UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

COMCAST OF MAINE/NEW HAMPSHIRE, INC., et al.	)	
Plaintiffs,	)	
v.	)	Docket No. 1:19-cv-410-NT
JANET MILLS, et al.,	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This year, Maine enacted LD 832, which requires cable operators to allow cable subscribers to purchase cable channels and programs individually. Maine is the first state in the nation to enact such an à la carte mandate. Plaintiff Comcast of Maine/New Hampshire ("**Comcast**") currently bundles most of its channels, requiring subscribers who wish to view specific programming to receive more channels and programs than they may need or want. Comcast and a number of video programmers (collectively, the "**Plaintiffs**") claim LD 832 is facially unconstitutional because it is preempted by federal law and because it violates the First Amendment. Before me is the Plaintiffs' motion for a preliminary injunction. For the reasons that follow, I **GRANT** the Plaintiffs' motion.

LEGAL STANDARD

In determining whether to grant a preliminary injunction, I must consider:

> (i) the movant's likelihood of success on the merits of its claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the

> parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest.

Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 9 (1st Cir. 2013).

The Plaintiffs bear the burden of establishing that these factors weigh in their favor. *Esso Standard Oil Co. (P.R.) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006). "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017), *as amended* (June 26, 2017) (internal quotation marks omitted). In the context of a First Amendment claim, the Plaintiffs have the burden to show that the state law infringes on their First Amendment rights. *Id.* at 180 n.5 (citing *Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 438 (7th Cir. 2005)). If the Plaintiffs make this showing, then the State must justify its restriction on speech under the appropriate constitutional standard. *Id.* (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011)).

DISCUSSION

I. Likelihood of Success

A party seeking a preliminary injunction must establish that it is likely to succeed on the merits of its claims. The likelihood of success on the merits prong has been described as the *sine qua non* of the four factors for establishing a preliminary injunction. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.")

The Plaintiffs argue that the à la carte mandate is preempted by the federal Cable Act, 47 U.S.C. §§ 521 *et seq.*,[1] and that the law violates their rights under the First Amendment. I discuss each argument in turn.

A. Preemption

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. It has long been recognized that "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). The Supreme Court has made clear that:

> because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Congress may preempt state law either directly—through an express preemption provision in a federal statute—or implicitly. *Grant's Dairy—Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 15 (1st Cir. 2000). The Plaintiffs maintain that the federal Cable Act does both.

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[1] Congress enacted the Cable Act in 1984. Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779 ("**1984 Cable Act**"), codified at 47 U.S.C. §§ 521 *et seq.* Congress amended the law in 1992, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 ("**1992 Cable Act**"), and in 1996, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56 ("**1996 Cable Act**").

1. Express Preemption

"Congressional intent is the touchstone of any effort to map the boundaries of an express preemption provision." *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 452 (1st Cir. 2014) (citations omitted). Because there exists a "presumption against the pre-emption of state police power regulations," the Supreme Court has instructed lower courts to narrowly interpret express preemption provisions. *Medtronic*, 518 U.S. at 485 (quoting *Cipollone*, 505 U.S. at 518).

The Plaintiffs contend that provisions of the Cable Act—47 U.S.C. § 544(f) and 47 U.S.C. § 544(a) and (b)—expressly preempt LD 832. Accordingly, I consider whether Congress intended to expressly preempt states from imposing à la carte mandates on cable operators under those sections.

a. Section 544(f)

Section 544(f) prohibits states from imposing "requirements regarding the provision or content of cable services," unless expressly allowed by the Cable Act. 47 U.S.C. § 544(f)(1). The Plaintiffs argue that the à la carte mandate is a "requirement[] regarding the provision or content of cable services," preempted by the plain meaning of § 544(f). Pls.' Mot. for Preliminary Injunction ("**Mot.**") 7 (ECF No. 14). The State urges me to adopt a narrower definition of the term "provision" in § 544(f), relying on the structure of the Cable Act, its legislative history, and cases that have interpreted the provision. State's Opp'n to Mot. ("**Opp'n**") 6–13 (ECF No. 69).

i. Interpreting § 544(f)

(I). The Plain Meaning of § 544(f)

Section 544(f) provides:

> [a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in [the Cable Act].

47 U.S.C. § 544(f)(1). In enacting LD 832, the State has attempted to impose requirements regarding how cable operators must provide programming. If § 544(f) is considered in isolation, then by its plain meaning, LD 832 would be preempted.

The Supreme Court has recently explained the relevant rules of statutory construction:

> If the statutory language is plain, we must enforce it according to its terms. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." [*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).] So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.* at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation marks omitted).

King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (parallel citations omitted).

(II). Section 544(f) in Context

"Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Taking into account the context of § 544(f), at least one other section of the Cable Act suggests that Congress did not intend the phrase "provision . . . of cable services" to be read broadly. Section 544(e), which was also enacted as part of the 1984 Cable Act, provides that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber

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