No. 00-623

In the Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 47 U.S.C. 533(f)(1)(A), which limits the total number of subscribers that a cable television system operator may serve through cable systems that it owns, and 47 U.S.C. 533(f)(1)(B), which limits the number of channels a cable system may occupy with affiliated programming, violate the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 211 F.3d 1313. The opinion of the district court (Pet. App. 18a-40a) is reported at 835 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2000. A petition for rehearing was denied on July 21, 2000 (Pet. App. 41a, 42a). The petition for a writ of certiorari was filed on October 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act or Act), significantly restructured federal regulation of the cable television industry. "Among other things," this Court has noted, the Act "subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators." *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 630 (1994) (*Turner I*). At issue in this case are two provisions of the 1992 Cable Act: the "subscriber-limit provision," 47 U.S.C. 533(f)(1)(A), and the "channel-occupancy provision," 47 U.S.C. 533(f)(1)(B).

The subscriber-limit provision requires the FCC "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. 533(f)(1)(A). The channel-occupancy provision requires the FCC "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. 533(f)(1)(B).

The 1992 Cable Act is the product of "three years of hearings on the structure and operation of the cable television industry." *Turner I*, 512 U.S. at 632; see

S. Rep. No. 92, 102d Cong., 1st Sess. 3-4 (1991) (Senate Report); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (House Report). Congress's conclusions based on those extensive hearings are embodied in legislative findings that are "recited in the text of the Act itself." *Turner I*, 512 U.S. at 632; see 1992 Cable Act § 2(a), 106 Stat. 1460-1463.

Among other things, Congress found that, "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act § 2(a)(2), 106 Stat. 1460. "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." *Ibid.* That market power is a matter of concern, Congress explained, because by the time the 1992 Cable Act was adopted, "the cable television industry ha[d] become a dominant nationwide video medium," with more than "60 percent of the households with televisions" subscribing. § 2(a)(3), 106 Stat. 1460.

Congress also found that the "cable industry has become highly concentrated." 1992 Cable Act § 2(a)(4), 106 Stat. 1460. As Congress explained, "the potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." *Ibid.* In addition, Congress found, "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership." § 2(a)(5), 106 Stat. 1460. "As a result," Congress stated, "cable operators have the incentive and ability to favor their affiliated programmers." *Ibid.* Congress explained that such vertical integration "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. The 1992 Cable Act's subscriber-limit and channel-occupancy provisions are intended to address Congress's concerns about some of the consequences of increasing horizontal concentration and vertical integration in the cable television industry.

2. Upon the passage of the 1992 Act, petitioner, then and now one of the nation's largest cable operators, filed a facial constitutional challenge to a number of the Act's requirements, including the subscriber-limit and channel-occupancy provisions. On cross-motions for summary judgment, the district court upheld the channel-occupancy provision but struck down the subscriber-limit provision. Pet. App. 28a & n.11, 34a-35a.

The district court upheld the channel-occupancy provision in the course of affirming the constitutionality of several of the 1992 Act's constraints upon vertically-integrated cable programmers. Pet. App. 28a. The court explained that the vertically-integrated programmer provisions are "content-neutral regulatory measures designed to correct a market to which access was controlled by those who own the technology" and address "an altogether understandable tendency on the part of operators to give preferential treatment to those programmers in which the operator has an economic interest." *Id.* at 27a-28a. The court emphasized that, because those statutory constraints are "based on a speech-neutral programmer characteristic, i.e., the economics of ownership," they are "entirely unrelated to the content of any program." *Id.* at 28a. The court concluded that the channel-occupancy restrictions, "[l]ike the other vertical integration restrictions[,] * * * appear unrelated to content." *Id.* at 28a n.11.

The district court assumed that the 1992 Cable Act's subscriber-limit provision is likewise content-neutral, and that intermediate First Amendment scrutiny is therefore also applicable to that provision. Pet. App. 35a. The court nonetheless concluded that "there would appear to be no circumstances under which the FCC could adopt constitutionally compatible regulations." *Ibid.* The court stated that "[a]ny governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience." The court found such a limitation incompatible with the First Amendment's protection of "the right of every citizen to reach the minds of any willing listeners." *Ibid.*

3. The court of appeals reversed the district court in part and upheld the constitutionality of both challenged provisions. Pet. App. 1a-17a.[1]

