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Petition for a Writ of Certiorari, Time Warner Entertainment Co. v. F.C.C., No. 01-223 (U.S. Aug. 08, 2001)

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Docket No. 01-223

NO. ______

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 2, 2001

QUESTIONS PRESENTED

In the ruling below, the United States Court of Appeals for the District of Columbia Circuit set aside a regulation of the Federal Communications Commission on both statutory and First Amendment grounds. The FCC rule implemented a facially-constitutional 1992 Cable Act directive that the Commission adopt a national cable ownership limit in order to foster diversity of cable programming and prevent industry concentration. After a notice and comment rulemaking, the FCC adopted a nationwide limit of 30%. The D.C. Circuit's ruling setting aside this limit opened the door to further concentration in the cable industry, an industry in which the three largest actors already control about half of the market. Moreover, the ruling has triggered a spate of litigation seeking to overturn ownership rules in a variety of other media subject to FCC regulation. The questions presented for review are:

1. Whether the FCC's 30% regulation (1) was justifiable based on the 1992 Act's objective of promoting diversity and (2) was adequately supported by a record comprised of detailed Congressional and agency findings?

2. Whether the First Amendment limits the FCC's ability to set a ceiling on the number of subscribers any one cable operator may reach in order to achieve the constitutionally-valid congressional goals of diversity and competition?

RULE 14.1(b) STATEMENT

The parties in the United States Court of Appeals for the District of Columbia Circuit, Docket No. 94-1035, were Time Warner Entertainment Co., L.P ("Time Warner"), as Petitioner, and the Federal Communications Commission and the United States ("FCC, *et al.*") as Respondents. Intervenors were Bell South Telecommunications, Inc.; Bell Atlantic Telephone Companies; AT&T Corporation; and Consumer Federation of America , Center for Media Education, Association of Independent Video and Filmmakers, National Association of Artists, National Alliance for Media Arts and Culture, Office of Communication of the United Church of Christ, Inc., and National Council of Senior Citizens (collectively "CFA, *et al.*").

Parties to Docket No. 95-1337, consolidated in 94-1035, were Time Warner, Petitioners and FCC *et al.*, Respondents. Intervenors were Cox Communications, Inc., Bell Atlantic Telephone Co., and U.S. West, Inc.

Parties to Docket No. 99-1503, consolidated in 94-1035, were Time Warner, Petitioners, and FCC, *et al.*, Respondents. Petitioner-Intervenor was AT&T Corp. Intervenors were CFA, *et al.*

Parties to Docket No. 99-1504, consolidated in 94-1035, were Time Warner, Petitioners, and FCC, *et al.*, Respondents. Intervenors were AT&T Corp. and CFA, *et al.*

Parties to Docket No. 99-1522, consolidated in 94-1035, were Petitioners Consumers Union and Respondents FCC, *et al.* Intervenors were Time Warner and AT&T Corp.

Parties to Docket No. 99-1541, consolidated in 94-1035, were Petitioners AT&T Corp. and Respondents FCC, *et al.* Intervenor was Time Warner.

Parties to Docket No. 99-1542, consolidated in 94-1035, were AT&T, Petitioners and FCC, *et al.*, Respondents. Intervenor was Time Warner.

Parties to Docket No. 00-1086, consolidated in 94-1035, were Petitioners Consumers Union and Respondents FCC, *et al.*

RULE STATEMENT 29.6

Consumer Federation of America, Consumers Union, Center for Media Education, Association of Independent Video and Filmmakers, National Association of Artists, National Alliance for Media Arts and Culture, Office of Communication of the United Church of Christ, Inc., and National Council of Senior Citizens have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Petitioners, Consumer Federation of America, Consumers Union, Center for Media Education, Association of Independent Video and Filmmakers, National Association of Artists, National Alliance for Media Arts and Culture, Office of Communication of the United Church of Christ, Inc., and National Council of Senior Citizens respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion for the United States Court of Appeals for the District of Columbia Circuit is reported at 240 F.3rd 1126 (App. 1-29).[1] The order of the United States Court of Appeals for the District of Columbia Circuit denying the Petition for Rehearing is unpublished (App. 30-31). Decisions of the Federal Communication Commission in MM Docket No. 92-264, Implementing Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, the Horizontal and Vertical Ownership Limits, are reported as follows: *Second Report and Order and Further Notice of Proposed Rulemaking* is reported at 8 FCC Rcd 8565 (App. 53-96); the *Memorandum Opinion and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking* is reported at 13 FCC Rcd 14462 (App. 115-180); and *Third Report and Order* is reported at 14 FCC Rcd 19098 (App. 254-311).

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 2001 (App. 1-29). A timely petition for rehearing was denied on May 4, 2001 (App. 30-31). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] "App." refers to the separately bound appendix.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

First Amendment, United States Constitution:
Congress shall make no law respecting ... abridging the freedom of speech, or of the press ....
Section 11(c) of the 1992 Cable Television Consumer Protection and Competition Act, as codified in 47 USC §533(f)(1-2):
§533. Ownership restrictions

* * * *

(f)(1) In order to enhance effective competition, the Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 (enacted Oct. 5, 1992), conduct a proceeding -

(A) 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....

* * * *

(2) In prescribing rules and regulations under paragraph (1), the Commission shall, among other public interest objectives -

(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from video programmer to the consumer;

(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of video programming of such programmers to other video distributors;

(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;

(E) make such rules and regulations that reflect the dynamic nature of the communications marketplace;

(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

(G) not impose limitations which would impair the development of diverse and high quality video programming.

47 C.F.R. §76.503:

§ 76.503 National subscriber limits.

(a) Subject to paragraph (b) of this section, no cable operator shall serve more than 30% of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest.

(b) Cable subscribers that a cable operator does not serve through incumbent cable franchises shall be excluded from the cable operator's limit.

(c) For purposes of this section, "incumbent cable franchise" means a cable franchise in existence as of October 20, 1999 and all successors in interest to these franchises.

(d) Subscribers that a cable operator serves through incumbent cable franchises shall include all subscribers served by those incumbent cable franchises, regardless of when the subscribers were added to the incumbent cable franchise system.

(e) "Multichannel video-programming subscribers" means subscribers who receive multichannel video-programming from cable systems, direct broadcast satellite services, direct-to-home satellite services, multichannel multipoint distribution services, local multipoint distribution services, satellite master antenna television services (as defined in § 76.5(a)(2)), and open video systems.

(f) "Cable operator" means any person or entity that owns or has an attributable interest in an incumbent cable franchise.

