No. 20-1104

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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.

On Appeal from the United States District Court for the District of Maine,
No. 1:19-cv-00410-NT

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees hereby state that:

Plaintiff-Appellee Comcast of Maine/New Hampshire, Inc., a New Hampshire corporation, is a wholly owned subsidiary of Comcast Cable Communications, LLC. Comcast Cable Communications, LLC is a wholly owned subsidiary of Comcast Holdings Corporation. Comcast Holdings Corporation is a wholly owned subsidiary of Comcast Corporation, a Pennsylvania corporation, which has no parent company, and no publicly held company owns 10% or more of Comcast Corporation.

Plaintiff-Appellee A&E Television Networks, LLC ("AETN") is a limited liability company with interests held by five entities, three of which own more than 10% of AETN: (1) Hearst Communications, Inc., the ultimate parent of which is The Hearst Corporation, which is not publicly traded; (2) Hearst Holdings, Inc., the ultimate parent of which is The Hearst Corporation, which is not publicly traded; and (3) Disney/ABC International Television, Inc., whose ultimate parent company is The Walt Disney Company, which is publicly traded. AETN does not own 10% or more of the outstanding shares of any publicly owned company.

Plaintiff-Appellee C-SPAN is a television network owned and operated by the National Cable Satellite Corporation, a District of Columbia non-profit, non-stock

corporation that is exempt from federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code, and as such has no stockholders.

Plaintiff-Appellee CBS Corp. is now known as ViacomCBS Inc. following the merger of Plaintiff-Appellee Viacom Inc. with and into CBS Corporation on December 4, 2019, with CBS Corporation continuing as the surviving corporation, which has been renamed ViacomCBS Inc. ViacomCBS Inc. is a Delaware corporation. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of ViacomCBS Inc. ViacomCBS Inc. is not aware of any publicly held company owning 10% or more of its total stock, *i.e.*, Class A and Class B on a combined basis.

Plaintiff-Appellee Discovery, Inc., a Delaware corporation, is a publicly held company with no parent corporation. No publicly held company owns 10% or more of Discovery Inc.'s stock.

Plaintiff-Appellee Disney Enterprises, Inc., a Delaware corporation, is a wholly owned indirect subsidiary of The Walt Disney Company, a Delaware corporation, which has no parent company, and no publicly held company owns 10% or more of The Walt Disney Company.

Plaintiff-Appellee Fox Cable Network Services, LLC, a Delaware limited liability company, is a wholly owned subsidiary of Foxcorp Holdings LLC. Foxcorp Holdings LLC, a Delaware limited liability company, is a wholly owned subsidiary

of Fox Corporation, a Delaware publicly held corporation. On January 10, 2020, BlackRock, Inc., a publicly held company, reported beneficial ownership of 10% of Fox Corporation's Class A non-voting common stock as of December 31, 2019. Fox Corporation is not aware of any publicly held company owning 10% or more of its total stock, *i.e.*, Class A and Class B on a combined basis.

Plaintiff-Appellee NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10% or more of the equity of NBCUniversal Media, LLC.

Plaintiff-Appellee New England Sports Network, LP is a Massachusetts limited partnership, whose partnership interests are owned by New England Sports Network, Inc., a Massachusetts corporation, and Deeridge Farms Hockey Association, a Delaware partnership.

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INTRODUCTION

In June 2019, Maine enacted an unprecedented law, Chapter 308, which requires cable operators—alone among providers of video services—to "offer subscribers the option of purchasing access to cable channels, or programs on cable channels, individually." H.P. 606 – L.D. 832, 129th Leg., Pub. Law, ch. 308 (Me. 2019) ("Chapter 308"). This "à la carte" mandate violates the First Amendment and runs afoul of the Communications Act of 1934, as amended (the "Communications Act" or "Act"). After acknowledging that Chapter 308 would cause significant industry disruption, the district court granted Plaintiffs' motion for a preliminary injunction on First Amendment grounds. This Court should affirm.

"There can be no disagreement" that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 636-37 (1994). Two relevant principles follow. First, the First Amendment protects cable operators and programmers from laws that "single out the press, or certain elements thereof, for special treatment." *Id.* at 640. Second, the First Amendment protects cable operators' and programmers' "editorial discretion in creating programming packages." *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 214 (1997).

Chapter 308 runs headlong into both of these bedrock principles, undermining the State's contention that the statute does not even *implicate* the First Amendment. *First*, Chapter 308 singles out cable operators for unique burdens by dictating the manner in which they offer television channels (*e.g.*, A&E, C-SPAN, Disney Channel, History Channel, or USA Network) and individual programs (*e.g.*, an episode of a television series or a telecast of a baseball game) to their customers. Programming providers are free to license their content, whether individual programs or linear channels, to all other video programming distributors with which cable operators compete—including the two national direct broadcast satellite ("DBS") providers, DIRECTV and DISH Network, and Internet-based providers such as Netflix, Amazon Prime, YouTube TV, or Sling TV—as they wish. And those competing distributors are free to package their content as they wish. Such differential treatment creates substantial distortions in the video programming marketplace and cannot be squared with the Supreme Court's or this Court's First Amendment jurisprudence.

Second, irrespective of such impermissible speaker-based discrimination, Chapter 308 infringes cable operators' and programmers' editorial discretion over the design and curation of programming networks and packages. Just as newspaper and magazine publishers exercise editorial discretion in deciding whether to present their content only as part of a bundled subscription (such as a daily newspaper or

weekly journal) without separately offering sections or individual articles for sale, cable operators and programmers make careful editorial judgments and expressive choices about whether and how to offer programming channels or individual programs to subscribers. These judgments include selecting appropriate groupings of content for various programming "tiers" (sometimes called "packages")—and whether and when to offer channels as part of a tier or on an à la carte basis. Similarly, programmers make important editorial judgments about what individual programs and series (*e.g.*, a new sitcom, cooking show, or news program) to include in a cable channel, and about when—and in what sequence—to provide such content. By mandating that cable operators offer all channels and programs individually, and prohibiting them from offering such programming as they often do (*i.e.*, only as part of a service tier), Chapter 308 tramples on a core aspect of their editorial discretion. It also infringes the editorial discretion of programmers by preventing them from requiring cable operators to offer individual programs only as part of an entire channel.

