facts concerning a private individual are of legitimate public interest and thus, are constitutionally protected. As Justice Marshall pointed out in his dissent to *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), using a public interest test for determining constitutional standards involves the courts in the business of deciding "what information is relevant to self-government," and also insufficiently protects "society's interest in protecting individuals from being

thrust in the public eye. . . ." *Id.* at 79; quoted with approval, *Gertz v. Robert Welch, Inc., supra*, at 342.

It is because of these problems that the Court in *Gertz* developed "broad rules of general application . . . [for] distinguishing among defamation plaintiffs. . . ." 418 U.S. at 343-344. Similarly, Paragraph 113 distinguishes between public officials and private individuals in order to insure that both Exurb's first amendment rights and individual privacy rights are adequately protected.

In contrast to its publications of private facts concerning public officials or conduct by the government, Exurb has no first amendment right to publish "highly offensive" facts concerning the intimate lives of private individuals. As the Supreme Court noted in *Chaplinsky v. New Hampshire, supra*, certain classes of speech have never been considered constitutionally protected:

> [T]hese include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. at 572.

Highly offensive facts concerning the personal lives of private citizens share the same indicia of unprotected speech. As in the case of lewd, obscene or libelous utterances, the publication of these facts uniformly results in harm to individual rights to privacy.

In addition, no societal benefit is derived through knowledge of private facts concerning private individuals. In contrast to public officials, society has neither the need nor the right to scrutinize the "fitness" of private individuals. *See Garrison v. Louisiana, supra* at 73 n.8. Thus, if the facts do not give the public needed information "to cope with the exigencies of the period," there is no right to disseminate them. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). *See also York v. Story*, 324 F.2d 450 (9th Cir.), *cert. denied*, 376 U.S. 939 (1964) (publication of an assault victim's nude photograph); *Briscoe v. Reader's Digest Ass'n, supra*, (disclosure of an individual's distant criminal past). Therefore, the only interest served by these publications is the ignominious pleasure of knowing of the "misfortunes and frailties of one's neighbors," and thus they should not be protected. Warren and Brandeis, *supra* at 196.

Though truth may be a constitutionally required defense in defamation actions, it does not necessarily follow that truthful publications of highly offensive facts are absolutely protected.

Cox Broadcasting v. Cohn, supra at 490. As this Court stated in *Gertz*, "the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted by defamatory falsehood." 418 U.S. at 341. Implicit in the law of defamation is an understanding that although to some extent we all may be judged by our fellows, this judgment must be fair, in other words the defamatory statement must be true. For this reason, this Court has held that while truthful defamatory statements are protected, there is no constitutional value in false statements of fact. *Id.* at 340. Thus, in stating that truth is a constitutionally required defense in that area, the Court is merely asserting that when the claimed injury results from falsehood, there can be no recovery when the information published is true.

The state's interest in compensating private individuals for highly offensive but true facts, is to create a zone of privacy in which there will be no undesired scrutiny by others. Thus, in contrast to the law of defamation in which the injury is caused by what is published, the harm sought to be prevented under public disclosure law results from the publication itself. The fact that the matter is either true or untrue is irrelevant.

Potential liability for the truthful publication of private facts will not lead to intolerable self-censure. Given that the publication is truthful, the burden of proving accuracy is not present. Thus, the sole burden on cable operators is proving that the facts are not "highly offensive to a reasonable person." Paragraph 113. Therefore, any alleged "chilling" effect on Exurb's right to publish is *de minimis* because Exurb must refrain only from publishing facts intended solely to satisfy the prurient interests of the public.

Finally, the differences between the interests involved in defamation and public disclosure privacy law require that different standards of protection for the classes of plaintiffs be used. *Time, Inc. v. Hill, supra* at 390, 391. The reasons behind the distinctions made between libeled public officials and public figures on one hand, and private figures on the other, are inappropriate in the area of privacy. *Gertz v. Robert Welch, Inc., supra*, at 344-347.

As this Court observed in *Gertz* the first remedy available to a defamation plaintiff is self-help, that is, using the channels of the press to counteract the defamation. 418 U.S. at 344. Because libeled public officials and public figures generally have more access to the press, they are better able to use this remedy, and thus, require less protection. *Id.*

In the case of plaintiffs in a privacy action, where the harm occurs as a result of the publication itself, this remedy is wholly unavailable. The basis of the plaintiff's claim is that the intimate and private aspects of his life have been thrust into the public arena. Consequently, any further exposure would do nothing to

remedy his harm, and would result only in increasing his original injury.

The second rationale used for distinguishing between the defamation plaintiffs is that in the case of most public figures and all public officials, their voluntary exposure to the public eye may be viewed as a voluntary waiver of some of their interest in protecting their reputation. *Id.* at 344, 345. However, although a public figure may waive some of his interest in protecting his reputation, it does not necessarily follow that there should be a complete waiver of his right to privacy. In contrast to the actual malice standard which provides some protection of his reputation, allowing the press to use truth as a defense in an action under Paragraph 113 by a public figure, results in total abrogation of his right to privacy.

Moreover, the fact that the public figure does not hold public office counsels that more protection of his right to privacy be allowed. The public has no right to scrutinize his character to determine his fitness for office. *Garrison v. Louisiana, supra*, 379 U.S. at 86. Finally, it should be noted that the nature of a private fact already affords a public figure less privacy protection than a private individual. Since a public figure is normally someone that is involved in a public controversy, private facts concerning him which are related to that controversy, would not be actionable, because they would not be part of his private life. This is so, even though those same facts would be actionable in the case of a private individual. *Cf. Time, Inc. v. Hill, supra*, 385 U.S. at 386.

In conclusion, Paragraph 113 is a constitutional accommodation by the Commission of the competing interests of free speech and individual rights to privacy. By enabling Exurb to publish all truthful information concerning actions by the government or conduct by public officials, the Commissioner is guaranteeing Exurb's first amendment right to publish matters of legitimate public interest. Similarly, by proscribing truth as a defense in civil actions for Exurb's disclosures of highly offensive facts concerning the personal lives of private individuals, the Commissioner is also insuring that the core privacy interests of Branwar citizens are protected.

CONCLUSION

For the reasons heretofore stated, Petitioner requests that the decision of the Court of Appeals for the Thirteenth Circuit be reversed and the judgment of the District Court of Branwar be reinstated. Respectfully submitted,

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APPENDIX A

RELEVANT CONSTITUTIONAL AMENDMENTS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT FEDERAL STATUTES

47 U.S.C. § 315:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station:

Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

RELEVANT STATE STATUTES

10 Bran. Stat. § 6.24 (1978):

(a) One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person.

(b) The truth of the matter asserted shall not be a defense in a civil action for publicity of private fact unless the matter asserted pertains to governmental action or conduct by a public official.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER A STATE MAY REGULATE THE CONTENT OF A CABLE TELEVISION TRANSMISSION IN SUCH A MANNER AS TO MANDATE EQUAL OPPORTUNITY USE OF A CABLE CHANNEL BY CANDIDATES FOR STATE AND LOCAL POLITICAL OFFICE.

II. WHETHER, AND TO WHAT EXTENT, A STATE MAY PROSCRIBE TRUTH AS A DEFENSE IN A PRIVACY ACTION FOR GIVING PUBLICITY TO A PRIVATE FACT.

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STATEMENT OF THE CASE

I. NATURE OF PROCEEDINGS

This case, No. 82-630, is on writ of certiorari to the United States Court of Appeals for the Thirteenth Circuit. The court reversed the district court's denial of Respondent's request for declaratory relief, reversed the granting of Petitioner's motion for summary judgment and held that cable television is afforded equal first amendment protection as that of the print media and that a provision which proscribes truth as a defense to a privacy action is unconstitutional.

II. SUMMARY OF THE FACTS

In 1976, the Branwar General Assembly enacted the "Public Utilities Act," 13 Bran. Stat. § 27.06 (1976) which authorized the creation of the State Cablevision Commission and the office of Cablevision Commissioner. The Commissioner is empowered under Article 27, Section 6 to "promulgate any provisions the Commissioner deems to be in the best interests of the State. . . ." On August 8, 1980, the Respondent, Exurb Media Corporation, "Exurb," signed a non-exclusive franchise agreement with the Commissioner which provided for a license to operate cable television for fifteen years throughout the State of Branwar. The Agreement also provided that the Commissioner had authority to promulgate additional provisions by which Exurb would be bound. Under Paragraph 44 of the Agreement, any breach of the Agreement would result in disenfranchisement and loss of an option to renew.

On January 21, 1982, the commissioner promulgated two provisions which were incorporated into the Agreement. One provision required Exurb to afford equal opportunity to qualified political candidates for use of a cable channel. The other provision proscribed truth as a defense in a civil action for publicity of a private fact.