(g) Prior to acquiring additional multichannel video-programming providers, any cable operator that serves 20% or more of multichannel video-programming subscribers nationwide shall certify to the Commission, concurrent with its applications to the Commission for transfer of licenses at issue in the acquisition, that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

STATEMENT

This petition seeks review of a decision of the D.C. Circuit that opens the door to substantial consolidation and restructuring in the cable industry in contradiction to the express desire of Congress. This decision creates precedent for overturning a significant portion of other FCC media ownership rules.

A. Facts Leading to the Passage of the 1992 Cable Act.

In 1989, Congress began a three-year investigation into the cable television industry, resulting in its sweeping re-regulation. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-835, 106 Stat. 1460 ("1992 Cable Act").

Undergirding the 1992 Cable Act is a deep and searching legislative history of over 12,000 pages documenting Congress' alarm at the cable industry's consolidation.

"Horizontal concentration was increasing as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide. .... The trend was accelerating, giving the MSO's increasing market power. *In 1985, the 10 largest MSO's controlled cable systems service slightly less than 42 percent of all cable subscribers; by 1989, the figure was* *nearly 54 percent.*" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997) (citations omitted) (emphasis added) ("*Turner II*"). In "unusually detailed" legislative findings, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 at 646 (1994) ("*Turner I*"), Congress concluded:

> The cable industry has become highly concentrated. 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.

1992 Cable Act, §2(a)(4). It determined that national policy was to:

> [P]romote the availability to the public of a diversity of views and information through cable television and other video distribution media.

1992 Cable Act, §2(b)(1); *see also id.* §2(a)(6).

Members specifically considered the implications of consolidation and the adequacy of antitrust laws to address it:

> Federal policy has always been vigilant to restrain concentration when it threatened diversity of voices *even though it did not rise to the level of an anti-trust violation.*

S.Rep. No. 102-92, at 32-33 (1991) (emphasis added) ("S.Rep.").

Congress studied the national market for programming acquisition, finding that it was rapidly becoming vertically integrated with the cable operators' distribution networks. 1992 Cable Act, §2(a)(5). Operators would "force programmer[s] to buy their way onto cable by giving up an equity interest in their programming." S.Rep. at 24.

Not only did individual operators purchase and invest in individual programming services, but multiple operators often simultaneously invested in programmers. Through their investments, major operators that might have otherwise competed in programming acquisition developed a web of alliances with each other, minimizing their rivalries and reducing opportunities for a competing channel to gain carriage from any operator. *Media Ownership: Diversity and Concentration, Hearings Before the Subcomm. on Communications of the Comm. on the Senate Commerce, Science, and Trans.*, S.Hrg. 101-357, at 379-85 (1989) ("S.Hrg. 101-357").[2] In one infamous example, a large number of cable operators–all with a stake in the Cable News Network–denied carriage to NBC's proposed news channel, CNBC, unless it agreed to circumscribe its coverage in a manner the FCC concluded was likely "to protect CNN from competition." *Id.* at 301, 609-10; *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report*, 5 FCC Rcd 4962, 5028-29 (1990)

Cable operators controlled the subscribers a new programming channel needed to succeed, and thus "ha[d] the market power to determine what programming services can 'make it' on cable." S.Rep. at 33. Successfully launching a channel was not easy. [3]

Cable operators denied their competitors, such as DBS operators, access to popular programming they needed to win customers. S.Rep. at 26. Even independently owned channels agreed to exclusive agreements with cable operators to avoid angering their largest customers. *See Hearings on S. 1880, Before*

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[2]For example, TCI jointly invested in various programmers with Time, Storer Cable Communications, Cablevision, and Comcast, and some of those operators also jointly invested in other programmers. *Id.*

[3]For example, the President of Discovery Network explained how, in 1982-83, he conceived of a new documentary channel, mortgaged his house, and sought for 18 months to raise the necessary $20 million in capital to launch a programming service that would not reach the minimum number of subscribers necessary to become self-supporting for one to two years. S. Hrg. 101-357, at 217-19. Only through a last-minute cooperative investment by several cable operators did the channel stave off bankruptcy. *Id.*

the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Trans., S. Hrg. 101-702, at 273, 412-13 (1990); S.Hrg. 101-357, at 345-48.

Consequently, Congress directed the Federal Communications Commission ("Commission" or "FCC") to adopt a prophylactic national cap to prevent growth of individual cable operators beyond "reasonable limits." 1992 Cable Act, §11(c). Section 11(c) contains two main subsections. The first subsection directs the Commission to conduct a proceeding to prescribe rules, and begins with the phrase "[i]n order to enhance effective competition." 47 U.S.C. §533(f)(1). The second states the FCC "shall, among other public interest objectives," take into account seven factors, including factors that specifically address the diversity of programming consumers receive. 47 U.S.C. §§ 533(f)(2)(A), (B), (C), (G).

B. Current State of the Cable Industry.

The cable industry's horizontal and vertical consolidation has continued unabated since Congress' findings in 1992. For example, in 1997, the Federal Trade Commission ("FTC") concluded that the cable television programing market is highly concentrated. *Time Warner Inc., Turner Broad. Sys. Inc., Telecommunications Inc., and Liberty Media Corp.*, FTC Docket No. C-3709, Complaint, ¶30, 1997 WL 65377 (Feb. 3, 1997). It further concluded that entry into the programming market is "difficult," taking "more than two years to develop [a service] to a point where it has a substantial subscriber base and competes with ... 'marquee' ... service[s]" *Id.* ¶34.

By 2000, the top ten cable operators added 30 points to the national subscriber share they held in 1992, increasing the figure to 84%, and reflecting a sharp increase from 1999, when it was 75%. *Seventh Annual Video Programming Competition Report*, FCC 01-01, CS Docket 00-132, ¶171 (Jan. 8, 2001). The top three cable operators control 47% of the market. *Id.* at Table

C-3. FCC cable industry data demonstrate the impact of the 30% limit in the present market. Without the rule, concentration rises to a level that Department of Justice ("DOJ") antitrust standards classify as highly concentrated.[4] Moreover, multiple cable operators continue to jointly invest programming channels with the highest proportion of subscribers. *Id.* at Tables D-6, D-7.[5] Non-affiliated programmers' dependence on the largest cable operators continues as well. General Accounting Office, GAO/RCED-99-158, *The Changing Status of Competition to Cable Television*, at 22 (1999).

C. Proceedings Below.

1. FCC Decisions.

The FCC established a 30% horizontal ownership limit in 1993,[6] App. 66, it further developed its record and analysis in 1998, App. 115-80, and 1999. App. 254-311.