For many of the same reasons, Chapter 308 is preempted because it "impose[s] requirements regarding the provision or content of cable services" that go beyond those "expressly provided in [Title VI]." 47 U.S.C. § 544(f)(1). In holding otherwise, the district court adopted an untenably narrow construction of this express preemption provision that conflicts with its plain text, precedent, and

common sense. There can be no doubt that Chapter 308, by dictating the manner in which cable operators must offer programming to their subscribers, "impose[s] requirements regarding the provision or content of cable services." *See id.*

The district court accordingly should have found that Plaintiffs are likely to succeed on the merits of their preemption claim, in addition to their First Amendment claim. While that decision was not outcome-determinative given that the injunction was granted on other grounds, it presents an alternative basis for affirmance, which this Court should address to ensure that any further proceedings do not unnecessarily (and inefficiently) focus on questions of constitutional law that would be rendered moot by an appropriate construction of Section 544(f).

STATEMENT OF THE ISSUES

1. Whether the district court properly granted preliminary injunctive relief based on a determination that Plaintiffs are likely to succeed on the merits of their claim that Chapter 308 violates the First Amendment.

2. Whether Plaintiffs were also entitled to preliminary injunctive relief because they are likely to succeed on the merits of their claim that Chapter 308 is preempted by federal law.

STATEMENT OF THE CASE

A. Provision of Cable Services

"Cable television provides to its subscribers news, information, and entertainment." *Leathers v. Medlock*, 499 U.S. 439, 444 (1991). For decades, cable programmers and operators have assembled and curated content into distinct channels (also called "networks") and tiers of channels. App. 96. In addition to the statutorily mandated "basic" tier that contains broadcast networks and other content, 47 U.S.C. §§ 534(b), 543(b)(7), cable operators typically offer an "expanded basic" tier and various other themed tiers—such as "Sports & News" and "Kids & Family"—as well as "premium channels" (*e.g.*, HBO) and other content offered individually. *See, e.g.*, App. 96-104 (listing Comcast's menu of tiers available in Maine). Cable operators increasingly complement their more fulsome packages by offering so-called "skinny" tiers, in which a smaller number of channels are curated and offered at a lower price. *See, e.g.*, Federal Communications Commission, *Communications Marketplace Report*, 33 FCC Rcd. 12558 ¶¶ 60, 76-82 (2018).

Tiers and packages often are attractive to both content providers and consumers for a host of creative and economic reasons. For example, content bundling through channels and tiers promotes programming diversity, enables new

and niche programmers to attract viewers, and saves money for subscribers.[1] In particular, a channel's placement on a tier can lead to greater viewership. Especially for a niche channel, which may not have broad name recognition, being included in a popular tier provides an opportunity to reach millions of consumers. Just as the Arts section of a newspaper benefits from being included as part of the whole paper, so too does a niche cable channel benefit from being included as part of the whole tier. Without inclusion in a popular tier, niche channels may struggle to attract and retain the viewers they need to survive. App. 70.

Moreover, the increase in viewership afforded by inclusion in a tier generally increases the advertising revenue a programmer may obtain and gives the programmer the ability to charge a lower license fee to cable operators, thereby lowering subscription prices. App. 37-38; *GAO Report* at 34. Consumers benefit from lower subscription prices and from being introduced to content they might not otherwise discover. And by packaging channels into tiers, cable operators and programmers are able to offer an array of cable programming options at different price points. From this diversified menu of carefully curated cable offerings, cable

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[1] *See, e.g.*, U.S. Gen. Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 32-37 (2003), https://docs.fcc.gov/public/attachments/DOC-254432A1.pdf ("*GAO Report*"); FCC, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public* 6, 45, 56 (2004), https://docs.fcc.gov/public/attachments/DOC-254432A1.pdf ("*2004 FCC Report*").

consumers may choose the tiers and individually available channels and programs that fit their own particular needs and means.

In designing their tiers and programming streams, cable operators and programmers express their editorial judgments about the nature and content of their offerings, as well as about the intended audiences. *See* App. 37-38, 82-83. Cable operators exercise their editorial judgment in deciding whether to offer channels in tiers, à la carte, or both. They must also decide which channels to package together if they do offer channels in tiers, and how to design their channel lineups. App. 86-87, 89-90. Similarly, cable programmers exercise significant editorial judgment in curating their programming lineups. They must decide, among other things, what programs to include as part of a particular network, when to offer programs, and the sequence of such programs based on various factors—including what programs are most likely to appeal to a particular channel's viewers and when the greatest audience will likely be watching TV. App. 82-83.

Those various editorial judgments are reflected in private contracts between cable operators and programmers called "affiliation agreements" (or, in the case of agreements between broadcast stations and cable operators, "retransmission consent" agreements). App. 37. Cable operators and programmers negotiate those agreements to contain various carriage, packaging, and penetration provisions that govern how a programmer's content is distributed over the cable system to viewers.

See GAO Report at 33-34. Such terms are grounded in the exercise of First Amendment and exclusive copyright rights to decide how to license creative works, and many programmers negotiate for them because they (and the content creators whose works they are licensed to provide) want their content to be available to wide audiences to attract viewers. *See* App. 37-38. Depending on the preferences of the particular programmer and cable operator, those provisions may require that a channel be included on a particular tier, not be included on particular tiers, or be distributed on the same tier as other competing channels. App. 38. They also may allow or prohibit à la carte exhibition of particular channels or programs. *Id.* For example, many professional sports leagues and teams do not make their programming available for à la carte distribution. App. 81. Furthermore, such agreements typically prohibit cable operators from disassembling a channel's "linear" programming stream or offering content on a program-by-program basis, apart from any video-on-demand rights that might be specifically conveyed. *Id.*

The prevalence of curated tiers—which may provide the exclusive means of accessing certain programming—is hardly unique to cable operators. A host of other programming distributors also offer services in tiers or other packages. Those distributors include the two national DBS providers, DIRECTV and DISH Network; "virtual" (Internet-based) multichannel video programming distributors ("MVPDs"), including Sling TV, YouTube TV, Hulu+ Live TV, and AT&T TV

NOW, whose channel lineups resemble those of traditional cable operators and DBS providers; and other Internet providers of video programming, such as Netflix, Hulu, and Amazon Prime. *See* App. 38-39.