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[1] In an intervening appeal, the court of appeals upheld the constitutionality of most of the provisions of the 1992 Cable Act that had been challenged before the district court. *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996). The court "express[ed] no opinion as to the constitutionality" of the subscriber-limit or the channel-occupancy provisions (*id.* at 980), however, because the FCC had in the interim promulgated rules implementing the provisions. See 47 C.F.R. 76.503(a) (1998), amended, *In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, *Third Report and Order*, 14 FCC Rcd 19,098 (1999) (*Third Horizontal Ownership Limits Report*) (setting subscriber limit at 30% of all multichannel video programming subscribers); 47 C.F.R. 76.504(a) (setting channel-occupancy limit at 40% of activated channels). The court of appeals accordingly chose to consolidate petitioner's constitutional challenge to the

The court concluded that neither the subscriber-limit nor the channel-occupancy provision is a content-based restriction on speech. Pet. App. 8a, 15a. The court explained that Congress enacted the subscriber-limit provision out of concern that cable operators might use their "bottleneck power" over video programming that is transmitted to a subscriber's home "to exclude other providers of cable programming." *Id.* at 7a. The court emphasized, however, that Congress's "concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public." *Ibid.* Congress "plac[ed] a value upon diversity and competition in cable programming," the court stated; but in doing so "Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." *Ibid.* Likewise, the court concluded that the channel-occupancy provision operates "without regard to the content of either the cable operator's speech or that of the unaffiliated programmer for which it secures an outlet." *Id.* at 14a. The court therefore evaluated both challenged provisions pursuant to an intermediate standard of First Amendment scrutiny, under which a statute will be sustained as long as it advances "important governmental interests unrelated to the suppression of free speech" and "does not burden substantially more speech than necessary to further those

1992 Cable Act's subscriber-limit and channel-occupancy provisions with its challenge to the FCC's implementing regulations. Petitioner's challenge to the FCC's implementing regulations was later severed and remains pending before the court of appeals. See Pet. App. 2a-3a; *Time Warner Entertainment Co.* v. *FCC*, No. 94-1035 (D.C. Cir.) (argued Oct. 17, 2000).

interests." *Id.* at 8a (citation omitted); see also *id.* at 15a.

On the merits, the court of appeals upheld the constitutionality of both provisions. The court held that, by addressing the increasing concentration of the cable industry, the subscriber-limit provision advances the government's important interests of preserving "the diversity of information available to the public" and preventing "a barrier to the entry of new cable programmers." Pet. App. 11a. The court rejected petitioner's argument that the subscriber-limit provision was unnecessary because it "focuses upon behavior already arguably proscribed by other laws." *Id.* at 12a. The court observed that the "subscriber limits provision * * * took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions." *Ibid.* Such a "structural limitation," the court stated, "adds a prophylaxis to the law and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior." *Ibid.*

The court likewise ruled that Congress had a reasonable basis for determining that the channel-occupancy provision would advance important government purposes, by "prevent[ing] cable operators from favoring affiliated programmers and possibly even excluding others." Pet. App. 16a. The court explained that, while "a cable operator has an incentive to offer an attractive package of programs to consumers," it "also has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise the consumers' interests." *Id.* at 16a-17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The 1992 Cable Act directs the FCC to establish "reasonable" limits on the number of subscribers that an operator can reach through systems that it owns, 47 U.S.C. 533(f)(1)(A), and "reasonable" limits on the number of channels on a cable system that can be occupied by programming that is affiliated with the cable operator, 47 U.S.C. 533(f)(1)(B). To prevail on its facial constitutional challenge to those provisions, petitioner must show that no implementing regulations adopted by the FCC, no matter how generous to the cable operator, could be consistent with the First Amendment. Petitioner has failed to satisfy that heavy burden.

Petitioner's principal contention (Pet. 10-22) is that the subscriber-limit and channel-occupancy provisions are subject to strict scrutiny rather than intermediate First Amendment scrutiny. That contention cannot be squared with this Court's decisions in *Turner I*, *supra*, and *Turner Broadcasting System* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*). As this Court made clear in *Turner I*, strict scrutiny under the First Amendment is reserved for laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." 512 U.S. at 642. In contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Ibid.* (citation omitted).

The application of the Act's subscriber-limit provision depends on "the number of cable subscribers" that a cable operator "is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. 533(f)(1)(A). The channel-occupancy provision applies to cable operators only insofar as they have an "attributable interest" in a cable programmer. 47 U.S.C. 533(f)(1)(B). Neither provision refers to, or makes its application dependent in the slightest upon, the content of the programming to be distributed by the operator. Accordingly, the court of appeals correctly concluded that both provisions are content-neutral and subject only to intermediate First Amendment scrutiny. Pet. App. 8a, 15a.

