

HONORABLE BRIAN MCDONALD
Department 48
Noted for Consideration: May 21, 2020
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON LEAGUE FOR INCREASED
TRANSPARENCY AND ETHICS, et al.,

Plaintiffs,

v.

FOX CORPORATION, et al.

Defendants.

NO. 20-2-07428-4 SEA

MOTION OF NCTA – THE INTERNET &
TELEVISION ASSOCIATION AND THE
REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS TO FILE AN AMICI
CURIAE BRIEF

I. RELIEF REQUESTED

NCTA – The Internet & Television Association (“NCTA”) and the Reporters Committee for Freedom of the Press (“Reporters Committee”) respectfully request that this Court grant leave to file the attached amici curiae brief in support of the Fox Defendants’ motion to dismiss. *See Parsons v. Dep’t of Soc. & Health Servs.*, 129 Wn. App. 293, 302, 118 P.3d 930, 934 (2005) (holding that a trial court has discretion to permit amicus participation “if it may be helpful to the court”).

II. STATEMENT OF FACTS

NCTA is the principal trade association of the cable television industry in the United States, representing more than 200 cable networks, including news providers, and cable operators serving nearly 80 percent of U.S. cable subscribers. NCTA and its membership are united by the bedrock proposition that all cable programming networks, and all news outlets, are protected by the First

1 Amendment’s guarantee of a free press and freedom of speech.

2 The Reporters Committee is an unincorporated nonprofit association. The Reporters
3 Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news
4 media faced an unprecedented wave of government subpoenas forcing reporters to name confidential
5 sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other
6 legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

7 NCTA and the Reporters Committee are familiar with the constitutional issues raised in
8 Defendants’ motion to dismiss, as well as the arguments asserted in Plaintiff’s opposition. NCTA
9 and the Reporters Committee submit this proposed amici brief in the interest of ensuring that the
10 Court is fully informed about the constitutional issues at stake and the dangerous implications of
11 Plaintiff’s contention that news providers that distribute content over cable systems are somehow
12 excluded from the First Amendment’s purview. NCTA and the Reporters Committee frequently
13 participate in litigation in courts throughout the country, including in particular to ensure that their
14 members’ First Amendment protections are upheld.

15 **III. STATEMENT OF ISSUES**

16 Whether the Court should consider the brief of amici curiae NCTA and the Reporters
17 Committee in adjudicating the First Amendment issues presented in the motion to dismiss filed by
18 the Fox News Defendants.

19 **IV. EVIDENCE RELIED UPON**

20 NCTA and the Reporters Committee do not rely on any evidence in bringing this motion.

21 **V. ARGUMENT**

22 Washington courts routinely accept amicus curiae briefs in order “to help the court with
23 points of law.” *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692, 695
24 (2005). Trial courts are no exception: This Court has “discretion to permit” amicus “participation
25

1 DATED this 18th day of May, 2020.

2
3 I certify that this memorandum contains 670 words,
4 in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I, Donna Patterson, declare that I am employed by the law firm of Corr Cronin LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On May 18, 2020, I caused a true and correct copy of the foregoing document to be served on the persons listed below in the manner indicated:

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11 *Attorneys for Fox Defendants*

12 I declare under penalty of perjury under the laws of the state of Washington that the
13 foregoing is true and correct.

14 DATED at Seattle, Washington on May 18, 2020.

15 /s/ Donna Patterson
16 Donna Patterson

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WASHINGTON LEAGUE FOR
INCREASED TRANSPARENCY AND
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No. 20-2-07428-4 SEA

AMICI CURIAE BRIEF OF NCTA – THE
INTERNET & TELEVISION
ASSOCIATION AND THE REPORTERS
COMMITTEE FOR FREEDOM OF THE
PRESS

I. IDENTITY AND INTEREST OF AMICI CURIAE

This brief is filed on behalf of amici curiae NCTA – The Internet & Television Association (“NCTA”) and the Reporters Committee for Freedom of the Press (the “Reporters Committee”).

NCTA is the principal trade association of the cable television industry in the United States, representing more than 200 cable networks, including news providers, and cable operators serving nearly 80 percent of U.S. cable subscribers. NCTA and its membership are united by the bedrock proposition that all cable programming networks, and all news outlets, are protected by the First Amendment’s guarantee of a free press and freedom of speech. NCTA submits this brief in the interest of ensuring that the Court is fully informed about the

1 constitutional issues at stake and the dangerous implications of Plaintiff’s contention that news
2 providers that distribute content over cable systems are somehow excluded from the First
3 Amendment’s purview.

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5 Committee was founded by leading journalists and media lawyers in 1970 when the nation’s
6 news media faced an unprecedented wave of government subpoenas forcing reporters to name
7 confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae
8 support, and other legal resources to protect First Amendment freedoms and the newsgathering
9 rights of journalists.

11 II. ARGUMENT

12 The Plaintiff in this case has asserted that news providers do not enjoy First Amendment
13 protection when they distribute their programming over a cable television system. That radical
14 proposition is plainly wrong: The First Amendment unquestionably protects “[c]able
15 programmers.” *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 636 (1994).