B. Federal Regulation of Cable Service

Congress established a comprehensive federal regulatory framework for cable television in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (the "1984 Cable Act"). The 1984 Cable Act was intended to remedy the "'ill[-]defined . . . state of regulatory uncertainty'" that had resulted from "overlapping authority of the FCC and the municipalities" over cable television services. *All. for Cmty. Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008) (citation omitted). It "establish[es] a national policy concerning cable communications," which includes "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems" and "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(1), (4), (6). Congress later enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act"), which (among other things) imposes certain discrete programming-related mandates on cable operators while generally preserving their control over what programming to offer

consumers and in what manner. Both statutes are codified in Title VI of the Communications Act.

This federal regulatory framework refers multiple times to the common and established practice of offering "tiers" of cable service made up of various individual channels. For example, the Communications Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals," and defines "service tier" as "a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator." 47 U.S.C. § 522(3), (17). The Act requires all cable operators to offer—and all subscribers to purchase—a basic service tier with certain minimum contents. *See id.* § 534(a) (requiring cable operators to carry local broadcast stations that elect "must carry" status on the basic tier); *id.* § 534(b)(7) (requiring that such signals—and, in effect, the basic tier—be "provided to every subscriber of a cable system").

This federal regulatory framework imposes certain circumscribed limitations on the editorial discretion of cable operators and programmers in designing tiers. Those limitations include the broadcast must-carry rules, *id.* §§ 534-35; the minimum basic tier specifications for areas not subject to effective competition, *id.* § 543(b)(7); and the program carriage and program access provisions, which prohibit certain forms of discrimination, *id.* §§ 536, 548.

Along with these discrete mandates, Congress enacted several provisions that preclude state and local governments—and even the FCC—from further limiting the editorial discretion of cable operators and programmers. Section 544(f)(1) provides that "[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" Title VI. *Id.* § 544(f)(1) (emphasis added). Section 544(a) and (b) prohibit franchising authorities from "regulat[ing] the services . . . provided by a cable operator except to the extent consistent with" Title VI, and from "establish[ing] requirements for video programming or other information services" in their "requests for proposals for a franchise." *Id.* § 544(a), (b)(1). And the Act expressly mandates that any state or local law that conflicts with the federal statute is preempted. *See id.* § 556(c).

C. Chapter 308

On June 15, 2019, the State enacted Chapter 308, which is titled "An Act To Expand Options for Consumers of Cable Television in Purchasing Individual Channels and Programs." The entirety of the law reads: "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." 129th Leg., Pub. Law, ch. 308 (Me. 2019), https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0606&item=3&snum=129. Chapter 308 applies solely to

cable operators—not to any of the other video programming distributors that employ tiers in structuring their channel offerings to customers. And it requires cable operators to offer each of their hundreds of cable channels, along with the many thousands of individual programs shown on those channels, on an individual, à la carte basis. Put another way, Chapter 308 prohibits the standard and longstanding industry practice of offering many channels and programs *only* as part of a tier or package.

Chapter 308 is a unique and unprecedented regulation. No other State has attempted to require à la carte provision of all cable channels, let alone individual programs. Nor does any such mandate apply at the federal level: The FCC has repeatedly acknowledged that it lacks authority to impose such a mandate under the Communications Act.[2] And in 2013, Congress rejected a proposed bill that would have introduced an à la carte requirement for *all* MVPDs into the federal regulatory

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[2] *See Financial Services and General Government Appropriations for 2009: Hearings Before the Subcomm. on Financial Services and General Government Appropriations of the H. Comm. on Appropriations*, 110th Cong. 401 (Apr. 9, 2008) (testimony of Kevin J. Martin, FCC Chairman) ("I actually don't think the Commission has any authority to require a la carte on the retail side."); Letter from Mignon L. Clyburn, FCC Acting Chairwoman, to Sen. John McCain (July 24, 2013), https://docs.fcc.gov/public/attachments/DOC-322561A1.pdf (transmitting staff letter stating that "the Commission does not have explicit authority to require MVPDs to provide service on an *a la carte* basis").

framework. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013).

Chapter 308 was proposed as a means of increasing consumer choice and reducing consumer costs. But the legislative record did not cite evidence showing that it would in fact do so, much less that a cable-only regulation would accomplish its intended objective. The lead sponsor referred to a lone study—a 2006 FCC staff report—that had long been discredited.[3] And the legislature failed to consider other credible and detailed studies concluding that an à la carte mandate would likely harm programming diversity and actually increase costs for consumers. *See, e.g.*, *GAO Report* at 34-37; *2004 FCC Report* at 6, 56.[4]

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[3] *See* Majority Staff, House Committee on Energy & Commerce, *Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin* 8-11 (Dec. 2008), https://www.natoa.org/policy-advocacy/Documents/Deception&DistrustHouseRptFCC.pdf (explaining that the FCC personnel responsible for the 2006 FCC Report had "manipulated report findings and policy direction" to support dubious conclusions about the likely effects of an à la carte requirement).

[4] *See also* Charles B. Goldfarb, CRS Report for Congress, *The FCC's "à la carte" Reports* 15 (Mar. 30, 2006), https://www.policyarchive.org/handle/10207/2789 ("[A]n a la carte approach could have serious implications for diversity."); *id.* at 3 ("[M]ost of the criticisms of the Initial Report that are presented in the Further Report either are not supported by available market data or cannot be proven one way or the other."); Michael L. Katz, *Slicing and Dicing: A Realistic Examination of Regulating Cable Programming Tier Structures* 17 (July 15, 2004), https://ecfsapi.fcc.gov/file/6516284144.pdf ("For a variety of reasons, mandatory unbundling can be expected to increase prices.").

