No. 11-481

IN THE
Supreme Court of the United States

DISH NETWORK CORPORATION *and*
DISH NETWORK L.L.C.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION[1]

The Government does not dispute any of the following propositions as to what § 207 does:

1. Section 207 grants a specific category of broadcast stations a preference that no other station enjoys.

2. The preference requires DISH to add an *extra* HD channel for those preferred stations—a channel that consumes the bandwidth of three to four SD channels.

3. The only way a station will enjoy § 207's preference is if it satisfies strict criteria, including: being a current recipient of federal funds and carrying a specified proportion of educational programming and not too much religious, political, or pedagogical programming.

4. The law targets the preference with almost laser precision to a group of speakers who carry content from PBS, the Government-funded production company.

The Government minimizes all this as "concern[ing] only the timing of a change in the technical manner of signal transmission." Opp. 6. But it is far more: It is a Government command that a private party grant a highly valuable preference to

[1] The Brief in Opposition is cited as "Opp." All other abbreviations are the same as in the Petition.

one set of speakers over all others based on the subject matter of their programming and their Government endorsement.

Regardless of the characterization, the Government does not deny that this would be a classic content-based preference if it applied in any other medium. Nor does it deny that this Court has expressly left open the question whether this very sort of preference in the broadcasting context is constitutional. The answer to that question is important and worthy of this Court's attention.

So, too, is the baseline level of scrutiny for satellite TV. The Government does not even argue otherwise. It completely ignores the question whether burdens on satellite TV should be subject to strict scrutiny, resting on the incorrect proposition that there is no circuit split on the level of scrutiny.

Finally, the Government incorrectly asserts that this petition has been overtaken by events. At this point—and for the next 14 months—DISH is being forced to reserve channels for PBS stations, and it will drop those channels the moment the obligation is found unconstitutional.

ARGUMENT

I. THIS CASE PRESENTS TWO ISSUES THAT HAVE SPLIT THE LOWER COURTS.

A. The Circuits Are Split Over How to Treat Carriage Obligations Imposed on Satellite TV.

The Government does not dispute that the D.C. Circuit and the Ninth Circuit have applied two different levels of scrutiny to satellite TV. It nevertheless contends that there is no circuit conflict because the court below "had no occasion to determine whether a lesser standard of scrutiny was appropriate" and "did not reject, or even discuss, the D.C. Circuit's reasoning in *Time Warner*" adopting rational-basis scrutiny. Opp. 13.

The Government is mistaken. The court of appeals explicitly held that intermediate scrutiny applies to burdens imposed on satellite TV. It observed that in "*Turner [I]* … the Supreme Court applied intermediate scrutiny to a content-neutral regulation that required carriage of local broadcast stations on cable systems." App. 11a. It held that "*Turner I* instructs that any law that singles out an element of the press is subject to some form of *heightened* First Amendment scrutiny" and it "appl[ied] that logic to the case at hand." App. 12a (emphasis added). That holding is flatly inconsistent with the D.C. Circuit's holding—which the Government strenuously pressed the Ninth Circuit to follow, *see* Brief for Appellees at 25-27—even

though the Ninth Circuit declined to mention the D.C. Circuit's holding.

In any event, although the Government studiously ignores acknowledging it, this case also presents this Court with the option of applying strict scrutiny—whether because the time has come to abandon the *Turner* rubric for cable and satellite, alike, or because satellite TV is different from cable. The Government does not deny that DISH preserved this argument both before the district court, *see* ER 69, and before the court of appeals, *see* Brief for Appellant at 33 n.4. Just as this Court is willing to entertain the argument that conventional over-the-air broadcast should enjoy strict scrutiny, *see* Brief of Respondents Fox Television Stations, Inc., et al. at 15, *FCC v. Fox Television Stations, Inc.*, No. 10-1293 (Nov. 3, 2011) ("Fox Brief")—even though no circuit has adopted that view—it is free to consider the same argument as applied to satellite TV.

B. The Lower Courts Are Split on How to Treat Educational and Public Affairs Programming—a Subject This Court Has Never Resolved.

Only by ignoring several pages of the petition can the Government claim that "Petitioners identify no authority that conflicts with [the court of appeals'] conclusion" that § 207 is content-neutral. Opp. 14. As the petition explains at length, if Congress had required a preference for "qualified educational" content in any other medium, it would be subject to strict scrutiny. *See* Pet. 17-20 (discussing *Arkansas Writers'*, *Discovery Network*, *Mosely*, and *Playboy*

Entertainment Group). Unless there is an exception to that rule in the context of television broadcasts, these cases "conflict with that conclusion."

The Government does not deny that this Court twice explicitly left open the question whether to treat television programming differently from all other media with respect to educational programming requirements. *See* Pet. 19. Nor does it deny that the majority opinion in *Turner I* gave mixed signals on the question or that the four-Justice dissent in that case would have found a preference like the one in § 207 content-based. *See* Pet. 19. Yet, the Government does not explain why that question is not worthy of resolution now.