Upon receiving notice of the new provisions, Exurb notified the Commissioner that it found the new provisions to be an unreasonable interference with its first amendment rights. On March 15, 1981, the Cablevision Commissioner declared the challenged provisions to be a valid exercise of the State's police power.

Exurb filed a petition for declaratory relief in the federal district court for the State of Branwar on March 30, 1981. The Commissioner moved for a summary judgment. On May 15, 1981, John Stewart, a private individual, filed suit in Branwar state court alleging that Exurb violated his privacy by publicizing a private fact during a newscast originated and produced by Exurb. Exurb was granted a stay in the proceedings pending the determination of the instant case. On April 30, 1982, the Commissioner's motion for summary judgment was granted.

On appeal, the United States Court of Appeals for the Thirteenth Circuit held that ¶ 112 was an unconstitutional regulation of the content of broadcast transmissions. The court concluded that "cable television is subject to the same regulation as print media" and that the context of print media is under the exclusive control and "editorial discretion" of the cable operator. Additionally, the court of appeals struck down the state's proscription of truth as a defense in a civil action for invasion of privacy as being unconstitutional.

On August 30, 1982, this Court granted certiorari to consider whether a state may regulate the content of cable television transmission and to what extent a state may proscribe truth as a defense in a privacy action for giving publicity to a private fact.

SUMMARY OF ARGUMENT

The Cablevision Commissioner in the State of Branwar has impermissibly invaded the editorial discretion of Exurb Media Corporation by imposition of two provisions regulating the content of information disseminated over Exurb's cable system. Initially, Provision 112 promulgated by the Branwar Cablevision Commissioner (which mandates equal access to political candidates if an opposing candidate is granted the use of a cable channel) is an unconstitutional attempt to regulate the content of Exurb's programming decisions. The unconstitutionality is based upon the first amendment protections of speech and the press.

The preliminary and prudential consideration is what degree of first amendment protection is to be applied to the cable television industry. Although never reached by this Court, the question of first amendment protection can be answered by analogy to the most similar medium—the print media. Exurb Media Corporation is entitled to first amendment rights equal to the print media and, therefore, must retain ultimate editorial discretion over its programming. The characteristics of cable television are nearly identical to the newspaper industry. If

present technology continues, it is fair to describe cable television as nothing more than an "electronic newspaper." Thus, accepting the level of protection of cable as being the equivalent of the print media, a right of reply would appear to be foreclosed by this Court's holding that the print media may support adversarial positions free of governmental intrusion.

Any argument that an equal access requirement should be allowable simply because it is allowed in the television industry should be rejected. The "scarcity" principle used as justification for content regulation of television and radio broadcasts cannot be applied to cable television. A cable channel should not be considered a "public trustee," and unlike the broadcast media, cable transmissions are not a part of the traditional public forum. Additionally, no important public interests are served by the limitations placed upon Exurb by the Cablevision Commissioner. The imposition of equal time requirements on cable television would hinder, rather than aid, the widest possible dissemination of information. Also, recent deregulation of the cable television industry militates against a state regulating programming content. No justifications exist for the imposition of contingent equal access requirements, and for that reason Provision 112 is clearly an unconstitutional abridgement of Exurb's first amendment rights.

The second provision of the Branwar Cablevision Commissioner which restrains the freedoms of speech and press of Exurb Media Corporation is Provision 113. That provision would attempt to proscribe truth as a defense, in an action by one not connected with governmental concerns, where the tort claimed to have been committed was the public disclosure of a private fact. The first infirmity of constitutional proportions is the belief of the Branwar legislature and Cablevision Commissioner that what is of legitimate public concern can be limited to matters involving public officials or governmental action. A matter lacking political or governmental relevance may nevertheless constitute "newsworthiness," *i.e.*, be of a legitimate public interest. Above and beyond that is the fact that the press should be the arbiter of what is or is not fit to print, not the Branwar legislative and administrative bodies. The final and perhaps most compelling reason for this Court to strike down Provision 113 is the absurd result it would dictate with regard to the tort of defamation. The State of Branwar, by prohibiting truth as a defense, would effectively grant greater first amendment rights to defamation defendants than to the publishers of truthful information. The result of Provision 113 would be to unconstitutionally impose a "chilling effect" on Exurb's willingness to publish nongovern-

mental information of general interest to the public. For these reasons, the Thirteenth Circuit Court of Appeals' holding that both provisions are unconstitutional should be affirmed.

ARGUMENT AND AUTHORITIES

I. THE PROVISION PROMULGATED BY THE BRANWAR CABLEVISION COMMISSIONER REQUIRING EQUAL TIME OPPORTUNITIES TO POLITICAL CANDIDATES UNCONSTITUTIONALLY REGULATES THE PROGRAMMING CONTENT OF EXURB MEDIA CORPORATION.

A democratic society requires the press to be free from governmental censorship; free to publish and promote ideas relating to matters of public concern. In order that these freedoms may be realized, the first amendment to the United States Constitution[1] has been applied by this Court to guarantee an individual's freedom of speech and the press from governmental abridgement. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). Initially, the battle for first amendment protections of the press was fought over newspapers. Within the past quarter century,[2] a new medium has been developing which is now ready to take its place alongside the traditional press; ready to assume the responsibilities; ready to receive the constitutional protections. This new medium is cable television.

It is the contention of Exurb Media Corporation ("Exurb")[3] that because of cable's unique nature as a new medium in our society, any attempt to regulate the content of its transmissions violates Exurb's right of speech and the press. No local, state or federal agency should be granted the power to tell a privately-owned cable television company what it can transmit over its cables and what it cannot. "If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom." *CBS v. Democratic National Committee*, 412

1. The first amendment prohibitions against abridging freedom of speech and of the press have been extended to the State of Branwar by incorporation through the due process clause of the fourteenth amendment. Fiske v. Kansas, 274 U.S. 380 (1927); U.S. CONST. amend. XIV.

2. Stern, *The Evolution of Cable Television Regulations: A Proposal for the Future*, 21 Urban Law Annual 179, 186 (1981).

3. As the District Court held on page 4, n.1 of its opinion, Exurb has sustained or is threatened with sustaining a direct injury as a result of the Commissioner's conduct. A threatened injury is sufficient to confer standing. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

U.S. 94, 146 (1973) (Stewart, J., concurring). Yet, the Cablevision Commissioner in the State of Branwar is before this Court seeking to control all rights of selection through use of "equal time" opportunities for political candidates.[4] Such regulations are antithetical to the first amendment's purpose of insuring that "Congress shall make no law . . . abridging the freedom of speech or the press." U.S. CONST. amend. I.

Although never specifically reached by this Court, the question of cable transmission's protection under the first amendment does not appear to be subject to doubt. *See, e.g., Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954) (motion pictures protected by first amendment); *see also Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (California Supreme Court extending first amendment protections to cable television), *cert. denied*, 385 U.S. 844 (1966). In fact, this Court in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705-708 (1979) (Midwest II), noticed in striking down FCC regulations that the right to editorial discretion is enjoyed by broadcasters and cable operators alike. Having accepted the premise that cable television communication is protected by first amendment guarantees, such communications are presumptively protected from governmental interference. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105 (1979). Thus, in order for Exurb's communications to be subject to regulation by the Branwar Cablevision Commissioner, an exception must be demonstrated to the first amendment's mandate of "no law abridging the freedom of speech and the press." U.S. CONST. amend. I.

Although this Court has condoned regulation of television as being non-violative of first amendment protections, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), it should not blindly follow the *Red Lion* precedent. Careful analysis of the justifications for regulation of speech in the cable industry should be made to determine the legitimacy of governmental infringement on a cable system's freedoms of press and speech.

4. 13 Bran. Stat. § 27.03(5) is the statutory grant of power allowing the Branwar Cablevision Commissioner to promulgate "any additional provisions." Provision 112 is the Commissioner's "equal opportunity access" provision. It is reprinted in its entirety in Appendix D.

A. Exurb Media Corporation Is Entitled To First Amendment Rights Equal To The Print Media And, Therefore, Must Retain Ultimate Editorial Discretion.

The Supreme Court has developed distinct first amendment standards for each medium of communication. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Thus, the right of governmental control over the content of cablecast discussion of public issues is dependent upon the status cable television has in first amendment terms. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-1055 (8th Cir. 1978) (Midwest II), *aff'd on other grounds*, 440 U.S. 689 (1979); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213, 219. Cable television is not the equivalent of other members of the broadcast media; therefore, prior precedent of this Court supporting an "equal time opportunity" requirement such as the one promulgated by the Branwar Cablevision Commissioner is not applicable. *See CBS v. FCC*, 453 U.S. 367 (1981) (reasonable access required to be given to bona fide federal candidates). This Court must extend to cable television the equivalent first amendment protection granted the print media, and, therefore, invalidate Branwar's "equal time opportunity" requirements. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In *Miami Herald*, this Court was faced with a Florida statute mandating a right of reply to editorials attacking a political candidate's personal character. The Miami Herald newspaper refused to print the reply of a candidate who had been criticized, claiming the first amendment protection of the press. In holding the statute unconstitutional this Court stated:

> The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time.