D. Procedural Background

Before Chapter 308 was scheduled to take effect, Plaintiffs—a leading cable operator and nine prominent cable programmers—filed a lawsuit challenging the validity of the law.[5] App. 22-73. Plaintiffs sought both declaratory and injunctive relief on the grounds that Chapter 308 (1) violates the First Amendment by targeting particular speakers and infringing their editorial discretion and (2) is preempted by federal law. App. 71-73.

On September 11, 2019, Plaintiffs moved for a preliminary injunction. ECF No. 14. The district court consolidated the hearing on that motion with trial on the merits under Federal Rule of Civil Procedure 65(a)(2). App. 18 (Docket entry No. 64). Both parties then extensively briefed the preliminary injunction issue along with the merits of the case. On December 20, 2019, the district court granted Plaintiffs' motion for a preliminary injunction. Order on Pls.' Mot. Prelim. Inj. 1, ECF No. 91 ("Order").

The district court held that Plaintiffs are likely to succeed on the merits of their First Amendment claim. Specifically, the court held that Chapter 308 "clearly

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[5] Plaintiffs also sued the City of Bath, Town of Berwick, Town of Bowdoin, Town of Bowdoinham, Town of Brunswick, Town of Durham, Town of Eliot, Town of Freeport, Town of Harpswell, Town of Kittery, Town of Phippsburg, Town of South Berwick, Town of Topsham, Town of West Bath, and Town of Woolwich. App. 23. The claims against those municipalities have since been dismissed by stipulation. Joint Stipulation of Dismissal, ECF No. 84.

singles out cable operators for differential treatment." Order 27-28. The court explained that "cable operators' rights fall within the ambit" of a line of Supreme Court cases holding that "laws singl[ing] out the press, or a component of the press, . . . were unconstitutional under the First Amendment." Order 27. And because Chapter 308 "clearly singles out cable operators for differential treatment," the court concluded, it clearly implicates Plaintiffs' "First Amendment interests." Order 27-28.

The district court further explained that because Plaintiffs "have First Amendment interests at stake," established precedent dictates that "some level of heightened scrutiny applies." *Id.* The court did not decide whether the proper level of scrutiny was strict or intermediate, because the State had "not met its burden of showing that it is likely to succeed under intermediate scrutiny." Order 30-31. In particular, the court found that the State had not "carried its burden of showing that Chapter 308 will, in fact, be likely to reduce prices and increase affordable access to cable." Order 33. As the court noted, the State had "candidly conceded" as much at oral argument. *Id.* (citing App. 143).

After holding that "the remaining factors for a preliminary injunction—whether the Plaintiffs will suffer irreparable harm, the balance of hardships, and the public interest—also weigh in the Plaintiffs' favor," the district court granted Plaintiffs' motion. Order 34. The court acknowledged that it "had anticipated

consolidating the preliminary injunction hearing with the trial on the merits," but it ultimately concluded that "the evidentiary record is not sufficiently developed to allow [it] to make a final determination" on the merits. Order 35.[6]

In the course of granting the preliminary injunction, the district court disagreed with Plaintiffs on two other important issues. *First*, the court held that Chapter 308 does not unconstitutionally infringe Plaintiffs' editorial discretion. Order 26. The court acknowledged that cable operators and programmers "are entitled to the protection of the speech and press provisions of the First Amendment" when "exercising editorial discretion over which stations or programs to include in [their] repertoire." Order 24 (quoting *Turner I*, 512 U.S. at 636). But the court suggested that this First Amendment protection extends only to "cable operators' editorial discretion to choose what channels or programs to offer" and not to "cable operators' discretion in *how* to sell that programming." Order 26. The court reasoned that Chapter 308 does not infringe cable operators' and programmers' editorial discretion because it "requires no . . . addition of content," "does not shrink the space remaining for programmers," and does not "prohibit the Plaintiffs from packaging programming in bundles." Order 25-26.

[6] The district court expressly reserved "the question of whether the legislature itself must create a record showing that a problem actually exists and that the law is likely to solve that problem." Order 33 n.14.

Second, the district court held that Plaintiffs were not likely to succeed on their preemption claim under Section 544(f). The court acknowledged that Chapter 308 "is a first-in-the-nation law that would significantly change how cable operators do business in Maine." Order 19. The court further acknowledged that under the statute's "plain meaning," Chapter 308 would be preempted because it "impose[s] requirements regarding how cable operators must provide programming." Order 5. But the court relied on an asserted "'presumption against the preemption of state police power regulations,'" which it believed required the court "to narrowly interpret express preemption provisions." Order 4 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Based largely on the legislative history of the 1984 Cable Act as a whole, the court then interpreted Section 544(f) to prohibit States only from "imposing content-based requirements or mandates that have the effect of restricting or requiring particular content." Order 16. The court concluded that Chapter 308 is "content-neutral" and therefore not preempted under its interpretation of Section 544(f). Order 20.

SUMMARY OF THE ARGUMENT

The district court correctly held that Plaintiffs are likely to succeed on the merits of their First Amendment challenge to Chapter 308 because the statute unconstitutionally imposes discriminatory burdens on cable operators' speech. That decision was correct. But the judgment should also be affirmed for two additional

reasons—because Chapter 308 infringes cable operators' and programmers' editorial discretion (wholly apart from singling out their speech) and because it is preempted by 47 U.S.C. § 544(f).

I. Chapter 308 violates the First Amendment. The Supreme Court has long recognized that cable operators and programmers "are entitled to the protection of the speech and press provisions of the First Amendment." *Turner I*, 512 U.S. at 636. As relevant here, the First Amendment protects cable operators and programmers from laws that single out a particular element of the press, or that infringe cable operators' and programmers' editorial discretion more generally. *Id.* at 636, 640. Chapter 308 violates the First Amendment for both reasons.