All the Government says is that the Ninth Circuit and the D.C. Circuit do not acknowledge that they are in conflict. *See* Opp. 12-13. But their approaches are different, for the reasons explained in the petition. And that the D.C. Circuit split so sharply even on the fundamental issue of standard of review only underscores the need for this Court's intervention. *See* Pet. 14.

The difference in approach is not mitigated by the court of appeals' qualification that § 207 is "likely a content-neutral restriction on speech." App. 18a. That hedge is an artifact of the preliminary injunction posture of the case. There was nothing in the court's analysis, however, that would permit a different result upon review of a final judgment.

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND THIS CASE PRESENTS A SUITABLE AND RARE VEHICLE FOR ADDRESSING THEM.

As is so often true in First Amendment cases, the questions presented here—regarding the baseline level of scrutiny for satellite TV and the treatment of educational requirements for satellite TV and cable—transcend the particular facts of this case. While insisting that this particular statute is unimportant, the Government does not deny that these larger questions are important, completely apart from the context in which they arise. *See* Pet. 22.

The importance of the transcendent issues is not diminished by the 2013 expiration date of this particular preference. Obviously, a First Amendment violation is unconstitutional even if it has an expiration date. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). When this Court addresses the merits, it will decide—as it does in any First Amendment case—whether Congress is permitted to impose such a requirement at all. The answer to that question will not depend on whether the incursion on editorial discretion will end up lasting ten more months or ten more years.

The Government is also incorrect in asserting that § 207 does not affect DISH because DISH opted to take the statute's less onerous burden—to enter

into a contract to carry 30 PBS stations in HD rather than having to carry 78 stations within six months and over 200 within 18 months of STELA's passage. *See* Pet. 7. It is undisputed that DISH would never have entered into that contract with the 30 PBS stations but for § 207, and that the contract is voidable if § 207 is invalidated. *See* Opp. 4.

Nor is the case mooted just because DISH currently has to carry 46 PBS stations in HD as part of its obligation to carry all local stations in HD in that many markets and will have to carry 93 stations in HD by February 2012. *See* Opp. 15. There are 210 media markets in the U.S. ER 198. While § 207 did not specify which 30 stations DISH would have to carry, DISH had to recruit 30 specific stations to sign the contract. Those specific stations are not all in markets that DISH is currently covering in HD. Nor are they all in the markets to which DISH will expand its HD service in February 2012. In other words, DISH is currently carrying PBS stations it would not currently be obligated to carry but for § 207, and the same will be true after February 2012. DISH would be able to—and would—immediately drop the stations it is carrying against its will if this Court were to reverse the court of appeals.

Contrary to the Government's assertion, *see* Opp. 14, there is no inconsistency between DISH's position that these issues are important and the observation that the opportunities to address these issues are rare. An issue does not have to present itself in numerous cases to be important. One of the reasons the questions presented are important is

that the Government has *already* imposed onerous carriage obligations on satellite TV, including considerable educational requirements. For the most part, they have all been challenged—by DISH and DIRECTV, Inc., the only two national satellite TV providers in the country—and upheld. The only way these issues will ever arise again is if Congress or the FCC decides to impose further obligations.

As the state of play in the D.C. Circuit demonstrates, this may not occur for years to come. Nearly 20 years ago, Congress co-opted 4-7% of the bandwidth of satellite TV providers for educational and public affairs programming. A 3-judge panel, applying rational-basis scrutiny, upheld the infringement on editorial discretion, with 5 judges urging en banc consideration of the panel's answer to both of the questions presented in this case. That was 14 years ago. That court has never revisited the issue because it has never been presented with another opportunity to do so. Satellite TV providers, and broadcasters generally, should not have to wait another 14 years for the answer to such fundamental questions.

III. THE COURT OF APPEALS' CONCLUSION IS WRONG.

The Government's arguments in support of the judgment below are unpersuasive—so unpersuasive, in fact, as to warrant summary reversal.

Baseline scrutiny for satellite TV. The Government does not try to defend the level of scrutiny that the court of appeals applied. It merely

mentions that satellite broadcasting is constrained by the number of satellite orbital locations and the degree to which signals from any one orbital can interfere with one another, and that a satellite TV provider's license is subject to certain public interest conditions. *See* Opp. 2. But the Government does not grapple with any of the arguments in the petition as to why these factors do not justify diminished scrutiny.

Nor does the Government even acknowledge the arguments for why satellite TV is entitled to greater First Amendment protection than either conventional broadcast or cable. *See* Pet. 27-29. For example, the Government does not deny that satellite TV has never had "bottleneck monopoly power" of the sort that cable exercised back in the days of *Turner*. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) ("*Turner I*"). Nor does the Government dispute that that was the dominant theme in *Turner I* and this Court left little doubt that the outcome of the case would have been different if cable did not have such power, which it no longer does, *see Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); Pet. 28.