The FCC concluded that Section 11(c) was adopted because "Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers." App. 58. It found that Congress was concerned about cable

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[4]The DOJ's measures market concentration by the Herfindahl-Hirschman Index ("HHI). DOJ considers an HHI between 1000 and 1800 to be moderately concentrated, and above 1800 to be highly concentrated. *Id.* at n.572. According to FCC data, the cable programming market's current HHI is 1814. *Id.* at Table C-3. If AT&T completes the suspended divestiture required by the ownership rule described *infra* at n. 12, the HHI will be reduced to 1118.

[5]This data shows 9 of the top 20 channels by subscribership and 11 of the top 20 channels by prime time ratings are vertically integrated, of those, 7 maintain joint investments from two operators.

[6]The Commission adopted this limit in 1993, but immediately stayed it when the underlying statute was declared unconstitutional, as explained *infra* at note 9. App. 54.

operators' ability to exercise monopsony power in the program acquisition market and that "[a]lthough under traditional antitrust analysis the cable industry is relatively unconcentrated, the 1992 Cable Act requires the Commission to establish limits on horizontal concentration." *Id.*

The FCC described the trend toward larger cable operators and received extensive comment from members of the cable industry describing their desire to expand. *See, e.g., id.* at 272-73, 277, 281, 285. The FCC found that the "market power of large cable operators has the potential to prevent nascent cable networks from even launching and to cause current networks to fail." *Id.* at 291.

Utilizing detailed economic studies of the cable industry, data submitted to the FCC by cable operators, its own reviews of the industry, and antitrust analysis, *see, e.g, id.* at 291-297, it concluded that new programming services need access to 40% of the nation's TV homes to attain viability.[7] *Id.* at 161-67, 278-300.[8] The Commission considered the impact of limits at 20, 30, and 40 %, considering the number of competitors each limit would likely produce. App. 62-65, 320-22, 161-62; 258. 284, 288-293. Reviewing the range of limits, it concluded a 30% limit would make it more difficult for them to "act in concert" in program purchasing because "reaching consensus, monitoring compliance, and punishing cheaters" would be more difficult. *Id.* at 138-40. It looked at the consequences of duopolies of equal or unequal size, and of more than two competitors. *Id.*

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[7]The FCC conducts its analysis on homes with televisions, called "television households." *Id.* at 322-31.

[8]The FCC based this estimate on a detailed review indicating that a new programmer needs to reach about 15 million subscribers, or an estimated 20% of the market, to ensure viability, App. 282-83, and that the programmer has a 50% chance of obtaining subscribers. *Id.* at 287; *see also id.* at 7-8.

Ultimately, the Commission reasoned that a 30% limit would balance between its costs and benefits, App. 125-126, and would best ensure the availability of the market to new programming services because a 30% limit would "ensur[e] ... at least 4 [operators] in the marketplace" and "will prevent two large operators from obtaining control over [more than] 60% of the market," *id.* at 290, and produce a "greater variety of media voices ... available to the public." *Id.*

The FCC also observed that, even under existing ownership limits, "credible evidence" indicated the largest operators could induce programmers not to sell their programming to competitors. *Id.* at 295; *see also id.* at 207-09. The FCC rejected claims that the cap should be based on a concern for unilateral action alone, however, citing the statutory concern with joint action. *Id.* at 284.

2. D.C. Circuit Decisions.

Last year, in the face of a First Amendment challenge, a panel of the D.C. Circuit declared that §11(c) of the 1992 Act is facially constitutional.[9] *Time Warner Entm't Co. v. United States,* 211 F.3d 1313 (D.C. Cir. 2000), *cert. den.*, 121 S. Ct. 1167 (2000) (*"Time Warner I"*). The court determined that Congress reviewed evidence showing that the increasing consolidation of the cable industry limited the likely success of new, independ-

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[9]More than eight years elapsed before the court considered the validity of the FCC's rules. Time Warner and other cable operators challenged the constitutionality of §11(c) on its face immediately in 1993 and a lower court invalidated the horizontal ownership limit that year. *Daniels Cablevision, Inc. v. United States,* 835 F. Supp. 1 (D.D.C. 1993). Time Warner subsequently filed a petition for review of the FCC's rules, which the D.C. Circuit later consolidated with the appeal of the statutory challenges. *Time Warner v. FCC,* 93 F.3d 975, 979-80 (D.C. Cir. 1996). In 1999, because the FCC continued to revise its rules, the court re-severed the two cases, considering the constitutionality of the statute separately from the rules. *Id.* at 1315-16.

ent programmers. It found that "Congress reasonably concluded that this concentration threatened the diversity of information available to the public and could form a barrier to the entry of new cable programmers. That is hardly an unreasonable inference." *Id.* at 1320.

On March 2, 2001, another panel of the D.C. Circuit vacated the FCC's rules, in an opinion authored by Judge Williams. App. 1-29. Despite the extremely detailed legislative and agency findings, the court found that the FCC had not met its burden under the First Amendment and lacked statutory authority for some of its actions. *Id.* at 2.

The court did not contest the FCC's conclusion that a new programmer needs an "open field" of 40%, *id.* at 9, but concluded that the FCC's analysis supported a rule limiting cable operators to 60%, rather than 30%, of subscribers. *Id.*

Although the court concluded that statutory authority to protect programmers from the action of one operator "flows plainly" to the FCC because "if the [government's interest] in diversity is to mean anything ... the government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability," *id.* at 8, the court did not extend its deference to Congress' language addressing multiple operators. The court concluded that the FCC must make a separate, and more significant, showing to justify a limit that protects potential programmers from joint cable operator action. *Id.*

Specifically, the court believed that a lower, 30% cap could be justified only if: (1) there was a non-conjectural risk that two or more operators would "collude" to deny carriage to a programmer, or (2) the FCC had the authority under the 1992 Act to promote diversity by regulating the unilateral acts of cable operators. App. 9.

The court's analysis of the first issue hinged on one of the many terms used by the FCC to consider the cap–the term "collusion." The court concluded that either Congress or the FCC must produce "substantial evidence" of "collusion" to meet the *Turner I* and *Turner II* standard. *Id.* at 9. The court found fault with Congress for failing to identify "collusion" specifically. *Id.* It found that the language Congress did use was inadequate, concluding that the statutory language "authorizing regulations to protect against '*joint* actions by a group of operators of sufficient size,'" was not a finding of "probable" collusion but instead evidenced only a "*possibility*" of collusion. *Id.* at 9 (quoting §533(f)(2)(A) (court's emphasis)).

The court then determined that the FCC also had not produced a sufficient record through its own proceedings. App. 10-11. The court dismissed as "economic commonplace" the Commission's analysis concluding that a limit producing three large competitors instead of two large competitors was preferable because collusion is less likely when there are more firms. *Id.* at 10.