First, Chapter 308 singles out cable operators' speech for disfavored treatment. Cable operators—alone among the many other similarly situated providers of video programming—are required to offer all channels and programs à la carte, and such a selective burden subjects them to competitive disadvantages and other harms. For this reason alone, the district court correctly held that Chapter 308 implicates the First Amendment.

Second, irrespective of such speaker-based discrimination, Chapter 308 infringes cable operators' and programmers' editorial discretion over the design and curation of programming channels and packages. The district court erred in holding otherwise.

Either way, Chapter 308 unquestionably implicates the First Amendment. And the State does not dispute that it failed to satisfy intermediate scrutiny in opposing preliminary injunctive relief. That alone warrants affirmance.

II. Chapter 308 also is preempted by the Communications Act. In particular, Section 544(f) expressly prohibits the State from imposing "requirements regarding the provision or content of cable services, except as expressly provided in" Title VI. 47 U.S.C. § 544(f)(1). Based on the plain text of Section 544(f) and this Court's preemption jurisprudence, the district court should have concluded that Chapter 308 is preempted—an independent ground for granting a preliminary injunction.

The district court erred in setting aside Section 544(f)'s plain text and instead adopting an interpretation that reads "provision" out of the statute. Contrary to the district court's assumption, no presumption against preemption is applicable here, given Plaintiffs' reliance on an express preemption provision (as opposed to a theory of implied preemption). *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). And neither the structure of the Communications Act, the Act's legislative history, nor any case that has construed Section 544(f) justifies deviating from the plain language of the statute, let alone turning the ban on requirements "regarding the provision . . . of cable services" into a dead letter.

For both of these reasons, this Court should affirm the district court's grant of Plaintiffs' motion for a preliminary injunction.

STANDARD OF REVIEW

This Court will not disturb a district court's grant of a preliminary injunction unless "the court abused its discretion." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013). A district court will be found to have abused its discretion if it "erred in assessing the facts" or "misapprehended the applicable legal principles." *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 9 (1st Cir. 2012) (citation omitted). In conducting this analysis, the Court "assess[es] the underlying conclusions of law de novo and the findings of fact for clear error." *March v. Mills*, 867 F.3d 46, 53 (1st Cir. 2017).

The State thus "bears the considerable burden of demonstrating that the trial court mishandled the four-part framework" for preliminary injunctions. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996). Under that well-settled framework, plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits of their claims; (2) they will suffer irreparable harm during the pendency of litigation in the absence of any injunction; (3) the injunction will burden the State less than denying the injunction will burden the plaintiffs; and (4) granting the injunction is in the public interest. *See, e.g.*, *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012).

ARGUMENT

The State's appeal is exceedingly narrow. The State does not dispute that Plaintiffs would suffer irreparable injury without an injunction; that the balance of hardships tips solidly in Plaintiffs' favor; or that an injunction is in the public interest. Order 34-35. Nor does the State argue that the legislative record could satisfy any applicable level of scrutiny if the First Amendment is implicated here. The State simply asserts that Plaintiffs enjoy no First Amendment protections *at all* with regard to their packaging and curation of content. The State is wrong. Chapter 308 unquestionably implicates the First Amendment (and, indeed, violates it) for two distinct reasons: (1) it impermissibly singles out cable operators' speech for different treatment as compared to all other video distributors operating in Maine, and (2) it infringes cable operators' and programmers' editorial discretion. And while either of those grounds would be enough, alone, to affirm the judgment, Chapter 308 also is preempted under Section 544(f). Such preemption provides an independent basis for affirmance, and one that would avoid the need for inefficient and unnecessary additional proceedings in the district court.

I. CHAPTER 308 VIOLATES THE FIRST AMENDMENT

Chapter 308 violates the First Amendment by impermissibly subjecting cable operators' speech to disfavored treatment vis-à-vis other providers of video programming distribution services and by infringing cable operators' and

programmers' editorial discretion more generally. Each of those features of Chapter 308 implicates the First Amendment, and the State does not dispute that it failed to satisfy even intermediate scrutiny.[7] The district court correctly held that Plaintiffs have a substantial likelihood of success on their claim that Chapter 308 violates the First Amendment.[8]

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[7] Plaintiffs maintain that Chapter 308 should be subject to strict scrutiny. This Court need not decide that issue, as the district court held—and the State does not dispute—that Chapter 308 cannot withstand even intermediate scrutiny based on the current record. Order 30-31.

[8] As noted above, the district court held open the possibility that the State could later argue that it should be permitted to carry its burden under the First Amendment through post-enactment evidence. Order 33 n.14. But a threadbare legislative record—such as that compiled in support of Chapter 308—is insufficient as a matter of law to satisfy the First Amendment. *See, e.g.*, *Turner II*, 520 U.S. 180, 211 (1997) ("[T]he question is whether the legislative conclusion was reasonable and supported by substantial evidence *in the record before Congress*." (emphasis added)); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) ("Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013) (en banc) ("'"[S]upplemental" materials cannot sustain regulations where there is *no* evidence in the pre-enactment legislative record' . . . ." (citation omitted)). Thus, not only did Plaintiffs demonstrate their likelihood of success on the merits, but the district court could and should have granted final judgment in their favor (consistent with its order initially consolidating consideration of the preliminary injunction motion with trial on the merits, after which the State offered no additional proof).

A. Chapter 308 Unconstitutionally Targets Cable Operators for Disfavored Treatment

As the district court held, Chapter 308 implicates the First Amendment because it is a speaker-based regulation that singles out cable operators' speech for disfavored treatment. Order 26-34.

1. Laws That Single Out a Particular Media Segment for Disfavored Treatment Implicate the First Amendment

Under the First Amendment, "[w]hen speakers . . . are similarly situated, the State may not pick and choose." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983). The Supreme Court has thus long been "deeply skeptical of laws that 'distinguis[h] among different speakers.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (alteration in original) (quoting *Citizens United v. FCC*, 558 U.S. 310, 340 (2010)); *see Ackerley Commc'ns of Mass., Inc. v. City of Somerville*, 878 F.2d 513, 518 (1st Cir. 1989) ("[W]e must consider carefully the government's decision to pick and choose among . . . speakers . . . .").

