No. 11-481

In the Supreme Court of the United States

DISH NETWORK CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' motion for a preliminary injunction against the enforcement of Section 207 of the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1253.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-23a) is reported at 653 F.3d 771. An earlier version of the opinion of the court of appeals is reported at 636 F.3d 1139. The order of the district court (Pet. App. 24a-25a) is unreported.

JURISDICTION

The judgment of the court of the appeals was entered on February 24, 2011. A petition for rehearing was denied on August 9, 2011 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Direct-broadcast satellite (DBS) providers deliver television programming by transmitting signals from satellites located at designated orbital locations in space directly to satellite dishes of individual consumers. By international agreement, the United States has been assigned eight orbital locations, each of which is divided into 32 satellite channels. *In re Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, 21 F.C.C.R. 9443, 9444-9445 ¶ 3 (2006). Because transmissions from satellites in the same orbital location may cause signal interference, Congress has authorized the Federal Communications Commission (FCC or Commission) to grant DBS providers licenses that assign the use of specified channels in particular orbital locations. 47 U.S.C. 307; see 47 C.F.R. Pt. 25. Those licenses are limited in duration, and the FCC may grant or renew them only if doing so serves the public interest, convenience, and necessity. See 47 U.S.C. 301, 304, 307.

Congress enacted the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523 (SHVIA), to promote competition between DBS providers and cable providers by relieving DBS providers of copyright restrictions that had posed significant obstacles to the industry's growth. See *Satellite Broad. & Commc'ns Ass'n* v. *FCC*, 275 F.3d 337, 347-349 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002). SHVIA created a statutory copyright license that allows satellite carriers to transmit a local broadcast station's signal into that station's local market without obtaining authorization from, or paying royalties to, the copyright holders of individual programs. *Id.* at 349; see 17 U.S.C.

122(a) and (c). When a DBS carrier utilizes that statutory license with respect to one local station, it must carry, on request, the programming of all other stations in the same local market. 47 U.S.C. 338(a)(1). Congress has also required DBS carriers to set aside four to seven percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. 335(b).

2. In implementing SHVIA, the FCC has required DBS carriers to "treat all local television stations in the same manner with regard to picture quality." *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 F.C.C.R. 1918, 1969 ¶ 118 (2000). In 2008, the FCC applied that principle to high-definition (HD) signals by requiring "satellite carriers to carry each station in the market in the same manner, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD." *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 23 F.C.C.R. 5351, 5354 ¶ 5 (*2008 Rulemaking*); 47 C.F.R. 76.66(k).

The FCC's 2008 regulation, which is not challenged in this litigation, established a four-year timetable for compliance. Under that timetable, satellite providers were required to achieve compliance in 15% of the markets in which they carry local channels in HD by February 17, 2010; 30% by February 17, 2011; 60% by February 17, 2012; and 100% by February 17, 2013. 47 C.F.R. 76.66(k)(2); *2008 Rulemaking*, 23 F.C.C.R. at 5356 ¶ 8.

3. In the Satellite Television Extension and Localism Act of 2010 (STELA), Pub. L. No. 111-175, 124 Stat. 1218, Congress accelerated the four-year timetable established in the FCC's 2008 rule with respect to the date

by which DBS providers would be required to carry in HD format the signals of "qualified noncommercial educational television stations." STELA § 207(a), 124 Stat. 1253 (amending 47 U.S.C. 338). Specifically, Section 207 of STELA directs that by December 31, 2010, providers must carry the signals of such stations in HD in 50% of the markets in which they use the statutory copyright license to retransmit local broadcasts in HD. *Ibid.* (amending 47 U.S.C. 338(a)(5)(A)(i)). By December 31, 2011, they must carry the signals of such stations in HD in 100% of those markets. *Ibid.* (amending 47 U.S.C. 338(a)(5)(a)(ii)). A DBS carrier is exempt from that timetable if, by July 27, 2010, it entered into an agreement governing carriage of at least 30 qualified noncommercial stations. STELA § 207(b), 124 Stat. 1253 (amending 47 U.S.C. 338(k)(2)).

4. Petitioners operate one of the two major DBS carriers in the United States. Pet. App. 4a. On July 2, 2010, petitioners sought a preliminary injunction against the enforcement of Section 207 of STELA. *Id.* at 24a.