Id. at 259.

Chief Justice Burger, writing for the majority, emphasized the private nature of a newspaper, and its power "to advance its own political, social and economic views." *Id.* at 255. Any right-to-access regulation, while possibly serving some beneficial purposes, was found to be intolerable because of its need for governmental implementation. *Id.* at 252. Unlike television, a

privately owned and operated newspaper is not a "surrogate for the public" who owes a fiduciary obligation to the public. *Id.* at 251. The Court focused on the special features which a privately owned newspaper has in a society dedicated to the freedoms of speech and the press.

The same features are present in the cable industry. Cable television is communication by choice—financial choice—not by chance. "Cable television is, in effect, an electronic newspaper." Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. Rev. 133, 146 (1976). Just as access to a newspaper is obtained through purchasing advertising space, access to a cable channel can be obtained through the lease of channel space. Just as a newspaper competes for an audience through competitive superiority, so can cable systems compete with each other for subscribers without interfering with the others' right to speak. Just as a newspaper collects stories from wire services and pieces them together as a final communication effort, cable collects varous types of channels to be combined for public consumption. In short, cable has the potential of creating "an electronic medium of communications more diverse, more pluralistic, and more open, more like print and film media than our present broadcast system." *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975) [citation omitted].

Thus, the print media offers the most analogous form of communication from which to determine first amendment protection. As the District of Columbia Circuit Court of Appeals has recognized in determining the degree of first amendment protection due cable television, "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

In *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978) (Midwest II), *aff'd*, 440 U.S. 689 (1979), the Eighth Circuit invalidated the FCC cable television access rules on jurisdictional grounds. However, it also chose to address the first amendment implications raised by governmental attempts to regulate access to cable television. The court found the FCC's power to regulate cable operators' first amendment rights to be "less, not greater, than its authority to intrude upon the first amendment rights of broadcasters." *Id.* at 1056. The court went so far as to say that had it been necessary, the access requirements would have also been found constitutionally impermissible on first amendment grounds. *Id.* at 1055. In effect, the Eighth Circuit found the limits of acceptable restriction on cable television first amendment rights to be the same as those applied to the print media.

In contrast, the Tenth Circuit recently refused to extend first amendment protection of the print media to cable television. *Community Communications Co. v. City of Boulder, Colo.*,

660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, — U.S. —, 102 S. Ct. 2287 (1982) (petition for writ of certiorari dismissed pursuant to Rule 53). However, this decision rests upon an unsound foundation. First, it argues that because cable television lays cables and strings poles in the public domain, first amendment differentiation from the press is obvious. *Id.* at 1377. The courts have repeatedly rejected such assertions as contrary to the first amendment. *See, e.g., Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (public control of the postal system does not justify regulation of the content of mail). Just because the public owns municipal streets and parks is no reason to regulate the speech content of those persons using them. Second, the court in *Community Communications* argues that since the broadcast media is already heavily regulated, a little more regulation would not be unconstitutional. Such analysis ignores the close scrutiny required by courts in cases involving state content regulation, and further ignores the current trend towards deregulation over cable television content.[5]

The State of Branwar has restricted the first amendment rights of cable. It must justify such regulations by evidence showing cable television to be similar to television. No evidentiary support exists. Instead, as noted, cable television is properly analogized to the print media for determining first amendment protections.

1. The "scarcity" principle used as justification for content regulation of the traditional broadcast media cannot be applied to cable television.

It is the scarcity of broadcast frequencies that necessitates regulation in order to insure diverse programming. *CBS v. Democratic National Committee*, 412 U.S. 94 (1973). Of the rationales used in justifying the fairness doctrine, the physical scarcity which exists in the broadcast spectrum is by far the most important, and the only significant interest recognized by this Court in its past decisions. This principle was first enunciated in *NBC v. United States*, 319 U.S. 190 (1943), when Justice Frankfurter pointed out that regulation of the airwaves was required because, "with everybody on the air, nobody could be heard." *Id.* at 212. Scarcity is the only rationale which has been judicially relied upon by the courts to distinguish between the degree of first amendment protection to be given the broadcast media as opposed to the print media. The limited size of the broadcast media is given as the major justification for content regulation of television and radio. Since anyone can publish, but only a few can broadcast, there exists a reason for disparate treatment.

5. *See* I(B)(2), *infra*, for discussion on recent deregulation of the cable industry, and its implication of first amendment restrictions.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Exurb does not contest the validity of the "scarcity" principle as applied to television.

However, the first amendment "scarcity principle exception" espoused in *National Broadcasting Co.* and its progeny cannot be logically applied to Exurb's cable television system. "First of all, cable is different in kind from broadcast television. The difference is not just degree. Cable offers at relatively low cost a diversity of programming and communication which broadcast television cannot even approach." Statement of George W. Overton, Co-Chair, Chicago Cable Television Study Commission upon release of Commission's Report, January 10, 1982. Indeed, the only relation cable has to broadcasting is the use of the same mechanism—the television set—for dissemination of information. Technological advances in the broadcast industry refute the notion of physical scarcity. *See* Special Project, *The Future of Content Regulation in Broadcasting*, 69 Calif. L. Rev. 555, 576 (1981). "A single coaxial cable, for example, can presently carry as many as fifty-four television stations, and the expected use of optical fibers for broadcast purposes in the near future should provide an even greater carrying capacity." *Id.* at 578. Thus, the scarcity of access caused by the existence of only three major networks is not present in the cable industry. W. Francois, *Mass Media Law and Regulations* 291 (1975).

In striking down content regulation of movies over cable channels, the District of Columbia Circuit Court found "an absence in cable television of the physical restraints of the electromagnetic spectrum." *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

The court in *Home Box Office* refused to allow pedantic extension of regulation of the television industry to the cable industry. The well-reasoned analysis in *Home Box Office* could thus be explained by the following syllogism: (1) Television is content regulated because of scarcity, (2) scarcity is not present in the cable industry; therefore, (3) cable television cannot be content regulated. Similarly, the content regulation of Exurb Media Corporation cannot be justified on the basis of scarcity of broadcast signals in the State of Branwar.

None of the inherent limitations of multiple television stations located in Branwar can be applied to the cable system of Exurb Media Corporation. The television broadcaster's advantage is monopolization of a certain wave length, in turn for accepting the obligation to support the public interest and cover all sides of important public issues. With no monopolization of

scarce wavelengths by a cable system, yet another justification for content regulation is lacking.

If any "monopolization" could be charged against Exurb, it would be economic monopolization. But, any argument that "economic scarcity" exists because individuals will not be economically capable of supporting a competing cable system in light of Exurb's presence in Branwar must also be rejected. As the court held in *Home Box Office*, "[i]n any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press." [citation omitted] *Id.* at 46.

In short, the State of Branwar has failed to substantiate the existence of any "scarcity" which might justify the content regulation.

2. First amendment protections of speech and the press prohibit governmental interference with cable transmissions since cable transmissions are not a part of the traditional public forum.

The absence in cable television of the physical scarcity present in the television and radio industries does not automatically lead to the conclusion that no regulation of Exurb's cable transmissions is valid. Regulations "which transform cacophony into ordered presentation can often be consistent with the First Amendment." *See*, A. Meiklejohn, *Political Freedom* 24-28 (1960). Restrictions or regulations would be valid in an absence of scarcity if the government was not seeking to limit speech "because it is on one side of the issue rather than another." *Id.* at 27. The restrictions will be allowable so long as the speech takes place in the traditional public forum, and is content neutral, imposing reasonable time, place, and manner restrictions on the communications. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

The critical inquiry in determining the constitutionality of the Branwar access requirements is their ability to satisfy public forum analysis. The answer to the inquiry is simple—the provisions requiring equal access for political candidates is not a limited time, place, and manner restriction of Exurb's freedom of speech. To the contrary, it specifically does what is prohibited in public forum analysis: it looks to the *content* of what is said. *See Police Dep't v. Mosley*, 408 U.S. 92 (1972) (government has no power to restrict expression because of its message, its ideas, its subject matter or its content). The provision requires that an opposing candidate be afforded equal opportunity to speak.