That principle has special force when it comes to speakers, such as cable operators, that disseminate news and information. Laws "that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S. at 659. That is because the "press plays a unique role as a check on government abuse." *Leathers v. Medlock*, 499 U.S.

439, 447 (1991). Laws that single out particular speakers for special treatment present very real "dangers of suppression and manipulation" of the media. *Turner I*, 512 U.S. at 661.

For those reasons, laws singling out some element of the press for special treatment "are *always* subject to at least *some degree* of heightened First Amendment scrutiny." *Id.* at 640-41 (emphasis added) (applying heightened scrutiny to must-carry provisions applicable only to cable operators); *see also, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *Leathers*, 499 U.S. at 447; *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583 (1983); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *see also* 3 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 22:14 (2020, Westlaw update) ("This principle is applied with such vigor and consistency that it has become essentially a per se constitutional violation to single out the press for disadvantaged treatment.").

2. Chapter 308 Singles Out Cable Operators for Disfavored Treatment

As the district court correctly concluded, "Chapter 308 clearly singles out cable operators for differential treatment." Order 27-28. Chapter 308 by its terms applies only to "cable system operator[s]." Chapter 308 thus does not apply to any of the other types of video distributors in today's competitive marketplace that also

offer programing via tiers and packages in Maine, including: (1) the national DBS video providers, DIRECTV and DISH Network, even though they are far larger than most cable operators; (2) "virtual" MVPDs, such as Sling TV, YouTube TV, Hulu+ Live TV, and AT&T TV NOW; and (3) other Internet providers of programming, such as Netflix, Hulu, and Amazon Prime. All of these many other providers of video programming services are free to offer both programming channels and individual programs only as part of tiers or packages—cable operators alone are not.

This significant limitation on cable operators puts them at a serious competitive disadvantage. *See* Order 19 (Chapter 308 "would significantly change how cable operators do business in Maine."). If allowed to take effect, Chapter 308 would force cable operators to violate provisions in affiliation agreements restricting à la carte carriage of individual networks or programs, causing reputational harm with cable programmers. It would also limit their ability to negotiate key terms of affiliation agreements—in particular, provisions regarding à la carte and tier placement—with programmers in the future. *See* App. 70, 94. Content providers would face the untenable choice of taking on the disruptive burden of disassembling their networks and authorizing cable operators to offer consumers all individual programs à la carte, or withholding their content from cable operators and thereby losing access to a significant segment of the marketplace. Chapter 308 also would impose significant compliance costs on cable operators. Such costs likely would

(1) divert resources away from developing programming, service, and technology enhancements that they might otherwise have been able to offer, and (2) increase prices for consumers. *See id.* These reputational and monetary harms would be shouldered by cable operators alone. Other video programming distributors would remain free to carry on business as usual—and would thereby enjoy a commercial edge.[9]

To make matters worse, Chapter 308 would also put cable *programmers* at a competitive disadvantage vis-à-vis entities that focus on other distribution platforms. For example, broadcast stations with must-carry rights would be guaranteed placement on the basic tier, making broadcast a comparatively more attractive option for advertisers. App. 69.

To be sure, some laws that apply only to cable operators, such as the must-carry provisions upheld in *Turner II*, have been found to satisfy intermediate scrutiny. *See Turner II*, 520 U.S. at 196-208 (upholding must carry obligation based on evidence that cable operators' monopoly power posed a grave threat to over-the-air broadcasting). It is doubtful that any such mandate could survive intermediate

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[9] App. 137 (testimony of Melinda Kinney, Charter Communications) ("[B]ased on the federal law preemption and the fact that the way consumers get their video content has dramatically changed with more options now than ever before, introducing a bill that targets one provider in a very competitive marketplace places an unfair disadvantage to an industry that invests heavily in Maine.").

(much less strict) scrutiny today, given that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see also Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("In today's highly competitive market, . . . [no] video programming distributor possesses market power in the national video programming distribution market. . . . In restricting the editorial discretion of video programming distributors, the FCC cannot continue to implement a regulatory model premised on a 1990s snapshot of the cable market."). And in all events, such cable-only mandates unquestionably *implicate* the First Amendment, *Turner I*, 512 U.S. at 640-41, as the district court in this case recognized, Order 26-28.[10]

3. The State's Arguments to the Contrary Are Unpersuasive

The State suggests that the district court erred in concluding that Chapter 308 implicates the First Amendment for three reasons, none of which has merit.

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[10] While the district court correctly held that Chapter 308 implicates the First Amendment—and that the State cannot satisfy any level of First Amendment scrutiny—it incorrectly described the State's burden under the First Amendment. The court suggested that the State need only justify the à la carte mandate, Order 31-34, but in fact the State's burden is to justify the *cable-specific* à la carte mandate. *See Turner I*, 512 U.S. at 661 (explaining that the cable-specific must-carry provisions were "justified by special characteristics of the cable medium"). Fatally, the State has never even attempted to justify Chapter 308's singling out of cable operators.

First, the State contends that Chapter 308 "does not somehow implicate the First Amendment simply because it applies to one particular set of entities that engage in First Amendment conduct." State Br. 26-27. But its argument cannot be squared with Supreme Court precedent.

As noted, the Supreme Court in *Turner I* instructed that "laws that single out the press, or certain elements thereof, for special treatment . . . are *always* subject to at least *some degree* of heightened First Amendment scrutiny." 512 U.S. at 640-41 (emphasis added). Rejecting the government's argument that the "must-carry provisions are nothing more than industry-specific antitrust legislation" warranting only "rational-basis scrutiny," the Court explained that laws singling out the press "for special treatment 'pose a particular danger of abuse by the State.'" *Id.* at 640 (quoting *Ark. Writers' Project*, 481 U.S. at 228). The Court in that case proceeded to apply intermediate rather than strict scrutiny based on its conclusion that the must-carry provisions were "justified by special characteristics of the cable medium." *Id.* at 661. But the Court left no doubt that laws that "impose special obligations upon cable operators and special burdens upon cable programmers"—as Chapter 308

does—demand "some measure of heightened First Amendment scrutiny." *Id.* at 641.[11]

The State therefore is wrong to argue that "laws directed only at cable operators trigger First Amendment scrutiny" only if they independently are shown to infringe the right to exercise editorial discretion by offering certain channels and programs only as part of a curated package. State Br. 13-14. As an initial matter, Chapter 308 *does* infringe cable operators' First Amendment editorial-discretion rights. *See infra* 33-42.