With respect to the second issue, the court sharply limited the Commission's ability to adopt regulations based on diversity, as opposed to competitive concerns. The court concluded that the first of seven guideposts in Section (f)(2) was the "relevant provision." App. 14-15. This section directed the FCC to ensure that no cable operator or group of operators could "unfairly impede ... the flow of video programming to the consumer." 47 U.S.C. §533(f)(2)(A). The court acknowledged the term "unfair" was "extremely vague." *Id.* at 15. The court also acknowledged that Section 11(c) contains the "duality" of competition and diversity which run throughout the 1992 Cable Act. *Id.* at 15-16. Nonetheless, the court determined the introductory phrase in §533(f)(1) ("to enhance effective competition") was plain enough for it to conclude that Congress' "primary" goal was to promote "fair"–meaning "economic"–competition. *Id.* at 15.

The court therefore rejected the Commission's interpretation of the statute based on the Act's codified legislative findings. App. 16-17. It did not address subsection (f)(2)'s remaining diversity directives. *Id.* As a result, the court held that the FCC could not achieve its goal of preserving a multiplicity of programming sources by selecting an ownership limit lower than that necessary to achieve fair competition alone. *Id.* at 14.

REASONS FOR GRANTING THE WRIT

I. THE INSTANT CASE WARRANTS REVIEW BECAUSE ITS FLAWED CONSTITUTIONAL DOCTRINE WOULD THREATEN NEARLY EVERY FCC MEDIA OWNERSHIP REGULATION.

Any decision invalidating, on constitutional grounds, a federal agency's implementation of a concededly valid statutory directive to impose industry-wide ownership limits is surely a matter of importance.[10]

Certiorari is especially appropriate here, not just because of the decision's intrinsic jurisprudential importance, but also because this case involves the mechanisms of citizenship. As this Court has emphasized, "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.

The precedential force of the D.C. Circuit's opinion promises to bring immediate and sweeping changes to ownership concentration in ***all*** electronic media industries.

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[10]Because the D.C. Circuit has exclusive jurisdiction of many telecommunications cases, *see* 47 U.S.C. §402(a), and is the traditional venue for most other broadcast and cable cases, it is highly unlikely that other circuits will consider the issues presented here. Thus, there is no reason for this Court to await the development of inter-circuit conflicts before granting certiorari.

This is ***not*** a matter of speculation: the court's decision has ***already*** been extended to justify interim relief suspending FCC rules limiting national and local broadcast station ownership, and it has been employed to challenge the Commission's ban on TV/cable cross-ownership rules. The immediate effect of this case was so dramatic that it became the subject of a page one *New York Times* story. Evaluating the impact of this case and the Viacom stay discussed below, the *Times* said that "[i]n a marked departure from decades of Supreme Court opinions on the subject, the appeals court and the FCC have become significantly ... more skeptical of the role of government in promoting diversity in mass media." "Media Companies Succeed in Easing Ownership Limits," *New York Times*, p. 1, April 16, 2001.

AT&T/Time Warner Divestiture - Just two weeks after the panel issued its decision, without awaiting issuance of the Circuit's mandate, the FCC, *sua sponte*, cited this case in relieving Respondent AT&T Corp. (the largest cable operator) of a May 19, 2001 deadline to divest its 22.5% partnership interest in the second largest cable operator, Respondent Time Warner Entertainment. *MediaOne Group, Inc.*, 16 FCC Rcd 5835 (2000). Thus, as a direct consequence of this case, AT&T now has ownership interests in cable systems reaching almost 40% of the nation's TV homes.[11]

Proposed Sale of AT&T Cable - In the weeks preceeding submission of this petition, Comcast, (the third largest operator) and AOL/Time Warner (the second largest) have publicly disclosed that each has been negotiating a possible takeover of AT&T. Industry executives, financial analysts, and press

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[11] *Letter from Douglas G. Garrett*, Docket 99-251 (filed June 29, 2001). When Congress mandated the cable ownership cap in 1992, the largest operator had a 25% share of that market. H.R. Rep. No. 102-628, at 42 (1992).

commentators pointed to the decision below when predicting that such combinations (which might result in a single operator serving well over half the nation's cable subscribers) could receive FCC approval.[12]

National Broadcast Ownership - The impact of the decision has not been limited to cable operators. On April 6, 2001, the D.C. Circuit granted a stay excusing Viacom, Inc. from complying with an FCC directive to divest one or more television stations to come into compliance with the FCC's 35% national ownership limit on broadcast properties. *Viacom, Inc. v. FCC*, No. 01-1136 (D.C. Cir., April 6, 2001).[13] Because of the *Viacom* stay, the FCC has indefinitely deferred enforcement of a similar requirement as applied to News Corp., the parent of the Fox network.[14] The FCC Chairman has publicly stated his doubt as

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[12]*See, e.g.*, "Regulatory Forecast Looks Fair for Possible Comcast Corp./ AT&T Broadband Merger," *Multichannel News*, p. 5, July 16, 2001; "Experts Say Regulators Would Likely Approve Comcast, AT&T Merger," *The Philadelphia Inquirer*, July 14, 2001 (referring to the court's decision as giving Comcast "an especially good time to bid because the old ownership rules were not in force...."); "Deal Should Face Little Opposition from Regulators," *The Wall Street Journal*, p. B1, July 10, 2001 ("But ownership caps were overturned by a federal appeals court earlier this year, and the FCC has yet to replace them. That means cable companies are enjoying a rare regulatory free-for-all.").

[13]The Appellants' March 19, 2001 *Emergency Motion for Interim Relief* argued that *Time Warner v. FCC* was controlling precedent. *See also CBS Corporation*, FCC No. 01-94 (March 16, 2001) (denying application for stay) ("I believe the facts before the Commission and the recent *TWE* decision warrant the interim relief sought by Viacom.")(Furchgott-Roth, dissenting). The case was brought under 42 U.S.C. §402(a), which, as is noted in note 10, *supra*, confers exclusive jurisdiction on the D.C. Circuit.

[14]*See UTV of San Francisco Inc.*, FCC No. 01-201 (rel. July 25, 2001) ("In light of [the *Viacom* stay], we believe it is appropriate to delay the effectiveness of our condition requiring [Fox] to come into compliance ... Accordingly, [Fox] will be afforded a period of 12 months following entry of a final deci-

to whether the national broadcast ownership cap will withstand review under the precedent of this case.[15]

Local Broadcast Ownership - The decision was also the basis for a successful motion for stay of the required divestiture of four TV stations under the Commission's local television duopoly rules. *Sinclair Broadcast Group v. FCC*, No. 01-1079 (D.C Cir. June 20, 2001). It has been reported that the FCC "is reviewing whether to extend the delay to ... other [broadcast ownership] groups" and that the several companies under similar divestiture orders "are likely to get some relief ... pending the outcome of a court challenge ...." *Broadcasting and Cable*, July 2, 2001, p. 4.