How is one to know whether an "opposing" candidate has the right to speak unless the content of the candidate speaking first is taken into account? Content regulation by another name—including access—is not tolerable under our system of government. While a governmental body like Branwar may constitutionally impose reasonable time, place, and manner regulations, "what [it] may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression." *Hudgens v. NLRB*, 424 U.S. 507, 510 (1976) (emphasis in original). The requirement that governmental regulation of cable communications be restricted to reasonable time, place, and manner restrictions is best illustrated by the case of *Omega Satellite Products Co. v. City of Indianapolis*, 536 F. Supp. 371 (S.D. Ind. 1982). In *Omega*, the district court expressly allowed local regulation of a cable television operator's use of the public ways to lay his coaxial cable and deliver his message. But, the court was careful to point out the constitutionality of the regulation was premised on its purpose not to regulate programming content. *Id.* at 379. Had the provision imposed regulations on the programming choices of the local operator, as did the State of Branwar in the instant case, it appears the court would have struck down the statute as unconstitutional. *Id.*

Petitioner contends that Exurb's need and use of public streets, highways, rights-of-way, and easements cause cable systems to fall within the public domain, and hence subject themselves to regulation by the keepers of the public domain—governments. Kreiss, *Deregulation of Cable Television and the Problem of Access under the First Amendment*, 54 S. Cal. L. Rev. 1001, 1006 (1981). However, simply because the people of Branwar own the municipal streets and parks does not justify content regulation of those using them. *See CBS v. Democratic National Committee*, 412 U.S. 94, 162 (1973) (Douglas, J., concurring). This Court has long held that regulation of the public forum cannot extend to *what* is being said, only when, where, and how it is being said. The regulation sought to be enforced by the State of Branwar fails to limit itself to controlling the when, where, and how of transmissions, but instead involves itself in *what* is broadcast.

Additionally, a fundamental reason exists for refusing the argument that use of the public domain equals the right to regulate. Cable television is not in the traditional public forum. Simply because an area is open to the public, and is speech related, does not transform that area into a public forum. *See American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950). That

Exurb has used the public rights-of-way does not in itself create a constitutional right in viewers to dictate program choices. *See Muir v. Alabama Educational Television Comm'n*, 656 F.2d 1012 (5th Cir.), *reh'g granted*, (en banc), 662 F.2d 1110 (1981). Just as public ownership of the mails does not justify governmental control of the content of what is sent through it, *Kunz v. New York*, 340 U.S. 290, 293-294 (1951), neither should public ownership of the poles, streets, alleys and roads of Branwar justify content regulation of Exurb's cable transmissions.

B. The Cablevision Commissioner Has Failed To Demonstrate Important Public Interests Which Would Allow Limitations On The First Amendment Rights Of Exurb Media Corporation.

Any governmental restriction of the right to communicate information and ideas is presumptively invalid. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The presumption may be overcome only by a showing that the regulation is necessary for the protection of a public interest. *Thomas v. Collins*, 323 U.S. 516 (1945). Unlike cable, a television broadcaster becomes a "public trustee" when licensed, responsible for presenting a diverse selection of programs to meet the needs and desires of his community. *Report and Order in Docket No. 12782*, 23 F.C.C.2d 382 (1970). Cable television is clearly distinguishable from the network monopoly present in television. In contrast to ABC, CBS, and NBC, Exurb is limited only in its transmissions to the 3,600 square miles of Branwar. In order for the Cablevision Commissioner to regulate the privately owned and locally originated transmissions of Exurb, there must be a showing that without such regulation the "gravest abuses, endangering public interests" are present. *Thomas v. Collins*, 323 U.S. at 530. There must be a demonstration that Branwar is protecting clear and compelling public interests.

1. Imposition of vague equal time requirements on cable television hinders, rather than aids, the widest possible dissemination of information to the public.

The effect of the Branwar provisions would inhibit the growth of information and ideas. In terms of the restraint on free speech and financial expense, the equal opportunity provisions are not worth the cost. The resulting harm to Exurb and the public from equal opportunity requirements manifest the counterproductive effect of the provisions. The adverse consequences that can be anticipated from the equal opportunity pro-

vision will restrict both Exurb and the public. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1, 29-32 (1976).

The Branwar regulation gives no guidance to Exurb as to the requirements of equal opportunity. The vagueness of Branwar's statute leaves Exurb in jeopardy of disenfranchisement and loss of the option to renew the franchise for the exercise of its first amendment rights. This harsh penalty adds ice to the chilling effect of equal time requirements. It transforms the licensee into an "easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of public interest will now be echoes of the dominant political voice that emerges after every election." *CBS v. Democratic National Committee*, 412 U.S. 94, 184 (1973) (Douglas, J., concurring). Must Exurb supply a single channel for the equal opportunity spots or must they appear on the same channel as the original appearance? May the reply be placed any time during the day or night, or will time slots be arranged by the Cablevision Commissioner, thus requiring further regulation of Exurb Media Corporation? Branwar has failed to adequately explain how to *implement* its provision. Logically, in order to avoid facing the possible application of the vague standard, Exurb will simply avoid any initial political discussion which might "trigger" a right of equal access. *See, e.g.*, Connor, *ABC Took Strict View of Fairness Doctrine in Its Cavett Ruling*, Wall St. J., Feb. 11, 1974, at 12, col. 2 (ABC refused transmission of Dick Cavett interview of four former radical activists apparently fearing Fairness Doctrine obligation); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (broadly worded ordinance banning the display of some nudity in drive-in movies might chill exhibitors from showing all movies involving any nudity). Clearly, Branwar Provision 113 "fails to give fair notice." *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

Additionally, it has not been demonstrated that a right of access would achieve its desired effect. As the Eighth Circuit pointed out in *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1059 (8th Cir. 1978) (Midwest II), *aff'd*, 440 U.S. 689 (1979), a showing would be required that equal access will indeed receive an audience. This would seem unlikely. "If a subscriber has paid a substantial price in order to see the year's best motion picture or most X-rated movies, how often will he tune in the access channel to hear his mailman's views on municipal finance or school desegregation?" *See* Note, *Midwest Video Corp.* [*sic*] *v. FCC:*

The First Amendment Implications of Cable Television Access, 54 Ind. L.J. 109, 121 (1978).

Regulation would act as a disservice to the subscribers in the State of Branwar. Regulating the content of Exurb's programming homogeneity of transmissions and weaken its role as an advocate. On television, the movement toward diversity in programming would serve the public interest. *CBS v. Democratic National Committee*, 412 U.S. 94, 184 (1973) (Brennan, J., dissenting). But with cable, diversity would be destroyed by equal opportunity requirements. The best guarantee of diversity is to eliminate the content regulations confronting Exurb and allow the growth of free dissemination of political measures over Exurb's "electronic newspaper." Otherwise, Exurb is faced with avoiding political endorsements to prevent lost air time to political opponents. By avoiding political endorsements, the subscribers of Exurb are denied the "uninhibited marketplace of ideas" which the Court recognized as a paramount interest. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

2. Recent deregulation of the cable television industry militates against a state regulating programming content.

Exurb does not contest the authority of the FCC or local communities to regulate cable television systems. *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). However, the extent of this power to regulate should be limited to the aspects of the medium and should not intrude on first amendment grounds.

With the advent of deregulation of the cable television industry, and the policy considerations underlying this deregulatory trend, the Cablevision Commissioner of Branwar must meet a heavy burden in justifying the enactment of the recent cablevision provisions. Through deregulation, the FCC and the federal courts have stated the proper course to follow in cable television system regulation.

In light of the broadened capabilities of cable television systems, including expanded channel capacity, long distance signal importation, and program origination, *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972), the Federal Communications Commission has initiated a tide of deregulation which has swept not only the lower courts but has been addressed by this Court in the recent case of *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Midwest II).

At issue in *Midwest II* were the FCC's access rules, 47 C.F.R. §§ 76.252-258 (1977), requiring cable operators to establish channels for public use.

Cable operators were successful in challenging those aspects of the FCC rules which imposed "common carrier" status upon cable systems in direct violation of section 3(h) of the Communications Act which states: "[A] person engaged in radio broadcasting[6] shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h) (1976). In reaching this decision, the Court concluded the FCC had exceeded its jurisdiction over cable television and that the access rules were not reasonably ancillary to the effective performance of the Commission's various responsibilities for regulation of television broadcasting. *Id.* at 708.

One month after the *Midwest II* decision, the FCC deleted restrictions on a cable system's importation of distant television programs and softened exclusivity rules limiting a cable system's competition with local broadcast stations. *Notice of Proposed Rulemaking in Docket No. 20988*, 71 F.C.C.2d 951 (1979). Also, the FCC deleted its minimum access requirements. *Cable TV Access Channel Rules*, 83 F.C.C.2d 197 (1981).