After filing suit, petitioners entered into a private HD carriage agreement with at least 30 qualified noncommercial educational television stations, thereby rendering themselves exempt from the accelerated timetable set forth in Section 207. Pet. App. 7a. That agreement, however, allows petitioners to withdraw from it if Section 207 of STELA is declared unconstitutional. Pet. 7. On July 30, 2010, the district court denied a preliminary injunction without opinion. Pet. App. 24a-25a.

5. The court of appeals affirmed. Pet. App. 1a-23a. The court rejected petitioner's argument that STELA was subject to strict scrutiny under the First Amendment. Observing that the statute was enacted to "promote fair competition," the court rejected petitioners'

"contention that Congress enacted § 207 because Congress thinks PBS is better than commercial television." *Id.* at 16a. Instead, the court explained, "[t]he record supports [the government's] assertion" that Section 207 of STELA "seeks to support expression, not suppress it." *Id.* at 15a-16a.

Applying intermediate scrutiny, the court of appeals found that Section 207 furthers the government's substantial interests in "eliminating restraints on fair competition" and "assuring that the public has access to a multiplicity of information sources." Pet. App. 19a (citation omitted). The court explained that Section 207 advances those interests by protecting the viewer funding mechanism on which local public stations depend. *Ibid.* The court of appeals concluded that "the district court did not abuse its discretion in determining that [petitioners] failed at this stage of the proceedings to demonstrate that § 207 would likely not survive intermediate scrutiny." *Id.* at 22a.

6. In response to a petition for rehearing, the court of appeals amended its opinion. The court clarified that, at the preliminary injunction stage, it "need not decide whether § 207 is actually content-neutral." Pet. App. 2a. Applying the standard that governs appeals from the denial of interim relief, the court explained that the district court had not abused its discretion in concluding that Section 207 "is likely a content-neutral restriction on speech." *Id.* at 18a. The court of appeals then denied rehearing en banc. *Id.* at 2a.

ARGUMENT

Reviewing the denial of a preliminary injunction, the court of appeals correctly affirmed the district court's determination that petitioners are unlikely to succeed on

their First Amendment challenge to Section 207 of STELA. The Ninth Circuit's decision does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner's request for a preliminary injunction has been overtaken by events, and it appears that the case no longer presents a live claim for relief. Further review is not warranted.

1. The court of appeals correctly held that petitioners are unlikely to prevail on their claim that Section 207 of STELA violates the First Amendment. As the court recognized, Section 207 concerns only the timing of a change in the technical manner of signal transmission, and it does not advance or suppress any message.

a. Petitioners operate DBS frequencies by virtue of federal licenses, and they have long been subject to a variety of conditions imposed on those licenses. For example, petitioners are required to set aside four to seven percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. 335(b). In *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957, 973-977 (1996), the D.C. Circuit upheld that requirement against a First Amendment challenge.

In addition, under SHVIA, petitioners have been granted the right to transmit local programming without regard to otherwise-applicable copyright restrictions. If they exercise that right with respect to programming in a particular local market, they must carry, on request, the programming of all other stations in the same market. 47 U.S.C. 338(a)(1). That requirement has also been upheld against First Amendment challenge. *Satellite Broad. & Commc'ns Ass'n* v. *FCC*, 275 F.3d 337, 352-366 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002).

An FCC regulation implementing 47 U.S.C. 338(a)(1) requires petitioners to transmit *all* stations in HD format in any market in which they invoke the SHVIA compulsory copyright license to transmit in HD. 47 C.F.R. 76.66(k). Under the timetable established by the regulation, DBS carriers must achieve compliance in 60% of their markets by February 17, 2012, and 100% by February 17, 2013. 47 C.F.R. 76.66(k)(2). The FCC regulation was issued in 2008, and petitioners have not challenged it.

b. At issue in this case is Section 207 of STELA, the only effect of which is to accelerate the timetable set out in the FCC's regulation. Assuming that the minor alterations to the timetable impose a First Amendment burden on petitioners, that burden is "minimal and nuanced." Pet. App. 12a. Section 207 easily withstands any First Amendment scrutiny that may be applicable.