Content-based. The Government's argument that § 207 is content-neutral is as follows: Step One: The definition of a "qualified noncommercial educational television station" in § 207 is "for all relevant purposes identical" to the one in the cable must-carry rules. Opp. 10. Step Two: *Turner I* held that the cable must-carry rules were content-neutral. Step Three: Therefore, § 207 must be

content-neutral. *See* Opp. 11. But the Government loses its footing with its very first step.

Unlike § 207, the statute challenged in *Turner I* benefited ***all*** full-power local television stations, both commercial and noncommercial. The must-carry rules applied to stations covered by *both* § 4 ("local commercial television" stations) and § 5 ("noncommercial educational" stations). "Taken together, therefore, [these provisions] … confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system." *Turner I*, 512 U.S. at 633. This observation was critical to this Court's decision to uphold the cable must-carry rules, for that was the only reason the Court was able to say that "[t]he rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network-affiliated, English or Spanish language, religious or secular." *Id.* at 645.

The same cannot be said of § 207. Section 207's benefits flow only to *qualified noncommercial educational* stations. *See* Pet. 5. It excludes all others: commercial stations and noncommercial stations that are too religious, political, or pedagogical. Extending a coveted benefit to only 1 of 13 local stations in a particular market, *see* Pet. 6, is a far cry from the regime benefitting "all full power broadcasters" that this Court found content-neutral in *Turner I*. 512 U.S. at 645.

The Government ignores that passage in *Turner I* in favor of a minor passage—also invoked by the court of appeals—to argue that a statute cannot be

content-based unless a governmental entity somehow "control[s]" the content (as opposed to favoring the speaker or favoring the subject matter). Opp. 11. But *Turner* said no such thing. Numerous cases, both before and after *Turner*, struck laws as content-based where the state did not control the speaker: The state utility commission in *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986) (plurality opinion), for example, did not dictate what the advocacy group put in its leaflets. Similarly, no governmental entity dictated what content went into the magazines that enjoyed the benefit in *Arkansas Writers*'. The rule has always been that the First Amendment is necessarily implicated whenever the Government seeks to privilege one subject matter over any other no matter the distance it pretends to keep. *See* Pet. 29-31.

The Government is equally off base in asserting that § 207 is content-neutral on the ground that § 207 was passed "not because [public television stations] broadcast any particular content but because their unique structure insulates them from pressures that motivate the programming choices of commercial broadcast stations." Opp. 11. If that had been Congress's goal, it would have granted a preference to all noncommercial stations, not just to "qualified" ones. The difference between the two is all about content.

Congress is free to support public television stations with its own money—even on the ground that it prefers the content of public television. What Congress has never done—and what it may not do

consistent with First Amendment principles—is force a private carrier to agree with and adopt the Government's content preferences.

Applying scrutiny. Whatever the level of scrutiny, the Government does not demonstrate that § 207 is justified by either the legislative record or the litigation record. In the legislative record, the Government points to nothing but a public television advocate's testimony that it is important "to ensure that Dish's 14 million customers have access to the full benefits of their local public television stations' digital offerings" and the Orwellian assertion in a House Report that DISH's refusal to put PBS at the front of the HD line "constitutes discriminatory treatment." Opp. 9 (citations omitted). By way of support in the litigation record, the Government cites nothing but a public television advocate's declaration that confirms that PBS relies on "donations from local viewers." Opp. 9 (quoting ER 178). The Government does not point to a single piece of evidence—nor any reason to believe—that PBS stations faced any jeopardy just because a single TV carrier denied them an extra HD channel. There is none, and what evidence *was* in the record proved exactly the opposite. *See* Pet. 35.

Equally fatal to its defense is the Government's failure to offer so much as a suggestion as to how Congress could have saved the entire group of 356 PBS stations from jeopardy simply by forcing DISH to sign a contract to carry 30 of them. *See* Pet. 36.

IV. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION PENDING THE OUTCOME OF *FOX TELEVISION*.

Even if this Court is not prepared to grant certiorari outright, it should hold this petition pending the outcome of *Fox Television*. The Government fails to see "how the cases relate to one another." Opp. 16 n.5. That is only because the Government completely ignores the petition's argument that carriage obligations on satellite TV are subject to strict scrutiny, like all other media.

The broadcasters in *Fox Television*, like Petitioners here, argue that "the Court should announce firmly and finally that the time for treating broadcast speech differently than all other communications is over." Fox Brief at 1. They also argue, as Petitioners here do, that "the media marketplace has changed radically in ways that" undermine the current doctrine. *Id.* at 17. If this Court accepts these arguments for over-the-air broadcast, then they will apply with even greater force to cable TV and satellite TV.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari or hold this petition pending the outcome of *Fox Television*.

Respectfully submitted,

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