Local Cable/Broadcast Cross-Ownership - Time Warner has also sought to extend the precedent of this case to the FCC's rule prohibiting common ownership of TV stations and cable systems in the same market. Its June 15, 2001 brief to the D.C. Circuit in Docket No. 00-1222 cites this case as the principal authority on which its challenge is based.

This decision must be reviewed now because the ownership consolidation it invites cannot be unraveled. After transactions are consummated, "it becomes difficult, and sometimes virtually impossible, to 'unscramble the the eggs.'" *Consolidated Gold Fields PLC v. Minorco, .A.*, 871 F.2d 252, 261 (2d Cir.), *amended*, 890 F.2d 569 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989) (*quoting*

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sion... upholding the national broadcast ownership cap."). Judicial review of this decision would, under 42 U.S.C. §402(a), occur in the D.C. Circuit.

[15]In an interview transcript posted on the Chairman's personal web page, he speculated that "Many people see [the stay] as a grave sign for the life of the rule....[N]ot so many weeks ago the court struck down horizontal rules in the cable context - potentially signaling sort of similar skepticism about this rule....[The court] has made already some judgment that there is a likelihood to prevail on the merits of the petition." *Conversation With Sam Donaldson*, www.fcc.gov/Speeches/Powell/2001/spmkp102.pdf (accessed July 26, 2001).

Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973)). The problem is worse when consolidation removes "an effective competitor in markets of vital interest to the nation's economy...." *Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 16 (2d Cir. 1981)).

II. THE COURT VIOLATED BASIC PRINCIPLES OF STATUTORY CONSTRUCTION AND DID NOT APPROPRIATELY DEFER TO THE AGENCY'S REASONABLE CONSTRUCTION OF THE ACT.

Only the D.C. Circuit's misinterpretation of the 1992 Cable Act allowed it to reach the First Amendment issues in this case. The panel sharply departed from the "elementary rule ... that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *INS v. Enrico St. Cyr.*, 121 S. Ct. 2271, 2279 n. 12 (2001) (quoting Hooper *v. California*, 155 U.S. 648, 657 (1895)); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("*DeBartolo*")(applied to agency's construction of a statute).

In previously upholding the facial constitutionality of §11(c), the *Time Warner I* court held that the concentrated cable industry posed a real, non-conjectural harm to diversity. 211 F.3d at 1320. Notwithstanding this holding, the court removed "diversity" from the First Amendment calculus when it declared the rules unconstitutional.

After finding that the FCC lacked the authority to limit ownership based on diversity, the court was free to narrow the First Amendment question as to whether Congress or the FCC had provided substantial evidence that two or more operators would "collude" to deny carriage to a programmer. App. 7. As a result, as detailed in Part I *supra*, the very dangers Congress foresaw and sought to prevent are now rapidly coming to pass.

A. The Court Improperly Construed the Statute to Exclude Diversity.

The Panel concluded that the FCC lacked statutory authority to limit the size of cable operators based on diversity concerns, and, in stark conflict with the statutory language, must instead act only on the court's notions of antitrust law. The opinion below disregarded the plain language of 11(c), failed to consider the statutory context, and brushed aside the mutually reinforcing nature of diversity and competition.

The panel erred in failing to read Section 11(c) within the statutory context of the 1992 Cable Act and the 1934 Communications Act. Basic canons of statutory construction require interpretation of this language and the purpose in the context of the statute as a whole. *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 132-33 (2000). In particular, where Congress chooses to amend the Communications Act rather than enact a freestanding provision, the court must read the separate statutory provisions in light of the broad purposes and powers of the Communications Act as a whole. *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 377-78 (1999).

Section 533(f)(2) directs that in setting ownership limits, the FCC "shall" consider "other public interest objectives." This Court has consistently construed the term "public interest" as embodying diversity. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943). As this Court has explained, "the 'public interest' standard necessarily invites reference to First Amendment principles," and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *FCC v. NCCB*, 436 U.S. 775, 795 (1978) (citations omitted).[16]

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[16]The concern with diversity does not conflict with the statute's stated purpose of "enhanc[ing] effective competition." §533(f)(1). To the contrary,

Four other public interest factors listed in §533(f)(2) explicitly refer to Congress' objective of promoting diversity. As the Commission emphasized, "[Sections 533(f)(2)(A), (B), (C) and (G)] require the Commission to ensure that operators, unilaterally or in coordination, do not unreasonably restrict the flow of video programming to consumers and do not hinder the development of new programing from diverse voices." App. 280.

In contrast, relying on the term "unfair" in §533(f)(2)(A), the panel concluded that the statute addressed only two situations - a single cable operator's actions, or, the "collusive" behavior of several operators. App. 6. The panel reached this result by relying on the introductory phrase of (f)(1), concluding "that *these* regulations are to be promulgated '[i]n order to enhance effective competition.'" App. at 16 (emphasis original).[17] The panel therefore dismissed the FCC's reliance on the congressional finding that the "'cable industry has become highly concen-

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"our past decisions have recognized, moreover, that the First Amendment *and* antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies." *NCCB*, 436 U.S. at 795(emphasis added). *See also Turner II*, 520 U.S. at 198.

[17]In attempting to read the statute as a limitation on the FCC's discretion, the court compared the purposes of §533(f) to two other sections of the 1992 Act which also contain specific directives for implementation. App. 16, n.8. Actually, all three sections explicitly expand the FCC's powers. However, were it true that the purposes set out in those two sections did limit the FCC's discretion, that is indubitably not the case for §533(f); unlike the other provisions, this one gives the FCC a range of objectives, from which it must pick and choose. *See FCC v. WNCN Listeners Guild*, 450 U.S. 568, 596 (1981) ("[D]iversity is not the only policy the Commission must consider....[Its] implementation ... when based on a rational weighing of policies ... is not to be set aside."); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 952-53 (1st Cir. 1993)(agency discretion is at its "zenith" when balancing among objectives).

trated,'" 1992 Cable Act §2(a)(4), and the general policy of promoting diversity, §2(b)(1). App. 16. The Panel concluded that "reference to a Congressional finding cannot overcome clear language and purpose of the actual provision." *Id.*

While a finding may not override statutory language, it does inform interpretation of the word Congress did use, "unfairly," particularly when, as the Panel admits, that word is "extremely vague." *Id.* at 15. Given the FCC's broad powers under the Communications Act to promote diversity ***and*** competition, *NCCB*, 436 U.S. at 798-802, the court should not have interpreted either "unfairly" or "enhance effective competition" as constricting the FCC's authority to regulate based on diversity concerns. *See, e.g., Whitman v. Am. Trucking Ass'n, Inc.*, 121 S. Ct. 903, 910 (2001) (Congress "does not ... hide elephants in mouseholes"); *see also United States v. Storer Broadcasting* Co., 351 U.S. 192, 203 (1956); *Oceanair of Fla,, Inc. v. U.S. Dep't. of Transp.*, 876 F.2d 1560, 1564 (11th Cir. 1989) ("[C]ourts should not infer that Congress intended to restrict an agency's broad powers ... unless Congress has explicitly done so.").