The efforts for deregulation culminated in perhaps the most important and extensive package of proposed amendments of the Communications Act recommended to Congress by the FCC. In a landmark decision supporting the need for all broadcasters to regain complete editorial discretion without unnecessary governmental interference, the FCC proposed the repeal of Section 315 of the Act which is the federal counterpart to the Branwar provision requiring licensees to provide equal access to qualified election candidates. FCC Report No. 5068, *FCC Sets Forth Proposals for Amending Communications Act* (September 17, 1981). The FCC also stated that no regulation or condition, including any obligation to afford opportunity for the discussion of conflicting views on any issue shall be promulgated or fixed by the Commission which shall interfere with the right of free speech or of free press. *Id.* In accord with its recognition that ultimate editorial discretion must be maintained by the broadcast media, the FCC recommended repeal of Section 312 which authorizes revocation of station licenses for failure to provide qualified federal candidates with reasonable access to broadcast time. The recommended amendments would eliminate the "chilling effect" these provisions and penalties, similar

6. "Radio broadcasting" has been held to include over-the-air television broadcasting and cable transmissions. *Midwest II*, 440 U.S. at 696-98.

to those found in the Branwar provision, have on the dissemination of information to the public.

Acknowledging the need for deregulation of the cable industry, and following the lead of the FCC, the United States Senate has passed a bill significantly reducing federal regulation of the broadcast media. Senate Bill 1629, passed in March of 1982, codified steps already taken by the FCC such as barring the agency from imposing public affairs programming requirements and deregulating radio broadcasting. S. 1629, 97th Cong., 2d Sess. (1982). Decisions such as these have reverted the FCC back to its policy of non-regulation implemented during the first twenty-five years of its existence. *See, e.g., Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958); *Report and Order in Docket No. 12443*, 26 F.C.C. 403, 431 (1959).

The FCC's proposals to deregulate cable coupled with the federal courts' and Congress' interpretations of cable as a unique medium of communication have enabled cable to be recognized as the counterpart to the print media. "Cable offers a rare opportunity for the [Commissioner] to foster first amendment ideals." Note, *FCC Regulation of Cable Television Content*, 31 Rutgers L. Rev. 238, 268 (1978). Only if the Commissioner permits Exurb Media Corporation to operate under a more lenient regulatory scheme will the Branwar provisions conform with the federal trend toward granting complete editorial discretion to cable operators and thus place cable television on equal footing with the print media.

II. THE PROSCRIPTION OF TRUTH AS A DEFENSE TO AN ACTION FOR PUBLIC DISCLOSURE OF A PRIVATE FACT BY THE BRANWAR CABLEVISION COMMISSIONER IS AN UNCONSTITUTIONAL RESTRAINT ON THE EXERCISE OF THE FIRST AMENDMENT RIGHTS OF EXURB MEDIA CORPORATION.

In the now famous article by Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 196 (1890), a tort action was born from the public's dissatisfaction with the press. It was charged that the press had overstepped its prerogatives by publishing material which was essentially private in nature. The tort would allow liability where the press published information, whether true or not, which unnecessarily caused embarrassment or injury to an individual. *Id.* The legal life of the tort has, however, been something less than auspicious.

From its inception the tort has been criticized for its direct confrontation with the first amendment right of the press to pub-

lish matters of legitimate interest. *See* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326 (Spring 1966); Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 Stan. L. Rev. 107 (1963). No less an authoritative source than Dean Prosser has acknowledged the possible interference by the public disclosure tort with the freedom of the press. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 410 (1960). Despite the hypothecations by legal scholars, the parameters of the tort have remained mostly a matter of conjecture. In the few cases before this Court which have addressed state actions based upon public disclosures, the question of the right to publish information about private individuals, free from liability, has yet to be reached. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 832 (1978) (limiting its decision to the press' right to publish information about the judiciary despite statute making such disclosures "confidential"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (limiting its decision to the press' right to make public disclosure of facts contained in public records). In fact, the Court in *Cox* expressly left open the question whether, with regard to private individuals, truthful publication could be constitutionally prohibited. *Id.* at 491.

This Court is now presented with a factual situation which directly addresses the question left open in *Cox*. The State of Branwar, through statutory rights granted its Cablevision Commissioner, has promulgated a regulation which prohibits Exurb Media Corporation from asserting truth as a defense to an action by private citizens for public disclosure of a private fact.[7] Not only is Exurb exposed to civil liability to private individuals through 10 Bran. Stat. § 6.24 (1978),[8] but it also faces cable system disenfranchisement and loss of an option to renew the franchise through administrative proceedings. Thus, this Court is directly presented with the issue of Exurb's right to truthful publication of information without fear of liability.

Admittedly, the provision offers a limited defense to Exurb and other publishers.[9] If Exurb published matters which concerned governmental action or conduct by public officials it would be free from liability both under the state statute and the Cablevision Commissioner's regulations. However, this "exception" would appear to be little more than a codification of this

7. Provision 113, the specific regulation imposed on Exurb through paragraph 44 of its franchise agreement, is reproduced in Appendix D.

8. 10 Bran. Stat. § 6.24 (1978) is reproduced in Appendix C.

9. As discussed in section I(A) of this brief, Exurb is entitled to first amendment protections equal to other members of the print media despite its unique nature.

Court's opinion in *Landmark Communications*, 435 U.S. at 829. In *Landmark* the Court's decision addressed the importance of public discussion on the qualifications of government officials. The Branwar laws allowing a defendant to aver that his publication concerns governmental action would thus conveniently avoid being held unconstitutional on the basis of *Landmark Communications*. But the existence of this "apparent defense" should not dissuade this Court from addressing the crucial question of Exurb's right to publish truthful information which it finds to be of legitimate public concern. The laws of Branwar are attempting to forever remove from the press the right to determine what the New York Times has called "all the news that's fit to print." This uncertainty as to the limits of the right of privacy when in confrontation with the first amendment[10] should be answered by this Court. "It would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the first amendment; an uneasy and unsettled constitutional posture . . . could only further harm the operation of a free press." *Mills v. Alabama*, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring).

A. The State Of Branwar May Not Restrict The Definition Of "Legitimate Public Interest" To Matters Involving Governmental Action.

Exurb does not condone the invasion of an individual's right to be left alone, and this case does not surround any of the shocking invasions of what Brandeis called the "right to be left alone." Rather, it questions the ability of state tort law to overcome the prudential considerations expressed in the words, "Congress shall make no laws . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The abridgement in the instant case arises from (1) the imposition of liability without fault despite the fact that Exurb has spoken the truth, and (2) Branwar's attempt to define what is "newsworthy" or of legitimate public concern by legislative fiat.

1. The determination of what is newsworthy must remain a function of the press.

The first basis upon which the State of Branwar's privacy laws and regulations were properly held unconstitutional by the Thirteenth Circuit Court of Appeals is the restriction of "legiti-

10. No better example of the disparate treatment of the public disclosure tort exists than the varying interpretations given that right by the states. See Appendix F for a detailed example of the various degrees of first amendment protection offered in state court decisions.

mate public interest to matters of governmental concern." In effect, the government of Branwar has taken upon itself to make the determination of what constitutes newsworthiness. The Federal District Court in its opinion below recognized as much when it stated, "the cable television company has adequate first amendment protection, as it may broadcast any information of legitimate public concern," *i.e.*, information pertaining to a governmental action or conduct by public officials. Accepting the plain English meaning of "*i.e.*" as standing for "that is," the import of the court's decision is clear. Black's Law Dictionary 672 (rev. 5th ed. 1979). The legislature and Cablevision Commissioner in Branwar have codified *their* definition of what is newsworthy. Such action by any governmental agency is repugnant to the plain meaning of the first amendment.

In addressing the question of who will decide newsworthiness, noted first amendment scholar Harry Kalven, Jr., stated that as "a rough generalization . . . courts will not, and indeed cannot, be arbiters of what is newsworthy." Kalven, *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 Sup. Ct. Rev. 267, 283-84. This principle has been followed by other courts, and has led to the rule that "[i]n determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community. Courts do not have license to sit as censors." *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 302 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980). *See also* Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 Iowa L. Rev. 1061, 1098 (1979). *But cf.* Woito and McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 Iowa L. Rev. 185 (1979) (supporting a free and independent press would obviously be facilitated by a standard which would leave to the editorial discretion of the press what is of interest to the public). Thomas Jefferson, faced with this same paradox of an overzealous press balanced against the use of governmental action to control the press commented,

> I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them . . . .
>
> [I]t is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.

T. Jefferson, *Democracy* 150-51 (Padover ed. 1939).

Despite its facial harshness, the first amendment would appear to require that "the press [will] be the arbiters of [newsworthiness] and the Court will be forced to yield to the

argument that whatever the press prints is by virtue of that fact newsworthy." Kalven, *The Reasonable Man and the First Amendment, supra* at 284.

