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Nos. 95-774 and 95-775

# In the Supreme Court of the United States

OCTOBER TERM, 1995



TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS 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 the court of appeals properly applied intermediate scrutiny in rejecting the cable industry's challenge to the FCC's implementation of Section 3 of the 1992 Cable Act, which requires regulation of the rates of cable operators that do not face effective competition.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-99a) is reported at 56 F.3d 151.

## JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995. A petition for rehearing was denied on August 17, 1995. Pet. App. 102a. The petitions for a writ of certiorari were filed on November 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Only about 50 of the more than 11,000 cable systems in this country face competition from another cable operator. As the court of appeals explained, "[t]he monopolies most cable operators now enjoy resulted from exclusive franchises granted by local authorities." Pet. App. 51a. See also *id.* at 52a ("Exclusive franchising ended in 1992 * * *, but the effects linger on.").

Like other monopolies that depend on the use of public rights-of-way, the cable industry, "[a]lmost from its inception in the 1950s, * * * has been subject to some form of rate regulation." Pet. App. 41a. Initially, rate regulation generally was administered by municipalities and other local franchising authorities "as a means to prevent cable operators from charging unreasonably high rates." H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984). In 1984, Congress enacted the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), to "establish a national policy concerning cable communications." 47 U.S.C. 521(1). With respect to rate regulation, the 1984 Cable Act restricted the authority of local governments by permitting them to regulate only the basic service rates of those cable systems that were not subject to "effective competition" as defined by the FCC. See S. Rep. No. 92, 102d Cong., 1st Sess. 4 (1991) (*1991 Senate Report*); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 (1992) (*1992 House Report*). The FCC's definition of "effective competition," as implemented in 1986, effectively prohibited local authorities from regulating the rates of cable systems in approximately 96% of the nation's communities. *1992 House Report* 31; see also *1991 Senate Report* 4.

Experience under the 1984 Cable Act's deregulatory regime led Congress to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). Contrary to Congress's expectation in 1984, competition to cable had not developed from satellite systems. *1992 House Report* 26. Consequently, Congress in 1992 found that "most cable television subscribers have no opportunity to select between competing cable systems" and that "[t]he result is undue market power for the cable operator as compared to that of consumers." 1992 Cable Act, § 2(a)(2) and (4), 106 Stat. 1460. The legislative record of the 1992 Cable Act contained substantial evidence that the cable industry, which had become the "dominant nationwide video medium" (*id.* § 2(a)(3), 106 Stat. 1460), was taking unfair advantage of its status as an unregulated monopoly. Specifically, Congress found that the average monthly cable rate had increased "almost 3 times as much as the Consumer Price Index since rate deregulation" (*id.* § 2(a)(1), 106 Stat. 1460); see also *1991 Senate Report* 4-8, and that consumers in some locations were being "gouged by cable operators" (*id.* at 7).

Congress concluded that rate reregulation was necessary to ensure that cable operators would not exercise "undue market power vis-a-vis video programmers and consumers." 1992 Cable Act, § 2(b)(5), 106 Stat. 1463; see also *1991 Senate Report* 8-9, 20. Accordingly, Congress enacted the 1992 Cable Act, which expanded the scope of cable rate regulation by redefining "effective competition." 47 U.S.C. 543(*l*)(1) (Supp. V 1993). Under the new statutory definition, a cable system faces "effective competition"—and is therefore exempt from rate regulation—only if it falls within one of three categories: (1) "low penetration systems," whose subscribers number less than 30% of the households in a franchise area (47 U.S.C. 543(*l*)(1)(A) (Supp. V 1993)); (2) "overbuilds," which face actual head-to-head competition from another video programming service (47 U.S.C. 543(*l*)(1)(B) (Supp. V 1993)); and (3) "municipal systems," which are operated by municipalities or by private operators that compete with municipally operated systems (47 U.S.C. 543(*l*)(1)(C) (Supp. V 1993)).