But in any event, a law may implicate the First Amendment because it improperly singles out particular entities' speech—even if the law does not also infringe those speakers' editorial discretion. As the district court correctly recognized, the editorial-discretion and singling-out doctrines are "two different doctrines of First Amendment law." Order 23. Typically, laws that selectively burden cable operators' speech will implicate both. But, as the Court in *Turner I*

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[11] Contrary to the State's suggestion, State Br. 11 n.7, Plaintiffs have consistently advanced this argument since the inception of this litigation. *See* App. 56-57 (Chapter 308 "constitutes, on its face, a speaker-based regulation of speech."); Pls.' PI Mot. 11-12, ECF No. 14 (Chapter 308 "uniquely burdens certain speakers."); PI Reply 7-8, ECF No. 85 (Chapter 308 "targets *only* the speech of cable operators."); PI Hrg. Tr. 41-42, ECF No. 87 ("[Y]ou can't selectively regulate speakers in that manner."). In any event, because "the district court addressed and passed on the issue directly," Plaintiffs are "free to address the issue so raised in this appeal." *Fid. Co-op. Bank v. Nova Cas. Co.*, 726 F.3d 31, 39 (1st Cir. 2013).

explained, the fact that "the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers" alone demanded "some measure of heightened First Amendment scrutiny." *Turner I*, 512 U.S. at 641; *see Ark. Writers' Project*, 481 U.S. at 223, 228 (holding that "sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals" implicates the First Amendment "because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State"). The Ninth Circuit similarly held that the "First Amendment [wa]s likely implicated" by a law that uniquely targeted the timing of a DBS operator's introduction of high definition channels because, even if the law's burdens were "minimal," its "singl[ing] out an element of the press is subject to some form of heightened First Amendment scrutiny." *DISH Network Corp. v. FCC*, 653 F.3d 771, 777 (9th Cir. 2011).

Second, the State fears that if "the First Amendment is triggered every time a law singles out a particular industry, it would mean that states would have to satisfy First Amendment scrutiny even for basic consumer protection statutes." State Br. 27 n.13. While that concern is overstated—as most consumer protection laws apply even-handedly to all participants in a given marketplace and thus do not raise concerns about speaker-based discrimination—it more fundamentally overlooks

core aspects of the Supreme Court's and this Court's First Amendment jurisprudence.

Where the government chooses to impose requirements, like Chapter 308, that are "aimed at particular speakers," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011), such requirements must indeed be "'justified by some special characteristic' of the regulated speaker." *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 740 (1st Cir. 1995) (quoting *Minneapolis Star*, 460 U.S. at 585). Of course, the mere fact that the First Amendment applies does not mean that the regulatory imposition at issue cannot stand. As noted, the Supreme Court determined that the bottleneck control possessed by cable operators in the early 1990s justified Congress's imposition of broadcast must-carry obligations on such providers—but not other video distributors—and other courts similarly have upheld other statutory mandates that apply only to cable operators. *See Turner II*, 520 U.S. at 196-208; *infra* 35-37 (summarizing other cases involving First Amendment challenges to cable mandates). In short, while the government is not absolutely barred from selectively regulating certain speakers, it must establish a sufficient justification for doing so based on relevant characteristics and must regulate in a narrowly tailored fashion. Here, the State made no attempt to articulate such a justification for imposing Chapter 308 only on cable operators, much less substantiate it with evidence.

Third, the State posits that *Minneapolis Star* and *Arkansas Writers' Project* are limited to "the context in which they arose—efforts by states to impose special taxes on the press." State Br. 23. That, too, is incorrect.

The Supreme Court itself has invoked the singling-out principle expressed in *Minneapolis Star* and *Arkansas Writers' Project* in cases involving all manner of regulations that impose special burdens on the press—not just taxes. *See, e.g.*, *Turner I*, 512 U.S. at 640-41 (must-carry provisions); *Rosenberger*, 515 U.S. at 827-28 (regulation limiting funding for student activities); *Tornillo*, 418 U.S. at 244, 256 (statute granting political candidate right to equal space in newspapers).[12] Indeed, the Supreme Court has expressly rejected the argument that this line of precedent is limited to taxes, explaining that, just like taxes, other "forms of financial burden operate as disincentives to speak" and thus raise the same First Amendment concerns. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *see also Pitt News v. Pappert*, 379 F.3d 96, 111-12 (3d Cir. 2004) (Alito, J.) ("The threat to the First Amendment arises from the imposition of financial burdens that may have the effect of influencing or suppressing speech,

[12] So too have other courts. *See, e.g.*, *Koala v. Khosla*, 931 F.3d 887, 899 (9th Cir. 2019) (withholding a subsidy); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 634, 638-40 (5th Cir. 2012) (law restricting access to state cable franchises); *Pitt News v. Pappert*, 379 F.3d 96, 101, 111-12 (3d Cir. 2004) (ban on alcohol advertising in "communications media" affiliated with schools).

and whether those burdens take the form of taxes or some other form is unimportant.").

Much like taxes and the other regulations to which the singling-out principle has been applied, Chapter 308 imposes financial and other burdens on cable operators and programmers. The measure outlaws the standard practice of offering many channels and programs only as part of a tier or package, and by subjecting only one type of video distribution platform to this prohibition, it creates substantial competitive disparities. The law also burdens cable programmers, as it deprives them of the ability to secure distribution of a network only within certain tiers and packages. The State is wrong to contend that it may selectively dictate how one group of video distributors offers channels and programs to consumers without even implicating the First Amendment. There is no precedent that supports that remarkable proposition.