Any argument by the State of Branwar that the question of what is newsworthy is more properly a jury question should not obfuscate this Court. For the definition of "newsworthy" in Branwar has not been left to the judicial process. Under the statute and regulation currently in existence in Branwar, a publication which is highly offensive to the reasonable person, and is not related to a governmental concern, is not subject to the defense of newsworthiness. This legislative usurpation of the newsworthiness privilege, in cases involving events or persons not connected with governmental concerns, far exceeds even the logic of those jurisdictions highly protective of an individual's privacy. *See, e.g., Deaton v. Delta Democrat Publishing Co.*, 326 So. 2d 471 (Miss. 1976); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970); *Cordel v. Detective Publishing, Inc.*, 307 F. Supp. 1212 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969).

Exurb can find no case law or scholarly work which supports such a limitation on what constitutes newsworthiness. Nor can Exurb discover any support for the proposition that legislatures or cablevision commissioners can decide what is of legitimate public interest. Even the liberal approach of the Restatement, recently accepted by some courts as being the proper standard, would not limit the definition of newsworthiness to governmental action. Restatement (Second) of Torts § 652D, Comment g (1977). (While not recommending the Restatement test, it is offered by Exurb as the outer limits to which constitutional protection might be permissible.). Under Restatement section 652D, it is necessary for the plaintiff to prove lack of newsworthiness of the disclosure as well as its invasiveness. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 301 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980). In contrast, a plaintiff in Branwar, if his suit is against a non-public official or involves non-governmental actions, will not have to rebut the existence of newsworthiness. The Branwar legislature has deemed non-governmental information unworthy of being newsworthy. Surely such usurpation of the press' right to decide what to publish is inconsistent with the dictates of the first amendment.

2. A matter may be newsworthy despite its lack of political or governmental relevance.

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California*, 314 U.S. 252, 269 (1941). This Court has construed the freedoms of speech and the press to

"embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). The scope of the privilege to publish thus extends to almost all reporting of recent events, even in cases involving the publication of a purely private individual's name or likeness. *See, e.g., Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

Illustrative of what has been found by this Court to be of legitimate public interest is its decision in *Time, Inc. v. Hill*, 385 U.S. at 374. Although not a public disclosure case, the Court was nevertheless required to determine the newsworthiness of a play which allegedly portrayed the plaintiff in a "false light." The *Hill* Court determined "[w]e have no doubt that . . . the opening of a new play linked to an actual incident is a matter of public interest." *Id.* at 388. The Court pointed out that "[t]he line between the informing and the entertaining is too elusive for the protection of freedom of the press." *Id.* (Relying on *Winters v. New York*, 333 U.S. 507, 510 (1948)). In effect, the Court recognized the wide latitude which must be given to the press in determining "newsworthiness" or "public interest." The protection from liability for publishing truthful information thus extends to "public affairs" as well as public officials and governmental action. In this respect, public affairs has been defined by at least two members of this Court as

> [m]atters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 n.6 (1974) (Douglas, J., dissenting). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring). While this Court has generally refused to accept the absolute approaches urged by Justices Black and Douglas, it has never accepted a definition of newsworthy as strict as that existing in Branwar.

The State of Branwar, through both its legislature and its Cablevision Commissioner, has vitiated the press' right to plead that any given publication is protected as involving "public affairs." No better example of Exurb's inability to assert the newsworthiness defense in nongovernmental matters exists than the case of *Stewart v. Exurb*, No. 81-690 (Cir. Ct., Corn Co., Branwar, filed May 15, 1981). The *Stewart* case, while presently not before this Court for consideration, illustrates the unacceptable limits placed on the newsworthiness defense by the State of Branwar. In *Stewart*, a professor at a Branwar private law school was denied tenure for plagiarizing a scholarly writing.

Surely the propriety and qualifications of those teaching the professionals of our society is a legitimate public interest. This Court has recently reiterated the importance of education to our society. *Plyler v. Doe*, — U.S. —, 102 S. Ct. 2382 (1982). Yet, the press' right to disseminate such information would be unexercisable in cases where the news was not "governmental." *See* 10 Bran. Stat. § 6.24 (1978). The sole burden placed upon a private individual, or for that matter a public *figure*,[11] would be "highly offensive to a reasonable person." *Id.* In other words, once shown by the private plaintiff that a publication gave publicity to a private fact, first amendment protection would be irrelevant and inadmissible to the privacy action in Branwar.

B. The State Of Branwar, By Prohibiting Truth As A Defense, Would Effectively Grant Greater First Amendment Protection To Defamation Defendants Than To Publishers Of Truthful Information.

The short yet profound words of the Court of Appeals below should not be glossed over; "If lies may sometimes be shielded by the Constitution, then certainly truth should be protected within the ambit of free speech." While at first glance such a statement appears superficial, close analysis of the protections granted defamatory statements reveals the paradoxicality in Branwar's proscription of truth as a defense in cases concerning nongovernmental persons or events.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court extended first amendment protections to a defamation defendant being sued by a public official by requiring the defendant to prove that the falsehood was published with knowing falsity or reckless disregard of the truth. The requirement of "actual malice" was said to flow from the conditional privilege immunizing honest mistakes of fact in furtherance of first and fourteenth amendment goals protecting speech and the press. *Id.* at 279-283. Concededly, the Branwar laws being contested would not contradict the *Sullivan* standard. Absolute first amendment protection has been granted truthful speech about public officials. 10 Bran. Stat. § 6.24(b) (1978). But, the *Sullivan* standard does not exist in a constitutional vacuum. The progeny flowing from the *Sullivan* case have expanded the first amendment protections of defamation defendants beyond those cases involving public officials. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It is the comparative pro-

11. A public figure, as opposed to a public official, is not necessarily connected with governmental concerns. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

tection granted a defendant being sued by a nongovernmental plaintiff for the public disclosure tort, as compared to protection under similar circumstances in defamation cases, which exposes the blatant unconstitutionality of the Branwar statute and regulation proscribing truth as a defense.

In *Gertz*, the Court was faced with determining whether strict liability should be imposed on a defamation defendant when the plaintiff was not a public official or a public figure, or whether the "actual malice" standard in *Sullivan* should be applied. The Court, finding both alternatives unacceptable, held that "so long as they do not impose liability without fault, the statutes may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). The logic behind granting first amendment protections to defendants who had defamed private individuals was that punishment of errors in publishing a fact to another runs the risk of "inducing a cautious and restrictive exercise of the constitutionally granted freedoms of speech and press." *Id.* at 340. In short, even those defendants who have defamed a private individual like Elmer Gertz are entitled to a certain degree of first amendment protections.

The same cannot be said of defendants in the State of Branwar who have *told the truth*, but have simultaneously made a disclosure of a private fact, concerning a private individual, which offends the sensibilities of the reasonable man. 10 Bran. Stat. § 6.24(b) (1978). The State of Branwar through its legislature and Cablevision Commissioner has effectively stripped all first amendment considerations from cases involving the public disclosure tort, *if* the plaintiff is not connected with governmental concerns. The ludicrous result of such a rule is obvious. A defendant who defames an Elmer Gertz-type private individual in Branwar is guaranteed some first amendment protection through a requirement of a private plaintiff's showing of fault. Yet, a defendant in Branwar who tells the truth in a way which invades the privacy of a private individual is devoid of first amendment protection. Surely this Court would not allow a state to subordinate truthful publication to false publication. Would this Court countenance state regulations which grant no protection to truthful statements, when this court has already mandated minimal protections to false statements under similar circumstances?

A Justice of this Court has, albeit in concurrence, already addressed this question. Justice Powell's opinion in *Cox Broadcasting Corp. v. Cohn* noted:

> The Court identifies as an open question the issue of "whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or a public figure . . . . In my view, our recent decision in *Gertz v. Robert Welch, Inc.* largely resolves that issue.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498 (1975) (Powell, J., concurring) (citations omitted). The analysis of Justice Powell did not attempt to thrust truthful disclosure onto the liability scale created by *Sullivan, Butts*, and *Gertz*. Instead, by constitutional analogy, Justice Powell found that if defamatory statements of private individuals were worthy of first amendment protection, then the recognition of truth as a defense was a "constitutional necessity." *Id.* at 499. And while recognizing the different interests sought to be protected in privacy cases as opposed to defamation cases, Justice Powell nevertheless argued that in situations where the interests sought to be protected involved *Gertz*-type facts, truth had to be recognized as a complete defense. *Id.* at 500. *Cf. Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (defense of truth is constitutionally required when the subject of the alleged defamation is a public figure).

Once again, *Stewart v. Exurb*, No. 81-690 (Cir. Ct., Corn Co., Bran., filed May 15, 1981), is useful for illustrative purposes. If Mr. Stewart had filed, or could have filed, a defamation suit against Exurb, he would be required to show his prima facie case that the falsehood was a false statement of a material fact which lowered his esteem or reputation in a substantial minority of the community.