Congress has long recognized that public broadcast stations operate at a commercial disadvantage, and it has repeatedly acted to ensure that such stations are available to viewers and are not subordinated in the commercial marketplace.[1] The court of appeals cor-

[1] More than 40 years ago, Congress found that it is "in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. 396(a)(9). Congress has adhered to that policy ever since. See, *e.g.*, 47 U.S.C. 390-393a (establishing a program of federal aid to be used in the construction of public telecommunication facilities); 47 U.S.C. 396-399b (creating the Corporation for Public Broadcasting); 47 U.S.C. 394 (establishing the National Endowment for Children's Educational Television); 47 U.S.C. 396(a)(1) (declaring that it is "in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes"); 47 U.S.C. 535(a)

rectly held that the accelerated timetable established by Section 207, like previous measures, furthers the government's substantial interest in "assuring that the public has access to a multiplicity of information sources." Pet. App. 19a (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 663 (1994)). See *Turner*, 512 U.S. at 663 (ensuring public "access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment").

Because public television funding depends largely on donations from local viewers, a delay in carrying public television stations in the same preferred format as other stations would compromise the financing mechanism on which they depend. Pet. App. 20a. The court of appeals correctly held that "it was reasonable for Congress to conclude that allowing satellite carriers to delay offering PBS in HD would lead to anticompetitive results," and that Section 207 "was necessary to promote" the substantial interest in protecting the viability and competitiveness of public television. *Id.* at 20a-21a.

Contrary to petitioners' suggestion (Pet. 34-35), the legislative record amply demonstrates the reasonableness of Congress's determination. See *Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act: Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong., 1st Sess. 56 (2009) (statement of Willard D. Rowland, Jr., Ph.D., Association of Public Television Stations) (explaining the necessity of STELA Section 207 "to ensure that Dish's 14 million customers have access to the full benefits of their

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(requiring cable operators to carry the signals of "qualified noncommercial educational television stations").

local public television stations' digital offerings"); H.R. Rep. No. 349, 111th Cong., 1st Sess. 23 (2009) (noting that "millions of consumers do not have access to public broadcasting in high definition format," and that this failure of satellite carriers "constitutes discriminatory treatment" that required legislative response).

The court of appeals correctly deferred to those legislative findings, which are supported by the record below. See *Turner*, 512 U.S. at 665-666 (plurality opinion) ("Congress' predictive judgments are entitled to substantial deference" because Congress is "far better equipped than the judiciary to amass and evaluate the vast amounts of data" relevant to television regulation.) (internal quotation marks omitted). In particular, the record evidence demonstrated that although Congress provides some support for public television stations through grants to the independent Corporation for Public Broadcasting (CPB), most support for those stations is derived from other sources, and the stations' "daily operations are directly funded by donations from local viewers." C.A. E.R. 178. Dependence on local viewers' contributions helps to ensure that local public stations' programming is responsive "to the interests of their communities." *Id.* at 177-179; S. Rep. No. 396, 108th Cong., 2d Sess. 3, 11 (2004).[2]

[2] There is no merit to petitioners' contention (Pet. 35) that the court of appeals, in rejecting the opinion of petitioners' expert, ignored the "only evidence in the record as to the actual effect of [petitioners'] editorial HD decision." In opposing the motion for a preliminary injunction, the government was not required to offer directly competing expert testimony. See *Preminger* v. *Principi*, 422 F.3d 815, 823 n.5 (9th Cir. 2005). In any event, the court of appeals evaluated the opinion of petitioner's expert against the weight of the legislative and district court record and determined that Congress had acted reasonably. Pet. App. 20a-21a.

Petitioners' *amicus* suggests (C-SPAN Br. 8) that technological advances have undercut the need for any "must-carry" rules because viewers have ready access to over-the-air signals. But as the Fourth Circuit has explained, "[f]or subscribing households, satellite becomes the primary source of television programming, and it follows that satellite subscribers will be less likely to watch non-carried broadcast stations even if they have antennas that can capture a clear signal from those stations." *Satellite Broad.*, 275 F.3d at 360 n.8. In any event, as petitioners' declarant acknowledged below, attempting to obtain over-the-air HD is an option only if "the HD signal is strong enough to reach the owners' residence." C.A. E.R. 76; see *id.* at 220 (admitting that over-the-air HD is not available in "locations where local geography inhibits signal reception"). Many residents of rural or mountainous areas, or areas with weak broadcast signal or signal interference, cannot receive over-the-air transmission in HD or otherwise. That is often why they seek out satellite providers like DISH in the first place.[3]