The court below improperly used the surrounding words in the statute to substitute its own strict re-reading of a single statutory word for the agency's reasonable construction and in violation of the plain language. *Babbit v. Sweet Home Chapter of Communities for a Greater Ore*, 515 U.S. 687, 708 (1995)("*Sweet Home*").; *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389-390 (1959). This renders "mere surplusage," *Sweet Home*, 515 U.S. at 698, the phrase "among other public interest objectives" and the remaining factors Congress enumerated for the FCC to consider. Such judicial revisionism is "an undertaking more consonant with the task of a congressional committee than with judicial construction." *Mandel Bros.*, 359 U.S. at 390. Indeed, by redrafting the statute in this fashion, the panel opened the door to the very consolidation §11(c) sought to prevent.

B. The Panel Failed to Defer to the Agency And Thus Unnecessarily Created a Constitutional Conflict.

The Panel's refusal to defer did more than misapply the relevant standard. It created an unnecessary Constitutional conflict, striking down the regulations on First Amendment grounds. In such a case, a construction that defers to the agency is particularly warranted. *DeBartolo*, 485 U.S. at 575.[18]

This Court has consistently recognized that "[w]hen Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to elucidate a specific provision of the statute by regulation." *United States v. Mead Corp.*, 121 S.Ct. 2164, 2170 (2001) (quoting *Chevron.*, 467 U.S. 837, 843-844 (1984)). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by ... an agency." *Chevron*, 467 U.S. at 844. In this case, Congress explicitly delegated to the FCC the task of setting the national limit, and the court should have deferred to the FCC's reasonable construction of section 533(f).

1. The FCC interpreted section 533(f) as directing it to consider diversity when setting the ownership limits. App. 267-269, 280. It explicitly rejected the view that Congress intended the FCC to focus on antitrust principles to the exclusion of its traditional public interest review, concluding that to do so would nullify four of the seven factors Congress included in §533(f)(2). App. 280; *Time Warner I*, 211 F.3d at 1316.

Although the court expressly acknowledged that the lan-

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[18]"It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Legal Services Corp. v. Velazquez*, 121 S.Ct. 1043, 1050 (2001) (*citing Gomez v. United States*, 490 U.S. 858, 864 (1989)); *See also Frisby v. Schultz*, 487 U.S. 474, 483 (noting that departure from this principle is "plain error") (1988).

guage it found controlling was "extremely vague," App. 15, it ignored the FCC's analysis.

The FCC's decision was far more reasonable than the court's. The Commission read the law as directing use of a traditional public interest analysis to remediate levels of concentration which might be considered "safe" under traditional antitrust analysis. App . 267-69 (relying on H.Rep at 42). This accords with the interpretation given to §11(c), and the 1992 Act generally, by the courts. *Turner II*, 520 U.S. at 198-90; *Time Warner I*, 211 F.3d at 1319-20. By contrast, Congress never used the word "collusion."

2. The legislative history shows that the drafters of the legislation did not intend to sever §11(c) from the FCC's general public interest authority. The Senate Report observed that "[a]lthough the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional), it has not done so." S.Rep. at 34. As a result, "to address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs." *Id.* The drafters intended that the legislation give "the FCC flexibility to determine what limits are reasonable ***and in the public interest***." *Id.* (emphasis added). This understanding is echoed in the section-by-section analysis. *Id.* at 80.

When considering the need for a horizontal limit, the Senate Report identified two concerns: that "concentration of the media in the hands of a few" would allow "media gatekeepers" to control information and foreclose avenues for "unorthodox or unpopular speech"; and that horizontal concentration "can be the basis of anticompetitive acts." S.Rep. at 32-33. It further noted that "Federal policy has always been vigilant to restrain concentration when it threatened diversity of voices even though it did not rise to the level of an anti-trust violation." *Id.*

at 32-33.

In considering an analogous provision, the House Report also rejected "traditional antitrust analysis," stating that "diversity of information sources can only be assured by imposing limits ... substantially below those that traditional antitrust analysis would support." H.R. Rep. at 42. The analysis concludes that "competition is essential ***both*** for ensuring diversity ... ***and*** for protecting consumers." Accordingly, "steps must be taken to encourage robust competition in the video programming marketplace." *Id.* at 44.

Thus, Congress clearly intended to promote diversity through the horizontal ownership limit. The drafters viewed the purpose of "enhancing effective competition" as the mechanism by which diversity is preserved and enhanced. *See also Time Warner I*, 211 F.3d at 1319-20. The court below, by substituting its judgment for that of the agency's, nullified this Congressional intent. By doing so, the panel undermined fundamental statutory policy designed to prevent "anticompetitive acts" and the creation of powerful "media gatekeepers." S.Rep. at 32-33.

III. THE PANEL FAILED TO AFFORD SUBSTANTIAL DEFERENCE TO THE PREDICTIVE JUDGMENT OF CONGRESS AND THE FCC.

The panel's failure to afford substantial deference to the predictive judgment of Congress and the FCC squarely conflicts with this Court's decisions in *NCCB*, *Turner I* and *II*, and other precedents. In so doing, the panel improperly dismissed the FCC's reliance on its decades of experience regulating the cable industry, as well as commonly accepted economic principles concerning concentrated markets and anti-competitive behavior. The result is an intermediate in theory, but strict in fact, *O'Brien* standard of review that more closely resembles the strict scrutiny reserved for content-based regulations. The panel's new standard strips Congress and the FCC of the flexibility necessary to adequately respond to the complicated issues presented by telecommunications regulation, preventing it from properly balancing the free speech interests at stake.

A. The Panel's Rejection of the Predictive Judgments of Congress and the FCC Sharply Departs From This Court's First Amendment Jurisprudence.

When reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." *Turner I*, 520 U.S. at 195 (citations omitted). Similarly, when "evaluating the First Amendment claims of respondents [this Court] must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broad. Sys. v. Democratic Nat. Comm.*, 412 U.S. 94, 102 (1973); *Turner II*, 520 U.S. at 196.533(f).