Then, in addition, the protections of speech and the press guaranteed to the defendant would require that Mr. Stewart show some degree of fault, presumably negligence. On the other hand, since Mr. Stewart claims that Exurb spoke the truth, and since he is an Elmer Gertz-type plaintiff, Mr. Stuart must show the matter publicized is a kind that would be highly offensive to a reasonable person. 10 Bran. Stat. § 6.24(a) (1978). The inquiry would then be over. Exurb would be unable to assert any first amendment claims of truth, and liability would attach despite the importance of what was published. This Court must not allow the first amendment to be turned on its head. The "chilling effect" of no constitutional protections for truthful statements about private individuals, when there has been an after-the-fact determination of its invasiveness, is unquestionable. Such a result "hardly seems consistent with the clearly expressed purposes of our founders to guarantee the press a favored spot in our free society." *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring). Branwar has hung the Sword of Damocles over the heads of publishers who wish to print or broadcast information concerning private individuals or nongov-

ernmental events. The Constitution of the United States mandates that it be removed.

CONCLUSION

For the reasons stated above, Respondent Exurb Media Corporation, respectfully prays that this Court affirm the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT

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APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, amendment XIV, section 1.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

RELEVANT FEDERAL STATUTE

47 U.S.C. § 315 (1976)

§ 315. Candidates for public office—Equal opportunities requirements; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Broadcast Media Rates

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest

unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

Definitions

(c) For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Rules and regulations

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

As amended Feb. 7, 1972, Pub. L. 92-225. Title I, §§ 103(a)(1), (2)(B), 104(c), 86 Stat. 4, 7; Oct. 15, 1974, Pub. L. 93-443, Title IV, § 402, 88 Stat. 1291.

APPENDIX C

BRANWAR STATE STATUTES

10 Bran. Stat. § 6.24 (1978):

(a) One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person.

(b) The truth of the matter asserted shall not be a defense in a civil action for publicity of private fact unless the matter asserted pertains to governmental action or conduct by a public official.

13 Bran. Stat. § 27.06 (1976):

* * *

(4) prepare, offer and grant, under terms the Commissioner deems to be in the best interests of the State, a nonexclusive cable franchise agreement to any person or business entity seeking enfranchisement in the State in compliance with those terms set forth in the proffered agreement;

(5) promulgate any additional provisions the Commissioner deems to be in the best interests of the State which shall be incorporated into all franchise agreements;

* * *

(7) exercise plenary authority in performing any of the above duties of office.

APPENDIX D

BRANWAR CABLEVISION REGULATIONS

(Promulgated under 13 Bran. Stat. § 27.06 (1976)):

¶ 112. If franchisee shall permit any person who is a legally qualified candidate for any State or local public office to use a cable channel, he shall afford equal opportunities to all other such candidates for that office in the use of a cable channel. Appearance by a legally qualified candidate on any

(1) bona fide newscast;
(2) bona fide news interview;
(3) bona fide news documentary where the candidate's appearance is incidental to the subject matter of the documentary; or
(4) on-the-spot coverage of bona fide news events

shall not be deemed to be use of a cable channel within the meaning of this paragraph. A franchisee shall not have the power to censor the material transmitted pursuant to this paragraph. No obligation is imposed upon a franchisee to allow use of a cable channel by any candidate except as provided in this paragraph.

¶ 113. The truth of the matter asserted shall not be a defense in a civil action for publicity of a private fact. In such a civil action, the franchisee may aver that the matter given publicity is of legitimate public interest when the matter concerns governmental action or conduct by public officials.

APPENDIX E

THE GROWTH OF THE CABLE TELEVISION INDUSTRY

Year	Number of Systems	Number of Subscribers
1955	400	150,000
1956	450	300,000
1957	500	350,000
1958	525	450,000
1959	560	550,000
1960	640	650,000
1961	700	725,000
1962	800	850,000
1963	1,000	950,000
1964	1,200	1,085,000
1965	1,325	1,275,000
1966	1,570	1,575,000
1967	1,770	2,100,000
1968	2,000	2,800,000
1969	2,260	3,600,000
1970	2,490	4,500,000
1971	2,639	5,300,000
1972	2,841	6,000,000
1973	2,991	7,300,000
1974	3,158	8,700,000
1975	3,506	9,800,000
1976	3,681	10,800,000
1977	3,832	11,900,000
1978	3,997	13,000,000
1979	4,150 (e)	14,100,000 (e)

e = estimated

Source: Besen & Crandall, *The Deregulation of Cable Television*, 44 Law & Contemp. Prob. 82 (No. 1) (1981) (reproduced from Television Fact Book, Services Volume 83a (1979 ed.)).

APPENDIX F

THE PUBLIC DISCLOSURE TORT IN OTHER JURISDICTIONS

All but two states have adopted a right of privacy either statutorily or judicially. Most states have, at least, developed a balancing test when this right of privacy conflicts with the interest

of the public in having free dissemination of news and information. No state has limited the first amendment defense of "newsworthiness" solely to matters involving public officials or governmental action as Branwar has done.

The following states have litigated the public disclosure privacy tort, and have applied the following standards:

Alabama

Daily Times Democrat v. Graham, 276 Ala. 380, 162 So.2d 474 (1964).

Facts: Action against newspaper for invasion of plaintiff's right of privacy by publication of a picture showing plaintiff with her dress blown up.

Test: The right of action for invasion of privacy must give way to the interest of the public to be informed.

Arizona

Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945).

Facts: Plaintiff alleged that the use of his photograph in connection with a magazine story of a crime violated his right of privacy.

Test: A right of privacy does not exist in the ordinary dissemination of news and events, nor in connection with the life of a person in whom the public has a rightful interest.

California

Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1939). Reaffirmed in *Forsher v. Bugliosi*, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980).

Facts: Action by husband and wife for invasion of privacy when photograph was published without plaintiffs' consent in defendant's magazine in conjunction with an article.

Test: The right to be protected from undesired publicity is not absolute but must be balanced against the public interest in dissemination of news and information consistent with the democratic process under the constitutional guarantees of freedom of speech and of the press. The right of privacy may be extended to prohibit any publication which may be of public or general interest. The right of privacy is to be determined by the norm of the ordinary man; that is to say, the alleged ob-

jectionable publication must appear offensive in the light of ordinary sensibilities.

Connecticut

Korn v. Rennison, 21 Conn. Supp. 400, 156 A.2d 476 (1959).

Facts: Action for invasion of right of privacy where plaintiff alleged defendant used plaintiff's photograph subjecting her to embarrassment and ridicule.

Test: Liability for a violation of the right of privacy exists if a defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities.

Delaware

Barbieri v. New-Journal Co., 56 Del. 67, 189 A.2d 773 (1963).

Facts: Plaintiff alleged violation of his right of privacy when defendant published a nine-year-old story concerning plaintiff in conjunction with a proposed bill making whipping the mandatory punishment for certain crimes.

Test: The press has the right, guaranteed by the federal and state constitutions, to publish news and all matters of legitimate public concern.

Florida

Fletcher v. Florida Publishing Co., 319 So. 2d 100 (Fla. 1975), *rev'd on other grounds, Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1977).

Facts: Action brought against newspaper for invasion of privacy arising out of publication of photograph of plaintiff's deceased daughter on floor of bedroom after a fire.

Test: Published matter of general public interest has always been a defense to a claim of invasion of privacy by publication.

Georgia

Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966).

Facts: Action by exotic dancer against magazine publisher and private club for invasion of privacy through unauthorized use of photograph.

Test: For a right of privacy to be actionable the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities. The right of privacy in Georgia is not absolute.

Hawaii

Fergerstrom v. Hawaiian Ocean View Estates, 50 Hawaii 374, 441 P.2d 141 (1968).

Facts: Plaintiff alleged invasion of privacy cause of action against defendant sales corporation when employees of defendant took pictures of plaintiff and plaintiff's house at various stages of construction and used photographs and plaintiff's name in sales brochures.

Test: Although Hawaii recognizes that a cause of action for invasion of privacy is available for appropriation of a name or picture for commercial purposes, the court recognized that limitations on other aspects of privacy may have to be recognized because "of the need to protect the first amendment freedoms we hold so precious."

Idaho

Baker v. Burlington Northern, Inc., 99 Idaho 688, 587 P.2d 829 (1978).

Facts: Employee brought libel and invasion of privacy action against employer for circulating letters containing allegedly libelous and embarrassing facts.

Test: For public disclosure of embarrassing facts to be actionable the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.

Illinois

Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978).

Facts: Parents brought suit against newspaper which published series of articles regarding death of their son from apparent drug overdose.

Test: The liberty of expression is constitutionally assured in a matter of public interest. The right of privacy does not prohibit any publication of matter which is of public or general concern.

Indiana

Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

Facts: Soldier alleged right of privacy against use by army of his photograph in connection with his work as a lens grinder.

Test: A right of privacy occurs with the publicizing of one's private affairs with which the public has no legitimate

concern of the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibility.