c. The court of appeals was also correct in concluding that Section 207 is likely a content-neutral restriction. The statute at issue in *Turner* required cable operators to carry "qualified noncommercial educational television station[s]," and its definition of that term was for all relevant purposes identical to the definition used in Section 207. See 47 U.S.C. 535(*l*)(1). This Court held that the carriage requirement was content-neutral, emphasizing that the FCC and Congress have negligible influence over programming because the government

[3] Dish Network Press Release (May 27, 2010), http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=474211 (DISH "serv[es] the many rural markets that lack vital local TV signals").

may not use its funding of the CPB to gain leverage over any programming decision. *Turner*, 512 U.S. at 651-652.

Like the statute at issue in *Turner*, Section 207 is content-neutral because it does not mandate any specific quantity of particular programming or require DBS providers to broadcast any particular programs. Pet. App. 16a-17a (citing *Turner*, 512 U.S. at 651). Indeed, it is undisputed that the government cannot control the programming of public television stations either directly or through funding to the CPB because appropriations are not year-to-year but instead cover a long period of time. *Id.* at 15a ("[T]he government is forbidden by law from exercising any direction, supervision, or control over the [CPB]."). Section 207 does nothing to alter that arrangement.

Moreover, even a statute that facially distinguishes a category of speech is content-neutral if it "serves purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). As the court of appeals recognized, Section 207 was enacted to ensure the continued availability of public television for viewers, not to hinder speech rights of DBS providers. Pet. App. 15a-16a. Congress has long supported public television stations not because they broadcast any particular content but because their unique structure insulates them from pressures that motivate the programming choices of commercial broadcast stations. See 127 Cong. Rec. 13,145 (1981) (Rep. Gonzalez) (acknowledging the need to "insulate public broadcasting from special interest influences—political, commercial, or any

other kind"); H.R. Rep. No. 82, 97th Cong., 1st Sess. 16 (1981).[4]

2. Contrary to petitioners' contention (Pet. 14-16, 20-22), the decision below does not conflict with any decision of another court of appeals.

Petitioners suggest (Pet. 14-16) that the circuits have rendered conflicting decisions concerning the level of First Amendment scrutiny that applies to regulation of satellite television. In fact, only one court of appeals has squarely addressed that question. In *Time Warner*, the D.C. Circuit rejected a First Amendment challenge to the statutory requirement that satellite carriers set aside four to seven percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 U.S.C. 335(b). The court held that regulation of satellite carriers "should be analyzed under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media." 93 F.3d at 975.

Contrary to petitioners' contentions, neither the Fourth Circuit nor the court below has rejected *Time Warner*'s holding. In *Satellite Broadcasting & Communications Ass'n*, the Fourth Circuit expressly declined to decide whether the "carry one, carry all" statute applicable to satellite providers was subject to rational-

[4] Petitioners' reliance on *Bullfrog Films, Inc.* v. *Wick*, 847 F.2d 502 (9th Cir. 1988), is misplaced. *Bullfrog Films* involved standards promulgated directly by the United States Information Agency for determining which American films would be exempt from import duties and license requirements under an international treaty. The regulations established an enforcement mechanism that involved close examination of films based on their content, and the rules were not justified by content-neutral interests. See *id.* at 505, 511. In any event, any intra-circuit conflict with that decision would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

basis review. 275 F.3d at 355 & n.6. Instead, the court determined that, because the statute was content-neutral under *Turner*, it was "[a]t most" subject to intermediate scrutiny. *Id.* at 355. Because the court held that the "carry one, carry all" rule survived intermediate scrutiny, it declined to "address the FCC and its intervenors' argument that the rule should be evaluated under a more lenient standard." *Ibid.*

Similarly, the court below held that Section 207 of STELA is "likely a content-neutral restriction," and it evaluated the provision under intermediate scrutiny. Pet. App. 18a. Having determined that Section 207 could survive such scrutiny, the court had no occasion to determine whether a lesser standard of scrutiny was appropriate. The court did not reject, or even discuss, the D.C. Circuit's reasoning in *Time Warner*.