Petitioner contends that, irrespective of content-neutrality, the subscriber-limit and channel-occupancy provisions are subject to strict First Amendment scrutiny because they impose "direct" restraints on speech that "necessarily reduce[] the quantity of expression." Pet. 11, 16 (citation omitted). But the restraints imposed by the subscriber-limit and channel-occupancy provisions of the 1992 Cable Act are no more "direct" than are those imposed by the "must-carry" provisions of the same statute, which require cable operators to set aside up to a third of their channel capacity to carry the signals of commercial broadcast stations and non-commercial educational stations requesting such carriage. 47 U.S.C. 534, 535. This Court applied intermediate scrutiny to those must-carry provisions in *Turner I*, 512 U.S. at 662, and *Turner II*, 520 U.S. at 189.

Moreover, contrary to petitioner's contention (Pet. 11), the provisions at issue in this case are not intended to and do not restrict the overall quantity of expression.

To the contrary, by preventing cable operators from exercising bottleneck monopoly power, the provisions ensure that cable operators do not prevent unaffiliated cable programmers, who have their own First Amendment expressive rights, from reaching their intended audience. As this Court stated in *Turner I*, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." 512 U.S. at 657.

Petitioner also contends (Pet. 14) that imposing restrictions on expression in order to promote a diversity of speech is inherently content-based. That submission is plainly incorrect. As the court of appeals observed, "[b]y placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." Pet. App. 7a. Indeed, as this Court has repeatedly recognized, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663; see also *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

Nor does the court of appeals' decision create an exception to First Amendment principles for the cable medium, as petitioner contends (Pet. 16). Under longstanding First Amendment principles, courts take account of the special aspects of each medium of communication in evaluating restrictions on expression. See, *e.g.*, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). The "unique physical characteristics of cable transmission * * * do not require the alteration of settled principles of our First Amendment jurisprudence," but neither should they "be ignored when determining the constitutionality of regulations affecting cable speech." *Turner I*, 512 U.S. at 639. Here, as this Court also emphasized in upholding the constitutionality of the 1992 Cable Act's "must carry" provisions, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. As a result, "simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude." *Ibid.* In short, "[a] cable operator, unlike speakers in other media, can * * * silence the voice of competing speakers with a mere flick of the switch." *Ibid.*[2]

[2] For this reason, petitioner's attempt to analogize the subscriber-limit and channel-occupancy provisions to restrictions on the operations of newspapers (Pet. 2) is entirely misplaced. As this Court explained in *Turner I*, unlike a cable operator, "[a] daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not

Petitioner suggests (Pet. 20) that the court of appeals' reliance on the cable medium's bottleneck power is undermined by recent developments in the marketplace, such as "the emergence of the Internet and the contemporary ability of broadcast television, broadband telephone networks, and direct broadcast satellites to deliver video programming to the public." Congress is the appropriate body to determine whether competition in the overall delivery of video programming has advanced to the point where the structural provisions of the 1992 Cable Act are no longer necessary. In addition, the FCC can take account of developments in the video programming market to adjust the rules that Congress has directed it to promulgate, and for that reason it has committed to reviewing its subscriber-limit rules every five years. See *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order*, 8 FCC Rcd 8565, 8583 (1993).

In any event, petitioner itself emphasizes (Pet. 1) that cable television remains "a vast electronic medium that is responsible for bringing Americans much of their news, information, and entertainment." While alternative methods of distribution of multichannel video programming have grown in significance, the latest available figures (as of June 2000) show that 80% of all subscribers to multichannel video programming distributors "received their video programming from a franchised cable operator." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual*

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thereby prevent other newspapers from being distributed to willing recipients in the same locale." 512 U.S. at 656.

Report ¶ 5 (Jan. 8, 2001) (*Seventh Competition Report*).[3] Thus, cable television remains, now as in 1992, "a dominant nationwide video medium." 1992 Cable Act § 2(a)(3), 106 Stat. 1460.[4]

2. Under intermediate First Amendment scrutiny, "[a] content-neutral regulation will be sustained * * * if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662; *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In this case, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663. Likewise, "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Id.* at 664. By addressing the concerns raised by horizontal concentration and vertical integration in the cable industry, the subscriber-limit and channel-occupancy provisions of the 1992 Cable Act advance

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[3] We have lodged a copy of the *Seventh Competition Report* with the Clerk.

[4] Contrary to petitioner's suggestion (Pet. 18 n.5), there is no reason to hold the petition in this case for the Court's decisions in *United States* v. *Vopper*, No. 99-1728, and *Bartnicki* v. *Vopper*, No. 99-1687 (argued Dec. 5, 2000), or for *FEC* v. *Colorado Republican Federal Campaign Committee*, No. 00-191 (to be argued Feb. 28, 2001). Neither of those cases has anything to do with the cable industry or with the constitutionality of regulations designed to preserve a diversity of voices or to regulate fair competition in a media industry.

these important governmental interests without unnecessarily burdening expressive activity.