Any cable system that does not face "effective competition" as defined by the 1992 Cable Act is subject to rate regulation. Under the statutory scheme, the FCC promulgates regulations pursuant to which local franchising authorities regulate the rates for the basic service tier. 47 U.S.C. 543(a) and (b) (Supp. V 1993).[1] The statute requires that the Commission "shall, by regulation, ensure that the rates for the basic service tier are reasonable." 47 U.S.C. 543(b)(1) (Supp. V 1993). The 1992 Cable Act also directs the Commission to establish a system of

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[1] At a minimum, the basic tier must include local commercial television stations; noncommercial educational television stations; public, educational, and governmental access programming required by the cable system's franchise; and television broadcast station signals provided by the cable system to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area. 47 U.S.C. 543(b)(7)(A) (Supp. V 1993). In addition, the statute permits cable operators to add other video programming signals or services to the basic tier. 47 U.S.C. 543(b)(7)(B) (Supp. V 1993).

exclusive FCC regulation of the rates of upper tiers, which are called "cable programming services." 47 U.S.C. 543(c) (Supp. V 1993).[2] The Commission's regulations must "establish * * * criteria * * * for identifying, in individual cases, rates for cable programming services that are unreasonable." 47 U.S.C. 543(c)(1)(A) (Supp. V 1993). In determining whether basic tier rates are "reasonable" and whether upper tier rates are "unreasonable," the Commission is directed to consider seven factors for basic tier rates and six similar factors for upper tier rates. 47 U.S.C. 543(b)(2)(C), 543(c)(2) (Supp. V 1993). Both sets of factors direct the Commission to consider "the rates for cable systems * * * that are subject to effective competition." 47 U.S.C. 543(b)(2)(C)(i), 543(c)(2)(B) (Supp. V 1993).

2. The Commission developed a "tier neutral" rate regulation system, under which "the same methodologies and standards are used to establish allowable rates for both the basic service tier and the cable programming service tier(s)." Pet. App. 29a-30a. Before developing that system, the Commission conducted a survey of the rates and system characteristics of more than 400 cable systems, including almost all systems that face head-to-head competition

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[2] The statute defines "cable programming service" to include "any video programming provided over a cable system * * * other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." 47 U.S.C. 543(*l*)(2) (Supp. V 1993). Video programming that is offered on a per channel or per program basis—including pay-per-view channels and premium channels such as HBO and Showtime—is exempt from rate regulation. See 47 U.S.C. 543(a)(1), 543(*l*)(2) (Supp. V 1993).

from another cable operator. The Commission then performed an econometric analysis of the survey data, comparing systems that were and were not subject to "effective competition" as defined by the 1992 Cable Act. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5761 (¶ 199) (1993) (*Rate Order*). The Commission's initial analysis of the survey results revealed that three system characteristics, in addition to the presence or absence of competition, explained variation in rates: the number of channels offered by the system; the number of subscribers; and the number of satellite-delivered signals offered. *Rate Order*, 8 FCC Rcd at 5768, 6144 (¶ 210, Appendix E at ¶ 27). Controlling for the effects of those three variables, the Commission found a "competitive differential" of 10% between the systems that faced "effective competition" (within the meaning of the 1992 Cable Act) and those that did not. *Rate Order*, 8 FCC Rcd at 6145, 6146 (Appendix E at ¶¶ 29, 31). As the court of appeals explained, however, the majority of the systems in the sample that faced "effective competition" as defined by the Act were "low penetration" systems—that is, systems that did not actually face head-to-head competition but that were relieved from rate regulation under the statute because they served fewer than 30% of the households in their franchise area. Pet. App. 9a. The survey showed that the rates charged by low penetration systems are only 1% lower than the rates charged by similar systems that do not face "effective competition." *Ibid.* In contrast, the rates charged by overbuilds were found to be 13% lower, and the rates charged by municipal systems 37% lower, than the rates charged by similar systems that do not face "effective competition." *Ibid.*

On reconsideration, the FCC refined its econometric analysis of the survey data in order to reflect more accurately the difference between the rates charged by noncompetitive systems and "reasonable" rates. *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*Second Reconsideration*). Specifically, "in a further multiple regression analysis, the FCC isolated and controlled for certain additional factors that affect a system's rates." Pet. App. 9a. "More significant[ly], however," the Commission disaggregated the data—that is, conducted separate analyses of low penetration systems, overbuilds, and municipal systems—and "decided that the overbuild sample provides the best indicator of the effects of competition upon rates." *Ibid.* As noted above, the Commission's analysis indicated a competitive differential of 13% between overbuilds and cable systems that did not face "effective competition." *Ibid.*

The Commission then made two adjustments to the 13% figure. First, only a few of the systems in the overbuild sample competed head-to-head across their entire franchise areas; not surprisingly, the FCC's analysis concluded that rates decreased as the extent of the competition increased. The Commission therefore "adjusted the overbuild figure from 13 percent to 16 percent * * * by factoring in the percentage of each system in that group that is actually overbuilt by a competing system." Pet. App. 9a. Second, since very few systems face competition from more than one cable operator, the 16% figure actually represents the difference in price between a monopolist and a duopolist. Based partly on the fact that a duopoly situation is far from ideal, and partly on consideration of other factors (including the 37% differential observed for municipal systems), the Commission adjusted the 16% figure to 17%. *Id.* at 16a. The 17% competitive differential represents the Commission's best estimate of the average difference between the rates charged by most cable operators and the "reasonable" rates mandated by the statute.