Iowa

Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980).

Facts: Plaintiff brought action for invasion of privacy against newspaper for disclosure in 1976 newspaper story that she had been involuntarily sterilized while a resident in a county home.

Test: A right of privacy is actionable only when the matter publicized is of a kind that would be highly offensive to a reasonable person *and* is not of legitimate concern to the public.

Kansas

Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 543 P.2d 988 (1975).

Facts: Former police officer brought action against publisher of newspaper, alleging invasion of privacy by publication of accounts of his alleged misconduct in office 10 years before.

Test: There is no actionable invasion of privacy in a legitimate matter of public interest which therefore constitutes newsworthiness.

Kentucky

McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981).

Facts: Attorney sued newspaper for invasion of right of privacy regarding publication of story that he used part of his fee to bribe a judge and "fix" his client's narcotics charges.

Test: The right of privacy does not prohibit a publication which is true.

Louisiana

Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386 (La. 1979).

Facts: Homeowners sued newspaper publisher for invasion of privacy arising from publication of photograph depicting plaintiffs' home accompanied by caption of uncomplimentary nature.

Test: An actionable invasion of privacy occurs only when defendant's conduct is unreasonable and seriously interferes with plaintiff's right of privacy. The reasonableness of defendant's conduct is determined by balancing the conflicting interests at stake. When the right of privacy is weighed against the freedom of the press it is appropriate for a state to give broader protection of these important rights (see art. 1 § 7 of the Louisiana Constitution of 1974).

Maine

Nelson v. Times, 373 A.2d 1221 (Me. 1977).

Facts: Mother and minor son brought action against newspaper for unauthorized publication of son's picture in connection with book review.

Test: Maine adopts the Restatement (Second) Torts § 652D which makes invasion of privacy actionable if the matter publicized is of a kind that would be highly offensive to a reasonable person *and* is not of legitimate concern to the public.

Maryland

Hollander v. Lubow, 277 Md. 47, 351 A.2d 421 (1976), *cert. denied*, 426 U.S. 936 (1976).

Facts: Plaintiff brought action for invasion of privacy against bank and others for revealing fact that plaintiff was a partner in a certain firm.

Test: Maryland adopts the Restatement (Second) Torts § 652D which makes invasion of privacy actionable if the matter publicized is of a kind that would be highly offensive to a reasonable person *and* is not of legitimate concern to the public.

Massachusetts

Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 391 N.E.2d 935 (1979), *cert. denied*, 444 U.S. 1060 (1980).

Facts: Plaintiff brought suit for invasion of privacy when defendant published photograph of plaintiff standing in unemployment line.

Test: Massachusetts' right of privacy has a statutory basis, G.L.C. 214 § 1B, as inserted by St. 1973, c. 941. However, Massachusetts recognizes the defenses as set out in Restatement (Second) Torts § 652D which provides that the matter publicized must be highly offensive to a reasonable man and of no legitimate concern to the public.

Missouri

Williams v. KCMO Broadcasting Division—Meredith Corp., 472 S.W.2d 1 (Mo. 1971).

Facts: Action for invasion of privacy growing out of television news broadcast showing plaintiff in various poses after his arrest.

Test: Before recovery for invasion of privacy can be had, publication must show a serious, unreasonable, unwarranted and offensive invasion of private affairs, and where the publication concerns a matter of legitimate public interest there is no cause of action for invasion of privacy.

Montana

Sistok v. Northwestern Telephone Systems, — Mont. —, 615 P.2d 176 (1980).

Facts: Subscriber to party line filed suit against telephone company for invasion of privacy when telephone company recorded conversations on the party line in response to complaints by subscribers to the line.

Test: A cause of action for intrusion of privacy exists only for a wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Nebraska

Nebraska does not recognize a right of privacy.

New Hampshire

Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

Facts: Plaintiff alleged violation of right of privacy when landlord installed listening and recording device in plaintiff's bedroom.

Test: New Hampshire adopts the Restatement, Torts § 867, comment J: that liability exists only if defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.

New Mexico

McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 540 P.2d 248 (1975).

Facts: Police officers and wives filed suit for invasion of privacy against newspaper in connection with article concerning gun battle with members of Black Berets.

Test: The right of privacy is not unqualified. One of the key qualifications is where the individual's right of privacy conflicts with the first amendment's freedom of press. In such a circumstance, the individual's right of privacy must yield to the greater public interest in the dissemination of newsworthy material.

New York

Costlow v. Cusimano, 34 A.D.2d 196, 311 N.Y.S.2d 92 (1970).

Facts: Action based on defendant's publication and exhibition of photographs portraying death of plaintiff's children who suffocated when they trapped themselves in refrigerator located in plaintiff's home.

Test: New York recognizes a statutory right of privacy, however, if the subject matter is within the area of legitimate public interest, the statutory right must give way to the public's right to know.

Ohio

Le Crone v. Ohio Bell Telephone Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963).

Facts: Plaintiff sued defendant telephone company for invasion of privacy when it installed an extension line on wife's phone and ran that extension to separated husband's separate residence at his request.

Test: For a tort right of privacy to be actionable it must go to a truly private matter and be of a nature to cause mental suffering or humiliation to a person of ordinary sensibilities.

Oklahoma

McCormack v. Oklahoma Publishing Co., 613 P.2d 737 (Okla. 1980).

Facts: Plaintiff brought action against publishing company regarding publication of his past criminal record.

Test: Oklahoma adopts the Restatement (Second) Torts § 652D which recognizes a cause of action for invasion of privacy if the matter publicized is of a kind that would be highly offensive to a reasonable person *and* is not of legitimate concern to the public.

Oregon

Hamilton v. Crown Life Insurance Co., 247 Or. 554, 423 P.2d 771 (1967).

Facts: Action for invasion of right of privacy against insurer for disclosing contents of check delivered by insurer to plaintiff after husband died violent suicidal death.

Test: A cause of action does not exist unless the material published would be offensive to the ordinary reasonable person or if the matter is newsworthy.

Pennsylvania

Hogel v. W. T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974).

Facts: Suit for violation of right to privacy where corporate defendant gave notification of arrearages appearing in credit account to employers and relatives of debtors.

Test: Pennsylvania adopts the Restatement (Second) of Torts § 652D which makes invasion of privacy actionable if the matter publicized is of a kind that would be highly offensive to a reasonable person.

Rhode Island

Kalian v. People Acting Through Community Effort, Inc., (PACE), 408 A.2d 608 (R.I. 1979).

Rhode Island recognizes a cause of action for the strand of the right of privacy recognized as the unauthorized use of a name, portrait or picture for commercial advantage. Rhode Island does not recognize a cause of action for unreasonable publicity given to another's private life.

South Carolina

Meetze v. Associated Press, 266 S.C. 455, 95 S.E. 606 (1956).

Facts: Action for invasion of privacy against newspaper for reporting that twelve-year old mother gave birth to son.

Test: The right of privacy is not absolute. Some limitations are essential for the protection of the right of freedom of speech and the press and the interests of the public in having a free dissemination of news and information. The right of privacy cannot prohibit the publication of a matter which is of legitimate or public interest.

In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might cause mental distress to anyone possessed of ordinary feelings and intelligence, situated in like circumstances.

South Dakota

Montgomery Ward v. Shope, 286 N.W.2d 806 (S.D. 1979).

Facts: Plaintiff alleged invasion of privacy against creditor for various activities and methods used in attempting to collect debt.

Test: To be actionable the invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.

Texas

Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

Facts: Action for invasion of privacy against telephone company for installation of wiretap device on subscriber's telephone.

Test: To be actionable the publication must be one with which the public has no legitimate concern or be a wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Virginia

Evans v. Sturgill, 430 F. Supp. 1209 (W.D. Va. 1977).

Test: No general right of privacy exists in Virginia except for the limited right conferred by Virginia Code ¶ 8-650 which states that the use, for commercial purposes of the name, portrait or picture of any person without his consent is a misdemeanor.

Washington

Mark v. King Broadcasting Co., 27 Wash. App. 344, 618 P.2d 512 (1980).

Facts: Plaintiff brought defamation and privacy action against broadcasting company for three news stories concerning his pharmacy.

Test: Publication of legitimate news story does not constitute an actionable invasion of privacy.

Wisconsin

Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

Facts: Newspaper brought action seeking writ of mandamus to compel chief of police to disclose daily arrest records.

Test: Wisconsin recently enacted a right of privacy law, sec. 895.50 Stats. ch. 176, Laws of 1977 which provides that one whose privacy is unreasonably invaded is entitled to relief. However the right to relief depends on whether there is a legitimate public interest in the matter involved. Sec. 895.50(2)(c). The basic common-law approach is that where a matter of legitimate public interest is concerned, no cause of action for invasion of privacy will lie.