It was entirely reasonable for Congress to conclude that the cable industry's increasing market concentration "threatened the diversity of information available to the public and could form a barrier to the entry of new cable programmers." Pet. App. 11a. By definition, increasing concentration in a media industry marks a corresponding reduction in the number of media voices available to consumers. See Senate Report 32-33. Moreover, there was evidence before Congress that programmers seeking to establish a successful cable channel are likely to be forced to deal with a dominant cable operator only on unfavorable terms and conditions, unless sufficient competitive programming outlets remain. See *id.* at 33. Thus, the House Report pointed to evidence indicating that "the size of certain [cable operators] could enable them to extract concessions from programmers, including equity positions, in exchange for carriage," thereby "discourag[ing] entry of new programming services, restrict[ing] competition, [and] impact[ing] adversely on diversity." House Report 42-43.[5] The subscriber-limit provision embodies Congress's effort to ensure that cable operators do not

[5] To achieve long-term viability, a newly-established cable programming service must achieve a certain level of subscribership, a level the FCC has most recently estimated at 15 million subscribers, or roughly 20% of the market. *Third Horizontal Ownership Limits Report*, 14 FCC Rcd at 19,115-19,116; see also *id.* at 19,117-19,118 (estimating that a new channel has a 50% chance of obtaining subscribers that are not actively denied to it). If a few companies own most of the cable systems in the country, a new programming service will not be able to succeed in the cable marketplace without acceding to the terms and conditions imposed by large operators with dominant systems of distribution.

dominate the national market for video programming to the detriment of diversity and fair competition.

Likewise, vertical integration gives "cable operators * * * the incentive and ability to favor their affiliated programmers," and "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." Pet. App. 16a (quoting 1992 Cable Act § 2(a)(5), 106 Stat. 1460-1461). Congress was concerned that when a vertically integrated cable operator is confronted with a choice between purchasing the programming of a service with which the operator is affiliated, or purchasing the programming of a service with which the operator has no ownership relation, the operator will give preference to the affiliated programmer, since the operator has a financial stake in the programmer's operations. See Senate Report 25-26; House Report 41. The channel-occupancy provision seeks to ensure that each cable system preserves sufficient outlets for unaffiliated programming, thereby furthering the governmental interests in media diversity and fair competition at the local level.

Petitioner contends (Pet. 24) that the court of appeals' analysis of the statute rested on "unadorned speculation." That submission is without merit. In evaluating the subscriber-limit provision, the court of appeals specifically noted the evidence that horizontal concentration in the cable industry "had increased dramatically," and that, "[b]y 1990, the five largest cable operators served nearly half the country's cable subscribers." Pet. App. 10a (citing Senate Report 32); see also *Turner II*, 520 U.S. at 197-198 (opinion of Kennedy, J.) (reciting evidence of horizontal concentration). Such increasing concentration necessarily resulted in a "reduction in the number of media voices available to consumers" of video programming, as

Congress recognized. 1992 Cable Act § 2(a)(4), 106 Stat. 1460. As the court of appeals noted (Pet. App. 10a), Congress also had before it evidence that such concentration resulted in large cable operators having the power to "determine what programming services can 'make it' on cable," and to "force programmers to buy their way onto cable by giving up an equity interest in their programming." See Senate Report 33.

The increasing vertical integration at the time of the passage of the 1992 Cable Act is also indisputable. Congress noted that, of the "68 nationally delivered cable video networks, 39 * * *, or 57 percent, have some ownership affiliation with the operating side of the cable industry." House Report 41; see also Senate Report 25 (noting that Viacom, which owns Viacom Cable Systems, "owns programming services such as MTV, Showtime, and Nickelodeon," and TCI, then the largest cable multisystem operator, "ha[d] financial interests in programming services such as American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore"); *Turner II*, 520 U.S. at 198 (opinion of Kennedy, J.). Because of the frequent common ownership between cable operators and cable programmers, Congress found, "cable operators have the incentive and ability to favor their affiliated programmers," which "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act § 2(a)(5), 106 Stat. 1460-1461; see House Report 41.[6]

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[6] Petitioner asserts that Congress's findings should be discounted because the testimony in the legislative record was "self-interested." Pet. 23. In doing so, petitioner "displays a lack of regard for Congress' factfinding function." *Turner II*, 520 U.S. at 199 (opinion of Kennedy, J.). "It is the nature of the legislative process to consider the submissions of the parties most affected by

Petitioner also contends (Pet. 23) that there is no evidence that cable operators have actually refused to carry unaffiliated programming services solely on anticompetitive grounds. But as one witness before Congress noted,

> You don't need a Ph.D in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services * * * in which he does *not* have an equity position.