The Commission did not necessarily require cable operators to reduce their rates to reflect the 17% differential. Instead, "a cable system can avoid the automatic (now 17 percent) reduction by opting for cost-of-service regulation." Pet. App. 10a. That is, any cable operator may elect to participate in a proceeding of the sort commonly used to set rates for other monopolists that use public rights-of-way, such as telephone companies and other utilities. Under that approach, a cable operator may set its rates to cover its costs of providing cable service together with an 11.25% return on its investment. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4612 (¶ 147) (1994) (*1994 Report and Order*).

After establishing the system for setting initial cable rates at a reasonable level, the Commission adopted a system of "price cap" regulation to ensure that rates would remain reasonable in the future. See *Rate Order*, 8 FCC Rcd at 5774, 5776-5777 (¶¶ 223, 227-229); *Second Reconsideration*, 9 FCC Rcd at

4200-4201 (¶ 169). Under the price cap system, cable rates may increase or decrease according to a formula that accounts for the annual percentage change in the cost of goods and services in the economy as a whole, as measured by the Gross National Product Price Index (GNP-PI), and for the change in specified "external costs" that are generally outside the cable operator's control and are not otherwise accounted for in the GNP-PI adjustment. *Rate Order*, 8 FCC Rcd at 5782-5790 (¶¶ 239-254). One "external cost" that a cable operator may recover (even though it is within the cable operator's control) is the cost of adding channels. To promote the growth and diversity of cable programming, FCC rules permit cable operators to pass on to their subscribers the actual expense of adding channels to their systems, along with an overhead charge and a 7.5% mark-up for each channel added. *Second Reconsideration*, 9 FCC Rcd at 4242-4245 (¶¶ 245-249).[3]

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[3] The Commission subsequently revised its rules to provide additional incentives for cable operators to add new channels. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226 (1994) (*Sixth Reconsideration*). Under the revised rules, operators may increase rates by a fixed amount per month per channel as an alternative to the 7.5% mark-up. *Id.* at 1244-1260 (¶¶ 54-98). In addition, operators may create "new product tiers" for which they can charge any rate as long as existing service is not fundamentally changed and subscribers affirmatively request a new tier. *Id.* at 1233-1239 (¶¶ 16-37). Petitioner Time Warner Entertainment (TWE) claims (Pet. 18 n.32) that the Commission "candidly admitted that it had originally gotten it wrong" when it made those adjustments to its price cap rules. In fact, the Commission neither made nor

3. Petitioners sought review of the FCC's cable rate regulations. In an opinion written by Judge Ginsburg, the court first rejected petitioners' claims under the Administrative Procedure Act (APA). With respect to the Commission's most important decision—to focus on the overbuild systems rather than the low penetration systems—the court (1) held that the Commission had "articulated a powerful economic rationale for according only minimal weight" to the low penetration data, and (2) further concluded that the decision to focus on the overbuilds, on the theory that they "provide the most accurate data for the purpose of simulating competitive cable rates," is "a proposition that seems at first glance to be nearly self-evident." Pet. App. 12a, 13a. The court found "completely reasonable" the adjustment from 13% to 16% based on the evidence showing that price competition intensifies based on the extent of the competition. *Id.* at 15a. The court of appeals also upheld the further 1% upward adjustment to a 17% competitive differential, recognizing that that adjustment was supported both by the Commission's theory that duopolists do not compete as vigorously as firms in a fully competitive market and by the data regarding municipal systems, which showed a 37% competitive differential. *Id.* at 16a.

