United States Court of Appeals
For the First Circuit

No. 20-1104

COMCAST OF MAINE/NEW HAMPSHIRE, INC.; A&E TELEVISION NETWORKS,
LLC; C-SPAN; CBS CORP.; DISCOVERY, INC.; DISNEY ENTERPRISES,
INC.; FOX CABLE NETWORK SERVICES, LLC; NBCUNIVERSAL MEDIA, LLC;
NEW ENGLAND SPORTS NETWORK, LP; VIACOM, INC.,

Plaintiffs, Appellees,

v.

JANET MILLS, in her official capacity as the Governor of Maine;
AARON FREY, in his official capacity as the Attorney General of
Maine,

Defendants, Appellants,

CITY OF BATH, MAINE; TOWN OF BERWICK, MAINE; TOWN OF BOWDOIN,
MAINE; TOWN OF BOWDOINHAM, MAINE; TOWN OF BRUNSWICK, MAINE; TOWN
OF DURHAM, MAINE; TOWN OF ELIOT, MAINE; TOWN OF FREEPORT, MAINE;
TOWN OF HARPSWELL, MAINE; TOWN OF KITTERY, MAINE; TOWN OF
PHIPPSBURG, MAINE; TOWN OF SOUTH BERWICK, MAINE; TOWN OF
TOPSHAM, MAINE; TOWN OF WEST BATH, MAINE; TOWN OF WOOLWICH,
MAINE,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. Nancy Torresen, U.S. District Judge]

Before
Lynch and Lipez, Circuit Judges.*

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* Judge Torruella heard oral argument in this matter and
participated in the semble, but he did not participate in the
issuance of the panel's opinion in this case. The remaining two
panelists therefore issued the opinion pursuant to 28 U.S.C.
§ 46(d).

Christopher C. Taub, Deputy Attorney General of the State of Maine, with whom Aaron M. Frey, Attorney General of the State of Maine, was on brief, for appellants.

Matthew A. Brill, with whom Melissa Arbus Sherry was on brief, for appellees.

Kelly M. Klaus, Donald B. Verrilli, Jr., and Elaine J. Goldenberg on brief for WarnerMedia, LLC, amicus curiae.

Corbin K. Barthold and Cory L. Andrews on brief for Washington Legal Foundation, amicus curiae.

John Ulin, James S. Blackburn, and Oscar Ramallo on brief for Motion Picture Association, Inc., amicus curiae.

February 24, 2021

LIPEZ, **Circuit Judge**. Maine passed a law in 2019 requiring cable operators to offer their subscribers the option of buying access to cable programs and channels individually, rather than bundled together in a channel or package of channels. A group of cable operators and programmers sued and sought a preliminary injunction against enforcement of the law, arguing that it violated the First Amendment and was preempted by provisions of the federal Communications Act. The district court granted the preliminary injunction on First Amendment grounds, and Maine appealed.

For the reasons discussed below, we agree with the district court that the law implicates the First Amendment and therefore triggers some form of heightened -- either intermediate or strict -- judicial scrutiny. We also accept Maine's concession that, at this point in the litigation, it has not offered enough evidence in support of the law to survive such scrutiny. We therefore affirm.

I.

The law at issue is called "An Act to Expand Options for Consumers of Cable Television in Purchasing Individual Channels and Programs." 2019 Me. Laws 129th Leg., ch. 308 (codified at Me. Stat. tit. 30-A, § 3008(3)(F) (2019)) ("Chapter 308" or "the Act"). The sole operative provision of the Act imposed an "à la carte" requirement on cable operators: "Notwithstanding any provision in a franchise, a cable system operator shall offer subscribers the

option of purchasing access to cable channels, or programs on cable channels, individually." Id. As far as the record on appeal indicates, the accompanying legislative record was sparse. The district court noted that the Maine Legislature did not hear from expert witnesses or commission a Maine-specific study to determine what impact the Act would have on access to cable services.

However, one of the Act's sponsors testified before the Energy, Utilities, and Technology Committee that he had "submitted th[e] bill on behalf of Maine's hundreds of thousands of cable television subscribers," who "[f]or far too long . . . have been forced to purchase cable TV packages which include dozens of channels the consumer has no interest in watching." Citing a Federal Communications Commission ("FCC") survey, the sponsor reported that the price of an expanded basic cable package had risen faster than inflation, and, relying on a 2006 FCC report, suggested that the average cable bill would be thirteen percent lower if consumers could subscribe to only their preferred channels. Barry Hobbins, Maine's Public Advocate, also offered testimony, suggesting that many consumers were frustrated with their cable providers and would prefer a regime in which they only paid for the channels they actually watched. Although the Public Advocate did not formally endorse the Act, he opined that the law "would go a long way in an attempt to remedy the lack of consumer choice in the cable marketplace in Maine."

Before the Act went into effect, a cable operator
(Comcast of Maine/New Hampshire, Inc.) and various cable
programmers (together, "plaintiffs" or "the cable companies")[1] sued
the Governor and the Attorney General of Maine ("the state
defendants" or simply "Maine" or "the state")[2] in federal district
court, claiming that Chapter 308 violated the First Amendment and
was preempted by various provisions of the federal Communications
Act of 1934, as amended. A few days later, the plaintiffs moved
for a preliminary injunction against enforcement of the Act. The
district court consolidated the trial on the merits with a hearing
on the preliminary injunction motion. See Fed. R. Civ. P.
65(a)(2).

During the district court proceedings, the state
explained in more detail how the Act would be interpreted and
enforced. See Sorrell v. IMS Health Inc., 564 U.S. 552, 563 (2011)

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[1] In general, cable operators own the physical cable
infrastructure that delivers a signal to viewers; cable
programmers produce television content and sell or license it to
cable operators. See Turner Broadcasting System, Inc. v. FCC
("Turner I"), 512 U.S. 622, 628 (1994). The programmers
challenging the law here are: A&E Television Networks, LLC; C-
SPAN; CBS Corp.; Discovery, Inc.; Disney Enterprises, Inc.; Fox
Cable Network Services, LLC; NBCUniversal Media, LLC; New England
Sports Network, LP; and Viacom, Inc. When the distinction between
the programmers and operators is unimportant, we occasionally
refer to the combined plaintiffs as just "the cable companies."

[2] The plaintiffs also named various Maine municipalities as
defendants. They were dismissed by a joint stipulation below and
are not parties to the present appeal.

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