1. In 1992, Congress determined that without preemptive action, the cable industry would reach a level of concentration inimical to the public interest. 1992 Cable Act, §2(a)(4); S.Rep. at 32-34. Congress made the underlying predictive judgment that a prophylactic cap on the number of subscribers a single cable operator could reach was necessary to preserve a diversity of outlets in the market, as well as safeguard against anticompetitive effects associated with highly concentrated markets with barriers to entry such as cable. 1992 Cable Act, §11(c); *Time Warner I*, 211 F.3d at 1320. Accordingly, Congress directed the FCC to set a reasonable limit to further these important interests.

The panel effectively contravenes Congress' fundamental predictive judgment concerning concentration and the cable industry. As demonstrated above, it frustrated Congressional directives by sharply limiting the FCC's authority under the statute to set a limit based on diversity concerns. As explained below, the panel failed to defer to the FCC's expertise, an expertise Congress intended the FCC to exercise in setting a pro-diversity, pro-competitive floor in the cable market. This is flatly inconsistent with this Court's precedents. *Turner II*, 520 U.S. at 224 ("Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make.")

2. When factual determinations of the FCC are "primarily of a judgmental or predictive nature ... complete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *NCCB*, 436 U.S. at 813-14 (citations and internal quotes omitted); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981); *Turner I*, 512 U.S. at 665 (citing *NCCB*, 436 U.S. at 814); *cf. Baltimore Gas & Electric Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 103 (1983) ("court must generally be at its most deferential" when reviewing predictions within agency's expertise).

The panel held that the FCC had not provided sufficient evidence demonstrating a risk of collusion. App. at 10. This is in clear conflict with NCCB; in upholding the FCC's newspaper-broadcast cross-ownership rule under a First Amendment challenge, this Court held that the "the [FCC] was *entitled to rely on its judgment, based on experience,* that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination." *NCCB*, 436 U.S. at 796-97 (citations and internal quotations omitted) (emphasis added). This Court rejected claims that the FCC needed to "conclusively establish" that the rule would lead to viewpoint diversity. *Id.* Rather, it emphasized deference to the FCC's predictive judgment because "[d]iversity and its effects are ... elusive concepts ... evidence of specific abuses by common owners is difficult to compile [and] the possible benefits of competition do not lend themselves to detailed forecast. " *Id.*

Given the Congressional directive to adopt an ownership cap, the FCC is entitled to even greater deference here than in *NCCB*, where the agency was invoking generic statutory powers. The FCC used its extensive expertise with the cable industry to predict that a high level of concentration would raise too great a threat to diversity and too high a risk of anti-competitive behavior. *NCCB*, 436 U.S. at 796-97; *Marsh Media v. FCC*, 798 F.2d 772, 776 (5th Cir. 1986) *cert. denied*, 479 U.S. 1085 (1987) (rejecting First Amendment challenge to broadcast TV-cable cross ownership rule based on predictive judgment); *see City of Erie, et al. v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277, 297 (2000)(referring to FCC's "special firsthand knowledge" of cable industry and citing *NCCB*, 436 U.S. at 775). Implementing legislation designed to *prevent* anti-competitive practices is precisely the situation that calls for substantial deference. *Turner II*, 520 U.S. at 225 (Stevens, J. concurring) (emphasizing deference to judgments concerning "forestalling the abuse of monopoly power..."). As in *NCCB*, demanding evidence of collusion *a priori* is "difficult to compile" and would defeat the prophylactic purpose of § 11(c).

In the decision under review, the FCC applied its familiarity with video markets to the rulemaking record. App. 281-88. This produced several possible percentages, *id.* 285-290, which it narrowed to three-20%, 30%, or 40%-after weighing Congress' concerns with preserving efficiencies of scale for cable operators and the threats concentration posed to competition and diversity. *Id.* The FCC ultimately concluded that a 30% limit would best ensure the availability of new programming services and preserve a reasonable level of diversity. *See* discussion *supra* at 9-10; App. 289-91. The 30% limit also addressed the unilateral effects a large operator may have on the market. *Id.* at 138, 295.

The court improperly second-guessed the FCC's predictive judgment in balancing the competing interests involved to set a pro-competitive, pro-diversity floor for the cable industry. *WNCN*, 450 U.S. at 594-96 (affirming the FCC's predictive judgment "assess[ing] the benefits and harms likely to flow from Government review of entertainment programming ..."); *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 (1972); *cf.*, *Turner II*, 520 U.S. at 224.

3. The reasonableness of the FCC's predictive judgment is further supported by its reliance on economic principles concerning the anti-competitive risks of concentrated markets. When reviewing First Amendment challenges, this Court has noted that "[t]he quantum of empirical evidence needed to satisfy heightened scrutiny of legislative judgment will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov. PAC*, 528 U.S. 377, 391 (2000). The FCC relied on accepted economic principles to conclude that a 30% limit would substantially reduce the likelihood of explicit or implicit coordinated activity between large cable operators because such "activity ... is more likely with few firms than many (due to greater ease in reaching consensus, monitoring compliance, and punishing cheaters), and such behavior will have a greater impact the larger combined share of the market these firms control." App. 295-96, 139. Such a proposition is "neither novel nor implausible." *Nixon*, 528 U.S. at 391 (characterizing the legislature's judgment regarding the effect of money on the political process). This Court has deferred in other First Amendment contexts to the predictive judgments of lawmakers centering on commonly accepted principles. *Id.* at 391-396; *Burson v. Freeman*, 504 U.S. 191, 208-211 (1992). The FCC should not be held to a higher standard.

While the panel discounts predictive judgments based on the level of concentration in a market, App. at 11-12, structural market analysis is a linchpin of antitrust law. "Merger law, 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict out put and achieve profits above competitive levels." *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001)(citations omitted).[19] For instance, the DOJ/FTC Merger Guidelines rely on market concentration to determine the potential anti-competitive dangers of a proposed merger. U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines*,§ 1.5 (1992), as revised (1995).