The court of appeals also rejected petitioners' argument that a separate competitive differential should be calculated for large systems. The court explained that the Commission had reasonably decided that it

makes any such admission. The court of appeals correctly approved both the initial rules, which authorized the 7.5% mark-up, and the additional options later provided to cable operators. See Pet. App. 50a & n.8.

would be "statistically risky" to "subdivid[e] the already small sample of systems facing effective competition into still-smaller sub-samples." Pet. App. 17a-18a. It also recognized that a partial FCC analysis had failed to support petitioners' theory that large cable systems are generally unable to exercise market power because they are typically located in areas that have more entertainment alternatives. *Id.* at 17a (noting that the Commission's analysis "takes much of the wind out of the cable petitioners' sails").[4]

In rejecting the cable operators' other primary challenge—their contention that the Commission had erred by developing a tier neutral approach—the court of appeals began by noting that the cable industry's argument was "premised upon a significant misunderstanding of the Act." Pet. App. 30a. First, contrary to the cable operators' contention, "Congress was concerned with what it perceived to be the excessiveness of cable rates in general, not the rates for a particular type of service." *Ibid.* In addition, the court found no merit to the cable operators' argument, based on the statutory requirement that basic rates be "reasonable" while cable

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[4] Petitioner National Cable Television Association (NCTA) states (Pet. 12) that "[t]he Commission acknowledged that there was no competitive differential at all for the large systems." The Commission made and makes no such acknowledgement. The Commission merely acknowledged that, if the data were sliced in a statistically improper manner, the differential could be rendered statistically insignificant for some sub-groups. See Gov't C.A. Br. 92-97. Moreover, the statistical analysis of the cable industry's own experts showed a 20% differential—that is, a differential larger than that selected by the Commission—for the largest cable operators, those with more than 50,000 subscribers. Charles River Associates, *An Analysis of the FCC's Cable Television Benchmark Rates* 33 (June 17, 1993).

programming service rates must not be "unreasonable," that "the Commission's regulation of cable programming service must be more lenient than its regulation of the basic service tier." *Id.* at 32a. The court found that argument "at the least counterintuitive" and stated that the difference in terminology "is easily explained as a product of the different procedural postures" in which challenges to basic tier rates and cable programming service tier rates arise. *Ibid.* With respect to the statutory directive that the Commission "consider" various factors in establishing reasonable rates, the court concluded that the FCC "met those requirements and exceeded them." *Id.* at 35a.

Petitioners also contended that the FCC's rate regulations violated the First Amendment rights of cable operators. In an opinion written by Judge Randolph, the court of appeals rejected petitioners' constitutional claim. Pet. App. 40a-57a. As an initial matter, the court ruled that the regulations were not subject to strict scrutiny. *Id.* at 47a-53a. The court noted that "[o]ne frequently-mentioned reason for imposing the more demanding First Amendment standard petitioners advocate is that the law is content-based," and concluded that "[n]o serious claim can be made that the cable rate regulations are of this sort." *Id.* at 48a.

The court of appeals reviewed the cable rate rules under the intermediate standard that this Court applied in *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994), and concluded that the cable rate rules satisfy the two-part intermediate scrutiny test. First, the court found that the government's interest in "protecting consumers from monopoly prices charged by cable operators who do not face effective competition" is "important or substantial." Pet. App. 53a. Second, the court determined that the Commission's rules for ensuring reasonable cable rates do not "burden substantially more speech than is necessary." *Id.* at 55a-56a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)). In that regard, the court emphasized that "rate regulation is triggered by the absence of effective competition and ceases when effective competition emerges." Pet. App. 56a.

In rejecting petitioners' First Amendment challenge to the methodology used by the Commission in implementing the rate regulation provisions of the 1992 Cable Act, Judge Randolph's opinion for the court incorporated by reference Judge Ginsburg's opinion rejecting petitioners' APA challenge. Judge Randolph stated:

> In the opinion for the court written by Judge Ginsburg, we explain in detail why the Commission's treatment of the data for low penetration and large systems was neither arbitrary and capricious nor in violation of the 1992 Cable Act. For the reasons discussed there, we also conclude here that the Commission's treatment of those data does not raise any First Amendment concerns. Because regulated large systems and low penetration systems may, as the FCC reasonably concluded, have significant market power and therefore charge supracompetitive rates, and because the Commission established the cost-of-service option as a protective safety-valve for individual systems, there was no mismatch between the problem and the Commission's solution.

Pet. App. 55a n.10.

## ARGUMENT

The court of appeals correctly held that the Commission's cable rate regulations are subject to review under intermediate rather than strict scrutiny, and it correctly sustained those regulations against petitioners' constitutional challenge. Further review is not warranted.