Senate Report 26. See generally *Turner II*, 520 U.S. at 196-199 (opinion of Kennedy, J.) (summarizing the legislative record). Congress was also entitled to act against the demonstrated potential for harm, without waiting for the damage to important governmental interests to occur. See *Turner I*, 512 U.S. at 671-672 (Stevens, J., concurring in part and concurring in the judgment) ("[E]ven if Congress had had before it no historical evidence that terminations or refusals of carriage had already occurred, it could reasonably infer that cable operators' bottleneck control, together with the already high degree of vertical integration in the industry, would motivate such conduct in the near future.") (footnotes omitted).[7]

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legislation"; indeed, cable operators also "sent representatives before Congress to try to persuade them of their side of the debate." *Ibid.*

[7] Petitioner derides (Pet. 24-26) the court of appeals' reference to "economic common sense" (Pet. App. 17a) in upholding Congress's judgment in this case. Contrary to petitioner's suggestion, the First Amendment does not require judges to check their

Finally, petitioner complains that the court of appeals did not base its decision on current market statistics. Pet. 25. But current figures do nothing to undermine the court of appeals' analysis. Horizontal concentration and vertical integration in the cable industry remain high. As the most recent (June 2000) figures show, "[t]he ten largest [cable] operators now serve close to 90 percent of all U.S. cable subscribers." *Seventh Competition Report* ¶ 15. And while the percentage of national programming networks affiliated with a cable operator has declined somewhat since the passage of the 1992 Cable Act, see *id.* ¶ 173 (noting that in 2000, cable operators were vertically integrated with 99 of 281, or 35%, of satellite-delivered national programming networks), "nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable [operator]," and "11 out of the top 20 video programming networks ranked by prime time ratings are vertically integrated with [a cable operator]." *Id.* ¶ 175.

In any event, as the court of appeals properly recognized (Pet. App. 9a, 15a), judgments about the wisdom or efficacy of provisions such as those at issue in this case are not matters for *de novo* review in the courts. "Even in the realm of First Amendment questions

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common sense at the courthouse door. Thus, prior decisions of this Court have upheld speech restrictions against First Amendment challenge based in whole or in part on "simple common sense." See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995); *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992). Petitioner's focus on that aspect of the court of appeals' analysis is in any event exaggerated, as the court's reference to common sense was made only in conjunction with its conclusion that the validity of the challenged statutory provisions was "well grounded in the evidence." Pet. App. 17a.

where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 196. Nor is "Congress * * * obligated * * * to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666 (opinion of Kennedy, J.). It is enough that, as here, Congress's action is "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner II*, 520 U.S. at 224.

Petitioner also suggests (Pet. 27) that the subscriber-limit and channel-occupancy provisions are invalid because the harms they address are also reached by the antitrust laws, as well as the statute's prohibition against unreasonable discrimination by cable operators against unaffiliated programmers. See 47 U.S.C. 536(a)(3). But, as the court of appeals recognized (Pet. App. 12a), "the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions," which require proof of particular conduct for their enforcement. By contrast, the subscriber-limit and channel-occupancy provisions are structural limitations, which "add[] a prophylaxis to the law and avoid[] the burden of individual proceedings to remedy particular instances of anticompetitive behavior." Moreover, contrary to petitioner's contention (Pet. 26-29), although prophylactic rules in the regulation of media entities must be reviewed with care, they are not *per se* invalid. Thus, in *Turner II*, this Court rejected the suggestion that antitrust enforcement or an administrative complaint procedure would be an adequate substitute for the 1992 Cable Act's equally prophylactic must-carry provisions. As this Court stated in that case, "Congress could conclude * * * that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these remedies inadequate substitutes." 520 U.S. at 222-223.

Finally, petitioner objects that the subscriber-limit and channel-occupancy provisions are regulatory "overkill." Pet. 27. In doing so, petitioner simply takes issue with Congress's determination as to the level of protection necessary to advance its interests in competition and media diversity. It is settled, however, that a statute subject to intermediate scrutiny under the First Amendment is not infirm simply because a party puts forth a "[dis]agreement with the responsible decisionmaker concerning . . . the degree to which [the Government's] interests should be promoted." *Turner II*, 520 U.S. at 219 (citations and internal quotation marks omitted; brackets and ellipses in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2001