The FCC employed these principles to set a limit to prevent the cable market from consolidating to a level that would present the anti-competitive harms associated with highly concentrated markets with large barriers to entry, such as cable. App. 291-293. "The combination of a concentrated market and barriers to entry is a recipe for price coordination." *H. J. Heinz Co.*, 246 F.3d at 724 (citations omitted). The FCC's concern with setting a limit preempting tacit coordination is especially supported by accepted economic principles. *Id.* (quoting 4 Areeda, *et al.*, ANTITRUST LAW ¶901b2, at 9 (rev. ed. 1998) ("central object of merger policy [is] to obstruct the creation or reinforcement by merger of ... oligopolistic market structures in which tacit coordination can occur."). The FCC's selection of 30% is consonant with the Merger Guidelines as well. Under the Guidelines, even a market less concentrated than one

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[19]*See also United States v. General Dynamics*, 415 U.S. 486, 497 (1974) (emphasizing *prima facie* anti-competitive threats of highly concentrated markets); Sullivan & Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 530 (2000) ("The rule of thumb...is that the more concentrated an industry, the more likely is oligopolistic behavior...For example, a ten-firm industry is more likely to require some sort of coordination...whereas the three-firm industry might more easily maintain prices through parallel behavior without express coordination.").

allowed by the FCC's cap would be highly concentrated and presumptively indicate a high risk of anti-competitive effects.[20]

Contrary to the panel's implication, the FCC did not act in a vacuum when it selected the 30% limit to create a prophylaxis to ensure diversity and enhance competition. App. 11 (rejecting conclusion "that ... collusion is less likely when there are more firms ...[because] ...by itself it lends no insight into the question of what the appropriate horizontal limit is."). As discussed above, the FCC applied these principles within the narrow context of deciding between a cap ensuring at least five (20%), four (30%), or three (40%) material operators in the market. Further, the record evinces barriers to entry for new programmers, App. 291-93, a trend toward concentration in the market, *see* discussion *supra* at 9, and a web of inter-connected relationships between operators, *id.* at 5-6. These factors make it particularly appropriate for the FCC to have employed economic principles to bolster its analysis.

Finally, other panels of the D.C. Circuit have deferred to predictive judgments forecasting anti-competitive practices in the cable industry founded on basic economic principles. In *Time Warner I*, the D.C. Circuit deferred to the predictive judgment of Congress that the concentrated cable market posed a risk to diversity and competition to uphold the constitutionality of §11(c). 211 F. 3d at 1319-1320.

B. The Court's Repudiation of the FCC's Predictive Judgment Creates a Standard Which is Intermediate in Theory,

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[20]Under the Guidelines, market concentration is measured by HHI. The Guidelines cite a market with four firms with market shares of 30%, 30%, 20% and 20% as highly concentrated with an HHI of 2600. *Merger Guidelines* § 1.5 n.17. A 30% limit is also consistent with the other standard measurement of market concentration-the Four Firm Concentration Ratio. *See* Shepard, THE ECONOMICS OF INDUSTRIAL ORGANIZATION 4 (1985) (market where leading four firms have in excess of 60% is considered highly concentrated).

but Strict in Fact.

The cable ownership limits are content-neutral. *Time Warner I*, 211 F.3d at 1317-18; App. 6. And as this Court has held, content-neutral rules "do not pose such inherent dangers to free expression, or present such potential for censorship ... as to justify application of the most exacting level of First Amendment scrutiny." *Turner I*, 512 U.S. at 661. Structural regulations like the ownership limits foster Congress' diversity goals in a content-neutral manner without raising the specter of government censorship. S.Rep. at 50; *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12915 (1999). For this reason, structural media regulations are reviewed under the more lenient *O'Brien* standard. *Id.*, at 12915 (citing *NCCB*, 436 U.S at 801; *Turner II*, 520 U.S. at 189)).

1. In dismissing the FCC's reliance on its expertise and accepted economic principles to set the 30% ownership limit, the panel effectively elevated the *O'Brien* intermediate standard of review to a level more closely resembling the strict scrutiny reserved for content-based rules. This new standard is driven by an overly demanding substantial evidence requirement of the "harm" prong of *O'Brien* intermediate scrutiny. It strips the FCC of the necessary flexibility to implement Congressionally mandated, prophylactic, content-neutral structural regulations. Precluding the FCC from employing accepted economic principles to *predict* anti-competitive behavior substantially hobbles the FCC's ability to promulgate rules *preventing* such harms.

A plurality of this Court has cautioned against the application of First Amendment norms in the media context that would "impose judicial formulas *so rigid that they become a straightjacket that disables government from responding to serious problems.*" *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (Breyer, J., joined by Stevens, O'Connor and Souter, J.J. concurring in judgment and concurring in part) (emphasis added). The court's misconstruction of *O'Brien* intermediate scrutiny does precisely what *Denver Area* instructs not to do. By sharply limiting the FCC's ability to act preemptively, the panel's new standard "lack[s] the flexibility necessary to allow government to respond to very serious practical problems ...." *Denver Area*, 518 U.S. at 740; *cf. Bartnicki v. Hopper*, 121 S Ct. 1753, 1768 (2001)("In my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy.") (Breyer, J., joined by O'Connor, J., concurring).

2.. Moreover, hamstringing the flexibility of the FCC prevents it from properly balancing the competing free speech interests implicated in this case. "In such circumstances, *where a law significantly implicates competing constitutionally protected interests in complex ways the Court ... has balanced interests.*" *Nixon*, 528 U.S. at 402 (Breyer, joined by Ginsburg, J.J., concurring) (emphasis added). In fact, this Court has consistently balanced the relevant free speech interests when reviewing First Amendment challenges to media regulations. *See, e.g., Turner II*, 520 U.S. at 192-194 (recognizing the speech interests of both viewers and cable operators) and at 224-229 (Breyer, J., concurring in part) (balancing "the important First Amendment interests on both sides of the equation"); *Columbia Broad. Syst.*, 412 U.S. at 102-103 ("Balancing the various First Amendment interests involved in the broadcast media ....").

The court radically departed from this body of caselaw by solely considering the free speech interests of cable operators. The panel's First Amendment analysis focused exclusively on the modest infringement the 30% limit imposed on cable operators' freedom of expression.[21] In contrast, the panel ignored the

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[21]The 30% limit excludes new subscribers gained from "overbuilding," the construction of a second cable system in an area already served by an

free speech interests of the key beneficiaries of the 1992 Act–the viewing public and independent programmers.

In sum, the court' decision demonstrably tilts the scale in favor of the cable operator, and indeed any entity challenging the FCC's structural media regulations. In so doing, it blurs the distinction between the strict scrutiny applied to content-based restrictions of speech and the traditionally more relaxed level of review applied to content-neutral regulations.[22] In this way, the panel's holding is reminiscent of the long since repudiated doctrine of *Lochner v. New York*, 198 U.S. 45 (1905) employed by this Court to strike down socio-economic legislation "based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson*, 447 U.S. at 589 (Rehnquist, C.J. dissenting). Accordingly, this Court should review the panel's decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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incumbent operator. App. 279. Thus, the limit *does not* prevent an operator from speaking directly to 100% of the country, as long as it competes with, rather than buys, the incumbent monopoly provider for any subscribers over the limit.

[22] *Cf. Central Hudson Gas & Elec. Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 589 (1980)(Rehnquist, C.J., dissenting)(citing similar concerns with "fail[ing] to give due deference to th[e] subordinate position of commercial speech" as representing a "return[] to the bygone era of *Lochner*").

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