1. Contrary to petitioner TWE's assertion (Pet. 12-20), the court of appeals' decision to apply intermediate scrutiny to the FCC's cable rate regulations is fully supported by governing precedent. As this Court noted in *Turner Broadcasting*, strict scrutiny under the First Amendment is reserved for "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." 114 S. Ct. at 2459. "In contrast," the Court declared, "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.* (citing *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The Court in *Turner Broadcasting* held strict scrutiny inapplicable to the FCC's must-carry rules, which require cable operators "to devote a portion of their channels"—about one-third—"to the transmission of local broadcast television stations." 114 S. Ct. at 2451. The Court acknowledged that the must-carry rules "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." *Id.* at 2460. Despite the effect of the must-carry rules on content, the Court found those rules content-neutral—and therefore subject to intermediate scrutiny—because they did "not require or prohibit the carriage of particular ideas or points of view." *Id.* at 2462.

In light of *Turner Broadcasting*, the court of appeals correctly applied intermediate scrutiny to the FCC's cable rate regulations. Those regulations, like the must-carry rules at issue in *Turner Broadcasting*, do not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" or otherwise threaten "to 'distort the market for ideas.'" *Turner Broadcasting*, 114 S. Ct. at 2459, 2468 (quoting *Leathers* v. *Medlock*, 499 U.S. 439, 448 (1991)). The cable rate regulations merely require cable operators to charge reasonable rates. In addition, FCC rules permit cable operators to make a cost-of-service showing instead of reducing their rates by the competitive differential (*Rate Order*, 8 FCC Rcd at 5797-5800 (¶¶ 270-272)), to recover the expense of adding new channels plus a 7.5% mark-up (*Second Reconsideration*, 9 FCC Rcd at 4242, 4244 (¶¶ 245, 248)), and to create "new product tiers" for which they may charge any rate (*Sixth Reconsideration*, 10 FCC Rcd at 1233-1239 (¶¶ 16-37)). Those provisions serve to minimize whatever effect rate regulation may have on content.

As in *Turner Broadcasting*, moreover, strict scrutiny is not warranted because the regulations at issue are "justified by some special characteristic" of the cable industry. *Turner Broadcasting*, 114 S. Ct. at 2468 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983)). As the court of appeals correctly found (Pet. App. 51a-52a), cable rate regulation is justified by the monopoly status that most cable operators have attained as a result of exclusive franchises granted by local authorities. In addition, monopolists in the cable industry (unlike newspapers) exercise "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 52a (quoting *Turner Broadcasting*, 114 S. Ct. at 2466). Responding to that distinctive characteristic of the cable industry, Congress enacted the cable rate provisions for reasons unrelated to the content of speech: It acted to prevent price-gouging by monopolists.

Thus, as the court of appeals explained (Pet. App. 49a-50a), this case is plainly distinguishable from *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988), where this Court applied "exacting First Amendment scrutiny" to a state statute that limited the fees that professional fundraisers could charge for the solicitation of charitable contributions. The Court observed that the "desired and intended effect" of the statute was "to encourage some forms of solicitation and discourage others." *Id.* at 789 n.5. In contrast to the state law challenged in *Riley*, the FCC's cable rate rules are content-neutral, and are therefore properly reviewed under intermediate scrutiny.[5]

[5] *Riley* is distinguishable in other respects as well. The rate regulation at issue in *Riley* was not supported by any showing that professional fundraisers in North Carolina exercised monopoly power, much less that they had been enabled to do so by the prior actions of governmental bodies. Fees that exceeded a specified percentage of the fundraiser's gross receipts were treated as presumptively unreasonable despite the Court's "clear holding" in a previous case that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S.

2. Notwithstanding petitioners' claims to the contrary (TWE Pet. 20-30; NCTA Pet. 17-30), there is nothing exceptional about the manner in which the court of appeals applied intermediate scrutiny to the cable rate regulations. Under the two-part test reiterated by this Court in *Turner Broadcasting*, a challenged regulation must advance "an important or substantial governmental interest," 114 S. Ct. at 2469 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and the means chosen must not "'burden substantially more speech than is necessary to further the government's legitimate interests," 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799). In other words, a regulation satisfies intermediate scrutiny if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The court of appeals clearly articulated that two-part test at the outset of its constitutional analysis. Pet. App. 53a.[6] The court then applied the test to the

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at 793. Finally, the standards for rebutting the presumption were ill-defined. *Id.* at 793-794. Here, by contrast, the Commission explained in detail its basis for establishing the presumptive "reasonable rate," and its methodology was determined by the court of appeals to be reasonable. Moreover, the procedure for avoiding the presumption in an individual case is closely analogous to the procedures traditionally employed for determining the permissible rates to be charged by other monopolists that use public rights-of-way.