Petitioners fare no better in attempting to identify a circuit split on the vaguely-defined question of "how to treat educational and public affairs programming." Pet. 16 (capitalization omitted). They characterize the D.C. Circuit's analysis in *Time Warner* as a "sliding scale" approach to the question, and they attempt to contrast that approach with the decision below, which they describe as holding that "educational requirements are categorically content-neutral." Pet. 22. Contrary to petitioners' suggestion, the court of appeals' observation that Section 207 "seeks to support expression, not suppress it" (Pet. App. 15a-16a), does not constitute a categorical holding that all educational carriage requirements imposed on DBS providers are content-neutral. Indeed, the court below did not even decide whether Section 207 "is actually content-neutral"; it merely held that the provision is "likely a content-neutral restriction

on speech." *Id.* at 18a. Petitioners identify no authority that conflicts with that conclusion.

3. Petitioners acknowledge that the issues raised in this case are unlikely to recur. See Pet. 25 ("[T]here will be few other opportunities for this Court to address the question in the future" because the relevant regulatory provisions, "for the most part, * * * have all been challenged and upheld."). Denial of the petition is appropriate for that reason alone. But even if the question presented otherwise warranted review, this case would be a poor vehicle for addressing it because events have overtaken petitioners' request for a preliminary injunction, and it appears that the case no longer involves a live claim for relief. Cf. *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 118, 122 (1994) (per curiam) (dismissing writ as improvidently granted because "deciding this case would require us to resolve a constitutional question that may be entirely hypothetical," and noting that "as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants").

In July 2010, petitioners entered into a contract to carry HD programming from at least 30 qualified noncommercial stations. Pet. 7. As a result, they are no longer required by statute to comply with the accelerated timetable set forth in Section 207. See STELA § 207(a), 124 Stat. 1253 (amending 47 U.S.C. 338(a)(5)(A)(ii)). Petitioners assert (Pet. 7) that they postponed plans to launch HD service in ten new markets when STELA was enacted, but they have not alleged that the purported delay persisted after they entered into the carriage contract. See C.A. E.R. 11-12, 201.

Petitioners remain subject to the unchallenged 2008 FCC rule that requires satellite providers to carry each station in a market in the same manner, "including carriage of HD signals in HD format if any local station in the same market is carried in HD." 47 C.F.R. 76.66(k). Petitioners must comply with that regulation in 60% of their markets by February 17, 2012, and 100% by February 17, 2013. 47 C.F.R. 76.66(k)(2). The record indicates that petitioners provide some HD service in at least 156 markets (C.A. E.R. 245), and that all but one of those markets include at least one PBS member station (*id.* at 79-124). The FCC regulation has therefore required petitioners to carry all local stations in HD format in approximately 46 markets (30% of their total number) since February 2011, and it will require petitioners to comply in approximately 93 markets (60% of their total number) by February 27, 2012. The 2008 regulation thus requires petitioners to carry in HD format all local stations, including PBS stations, in far more than the 30 markets covered by the contract.

Accordingly, although the entry of a preliminary injunction would give petitioners the option of voiding their contract, the regulation appears to impose substantially greater carriage obligations than does the contract itself. It is therefore difficult to see how the entry of an injunction would provide petitioners any meaningful benefit. More generally, it is unclear how any future order in this suit could redress a cognizable injury. Even assuming that petitioners continue to have standing, the practical effect of any favorable order would be negligible and short-lived, since petitioners must comply with the FCC regulation in *all* markets by

February 17, 2013, at which point their challenge will be entirely moot.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys

DECEMBER 2011

[5] Petitioners suggest (Pet. 2-3) that the petition should be held pending the Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293 (oral argument scheduled for Jan. 10, 2012), but they fail to explain how the cases relate to one another. In any event, holding the petition would simply exacerbate the problem described in the text because, as petitioners acknowledge (Pet. 26), Section 207 of STELA will have no practical effect after February 2013, when satellite providers will be required by the 2008 regulation to provide HD coverage of all stations in 100% of the markets in which they provide HD coverage of any station. 47 C.F.R. 76.66(k).