16 Since the advent of cable television, the Supreme Court has explained time and again
17 that cable programmers are protected by the First Amendment. As the Court explained more
18 than 25 years ago in *Turner I*, “[t]here can be no disagreement on an initial premise: Cable
19 programmers and cable operators engage in and transmit speech, and they are entitled to the
20 protection of the speech and press provisions of the First Amendment.” 512 U.S. at 636. The
21 Court explained that “[t]hrough ‘original programming or by exercising editorial discretion,’”
22 cable programmers “‘see[k] to communicate messages on a wide variety of topics and in a wide
23 variety of formats.’” *Id.* (second alteration in original) (quoting *Los Angeles v. Preferred*
24 *Commc’ns, Inc.*, 476 U.S. 488, 494 (1986)). And those messages, whether they consist of news
25 or entertainment, enjoy the protections of the First Amendment, no less than content published

1 by newspapers or broadcast over the air. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 444
2 (1991) (“Cable television provides to its subscribers news, information, and entertainment. It
3 is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the
4 ‘press.’”); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000) (explaining
5 that Playboy’s adult cable programming was fully protected by the First Amendment).

6 While all cable programming enjoys First Amendment protection, the constitutional
7 prohibition against unwarranted governmental interference with programming on *news*
8 networks is especially clear. As the Supreme Court has explained, “speech on public issues
9 occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to
10 special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted). That
11 special protection does not depend on the *manner* in which such speech is distributed; it is
12 grounded in the *nature* of the speech itself. News media thus enjoy First Amendment protection
13 whether they distribute their content in a newspaper, via broadcast radio or television, or over
14 a cable system. *See, e.g., Greater Los Angeles Agency on Deafness, Inc. v. Cable News*
15 *Network, Inc.*, 742 F.3d 414, 430-32 (9th Cir. 2014) (CNN is protected by the First
16 Amendment); *Park v. Bd. of Trustees of Cal. State Univ.*, 2 Cal. 5th 1057, 1071, 393 P.3d 905,
17 914 (2017) (“The reporting of news, whether in print or on air, is constitutionally protected free
18 speech”); *see also Leathers*, 499 U.S. at 449 (finding “no evidence” that cable
19 programming “differs systematically in its message from that communicated by satellite
20 broadcast programming, newspapers, or magazines”); *Brown v. Entm’t Merchants Ass’n*, 564
21 U.S. 786, 790 (2011) (“[T]he basic principles of freedom of speech and the press, like the First
22 Amendment’s command, do not vary’ when a new and different medium for communication
23 appears.” (citation omitted)).¹

24 ¹ Indeed, a distinction between broadcast news and cable news would be especially absurd.
25 Broadcast news itself is typically distributed over cable systems. *See Denver Area Educ.*
Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 734 (1996) (plurality opinion) (explaining

1 Plaintiff's reliance on *Denver Area Educational Telecommunications Consortium, Inc.*
2 *v. FCC* is entirely misplaced. That case, in pertinent part, addressed a federal statutory mandate
3 that requires cable operators to lease channel capacity to third parties. A divided Court held
4 that a provision authorizing one group of private parties, *cable operators*, to refuse to carry
5 other private parties' indecent programming on leased access channels does not violate the First
6 Amendment (while striking down two related provisions). 518 U.S. 727, 737-53 (1996)
7 (plurality opinion); *id.* at 819-31 (Thomas, J, concurring in the judgment in part and dissenting
8 in part). But that decision in no way authorizes *governmental* censorship of a cable
9 programmer's speech. The Court by no means suggested, much less held, that news outlets
10 somehow shed their traditional First Amendment protections (i.e., protections from state action)
11 when they distribute their content over cable. To the contrary, the Court in *Denver Area*
12 reaffirmed the long-recognized "First Amendment interests of cable operators *and other*
13 *programmers.*" *Id.* at 743 (plurality opinion) (emphasis added); *see also id.* at 816 (Thomas, J,
14 concurring in the judgment in part and dissenting in part) (similarly recognizing "the First
15 Amendment rights of both cable operators *and cable programmers*" (emphasis added)).

16 In sum, "[t]here can be no disagreement" that cable news programmers—like any other
17 news distributors—"are entitled to the protection of the speech and press provisions of the First
18 Amendment." *Turner I*, 512 U.S. at 636. As a cable news programmer, Fox News is entitled
19 to that protection in this case.

20 III. CONCLUSION

21 For these reasons, NCTA and the Reporters Committee respectfully urge the Court to
22 grant Defendants' motion to dismiss on First Amendment grounds.
23

24 _____
25 that cable "channels may simply retransmit through cable the signals of over-the-air broadcast
stations").

1 DATED this 18th day of May, 2020.

2 LCR 7(b) Certification: I certify that this
3 memorandum contains 1,058 words, in
4 compliance with the Local Civil Rules.

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20 DATED at Seattle, Washington on May 18, 2020.

21 /s/ Donna Patterson
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