[6] Petitioners are incorrect in their contention that the court of appeals (per Judge Randolph) misapplied intermediate scrutiny in incorporating by reference (see Pet. App. 55a n.10) Judge Ginsburg's discussion of their APA claim. Judge Randolph's opinion for the court accurately stated this Court's intermediate scrutiny standard, see *id.* at 53a, and the court

challenged regulations. First, the court of appeals found that the government has a substantial interest in "protecting consumers from monopoly prices charged by cable operators who do not face effective competition." *Ibid.* That interest clearly provides a legitimate basis for cable rate regulation. Cf. *Turner Broadcasting*, 114 S. Ct. at 2470 ("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"). See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

The court of appeals then concluded that the cable rate regulations do not "burden substantially more speech than is necessary." Pet. App. 55a-56a (quoting

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made clear its recognition "that rational basis cannot be the test," *id.* at 47a. Petitioners are surely correct in arguing that not every agency action that would survive APA review can be sustained under intermediate scrutiny. Petitioners do not contend, however, that the government's interest in protecting consumers from the exercise of monopoly power is insufficiently substantial to satisfy intermediate scrutiny; and they appear to concede (at least for purposes of this case, see TWE Pet. 14 n.20) that the establishment of reasonable rates, measured by reference to rates charged by similar cable operators in competitive markets, is a constitutionally permissible method of furthering that interest. Their sole quarrel is with the economic analysis employed by the Commission in making that comparison. With respect to the Commission's resolution of subsidiary economic questions, the court of appeals properly accorded deference to the expert agency's findings, see pages 19-21, *infra*; and Judge Randolph properly relied on Judge Ginsburg's discussion regarding the reasonableness of those findings.

*Ward*, 491 U.S. at 799). The court correctly found that "the rate regulations are narrow enough" because "rate regulation is triggered by the absence of effective competition and ceases when effective competition emerges." Pet. App. 56a. As the court of appeals further noted, the Commission is taking affirmative steps to limit the duration of cable rate regulation by promoting the development of competitive alternative video services through telephone-company wires. *Ibid.*[7]

The court of appeals also pointed out that the cable rate regulations provide a "safety valve"—a cost-of-service option—for any cable operator that believes it would be justified in charging rates higher than those permitted through application of the competitive differential. Pet. App. 56a-57a. The availability of that option ensures that every cable operator will be able to recover its reasonable costs and earn an 11.25% rate of return on investment. See *1994 Report and Order*, 9 FCC Rcd at 4612 (¶ 147). Taking all of those factors into account, the court correctly found that the FCC's rules do not burden substantially more speech than is necessary to achieve the congressional objective of ensuring that cable rates are reasonable.

[7] Petitioner NCTA relies (Pet. 26) on the fact that, "during the period of deregulation, rates on a per-channel basis had increased *less* than the rate of inflation" as evidence that cable operators have refrained from exercising their market power. But, as the court of appeals explained (Pet. App. 54a-55a), "per-channel figures are misleading because, * * * [a]s a cable operator adds more channels (most did in the 1980s), the operator's fixed costs are spread over additional channels and its per-channel fixed costs decline."

Contrary to petitioners' contention, the court of appeals did not err in according deference to the economic analysis used by the Commission in setting "reasonable rates" pursuant to its statutory mandate. As *Turner Broadcasting* makes clear, a reviewing court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the court's] own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." 114 S. Ct. at 2471 (opinion of Kennedy, J.); see also *id.* at 2473-2475 (Stevens, J., concurring in part and concurring in the judgment). The fact that First Amendment issues are implicated therefore does not mean that a reviewing court must resolve *de novo* all empirical questions bearing on the ultimate disposition of a constitutional claim.[8]

Similar concerns for institutional competence mandate judicial deference to technical judgments made by an expert agency pursuant to a clear

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[8] Indeed, even when applying strict scrutiny, this Court has not required the government to demonstrate that the precise line between lawful and unlawful conduct is the best (much less the only reasonable) one that could be drawn. See *Burson* v. *Freeman*, 504 U.S. 191, 210 (1992) (opinion of Blackmun, J.) (argument that 100-foot campaign-free zone around polling places should be reduced to 25 feet "is a difference only in degree, not a less restrictive alternative in kind," that does not raise a question of "constitutional dimension"); *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976) (per curiam) (if a reviewing court "is satisfied that some limit on [campaign] contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000").