In sum, the Court should affirm the grant of a preliminary injunction because Chapter 308 singles out cable operators' speech and therefore triggers First Amendment scrutiny.

B. Chapter 308 Unconstitutionally Infringes Cable Operators' and Programmers' Editorial Discretion

Chapter 308 triggers heightened First Amendment scrutiny for a second, independent reason: Chapter 308 unconstitutionally infringes cable operators' and programmers' editorial discretion. The district court erred in holding otherwise.

1. Laws That Infringe Cable Operators' and Programmers' Editorial Discretion in Creating Programming Packages Implicate the First Amendment

The Supreme Court has made clear that cable operators and cable programmers engage in protected speech not only when they produce "original programming," but also when "exercising editorial discretion over which stations or programs to include in [their] repertoire." *Turner I*, 512 U.S. at 636 (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality opinion) ("[T]his Court has held [that] the editorial function itself is an aspect of 'speech,'" protecting a cable operator's "freedom to speak as an editor." (citation omitted)); *id.* at 822 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that cable "operators' editorial discretion" is something "all recognize as fundamentally protected").

Chapter 308 constrains cable operators' and programmers' First Amendment-protected "editorial discretion in creating programming packages." *Turner II*, 520 U.S. at 214. The Supreme Court has recognized that cable operators' and programmers' "compilation of the speech of third parties" is itself a "communicative act[]." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). In curating their channel and programming lineups, "cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety

of formats.'" *Turner I*, 512 U.S. at 636 (alteration in original) (quoting *Preferred Commc'ns*, 476 U.S. at 494).

The district court was wrong to suggest that the First Amendment's protection of "cable operators' editorial discretion to choose *what* channels or programs to offer" does not also "extend to cable operators' discretion in *how* to sell that programming." Order 26 (first emphasis added). Rather, as the Supreme Court's precedents instruct, the First Amendment protects cable operators' and programmers' editorial discretion regarding both what content to offer and how to offer it. *See Forbes*, 523 U.S. at 674 (holding that cable operators enjoy First Amendment protection in both "the selection *and presentation* of [their] programming" (emphasis added)); *cf. Tornillo*, 418 U.S. at 258 (Both the "choice of material to go into a newspaper" and "decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) ("[T]he protection afforded to editorial judgment" encompasses both "content" and "layout.").

As the district court recognized, courts and judges have thus routinely embraced a "broad[]" understanding of the editorial discretion that is protected by the First Amendment. Order 26 & n.11. Courts reviewing other regulations governing the provision of cable services have not doubted that the First Amendment

is implicated; the question instead has been which level of heightened scrutiny is proper.

The Second Circuit, for example, has explained that there is "no question" that cable operators engage in "protected speech" when they exercise "their editorial discretion over which programming networks to carry *and on what terms*." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 154 (2d Cir. 2013) (emphasis added). Nor was there "any dispute" that a program carriage regime that, in certain circumstances, constrained how MVPDs may treat unaffiliated programming providers in the terms of carriage arrangements burdened that editorial discretion and thus implicated the First Amendment. *Id.* The only questions for the court were which level of heightened scrutiny applied (*i.e.*, strict or intermediate), and whether the program carriage regime withstood such scrutiny based on the factual circumstances at that time. *Id.* at 154-55.

The Fourth Circuit has likewise explained that "cable operators engage in speech protected by the First Amendment when they exercise editorial discretion over the *menu of channels they offer to their subscribers*." *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 352-53 (4th Cir. 2001) (emphasis added). The Fourth Circuit accordingly recognized that the First Amendment was implicated by a law that required DBS providers that carry one local broadcast station to carry all local broadcast stations. *Id.* at 352-53. The relevant disputes, again, concerned

which level of heightened scrutiny applied and whether the carriage requirement withstood such scrutiny. *Id.* at 353-55.[13]

This great weight of precedent undermines the district court's determination that *Turner I* is "distinguishable from the instant case." Order 25-26. *Turner I* is not limited to its facts, but instead establishes the fundamental principle that government interference with the manner in which cable operators and programmers offer channels and programs to consumers implicates the First Amendment. *Turner I*, 512 U.S. at 636. There is accordingly no doubt that a law that substantially limits cable operators' and programmers' discretion in these protected areas triggers at least intermediate scrutiny, notwithstanding that it does not altogether preclude a cable operator from carrying specific programming or compel it to carry particular

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[13] Numerous other circuit court decisions are to the same effect. *See, e.g.*, *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 96 (2d Cir. 2009) (involving a challenge to FCC order that "reduce[d] the number of channels over which Cablevision exercises editorial control by forcing it to carry WRNN"); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (holding that limits on the number of channels on a cable system that can be occupied by a programmer in which an operator has an attributable interest implicate editorial discretion); *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000) (holding that limits on the number of subscribers a cable operator may reach implicate editorial discretion); *Knights of Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094-95 (8th Cir. 2000) (explaining that a radio station exercised "editorial discretion by rejecting the proposed sponsorship" of the KKK); *see also Comcast Cable Commc'ns, LLC*, 717 F.3d at 993 (Kavanaugh, J., concurring) (stating that "a video programming distributor exercises editorial discretion over which video programming networks to carry *and at what level of carriage*" (emphasis added)).

programming. *See United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that prosecution for burning draft card triggered intermediate scrutiny, because even regulations of conduct implicate the First Amendment where they incidentally burden expressive activity).

2. Chapter 308 Infringes Cable Operators' and Programmers' Editorial Discretion in Creating Programming Packages

Under these established principles, Chapter 308 plainly implicates the First Amendment because it overrides cable operators' and programmers' "editorial discretion in creating programming packages." *Turner II*, 520 U.S. at 214. In requiring that cable operators and programmers must offer all channels and all programs on an à la carte basis, Chapter 308 deprives cable operators and programmers of the editorial discretion to package channels and programs as they deem fit, including by making the editorial judgment to offer a channel or program *only* as part of a tier or package.

The State is wrong to suggest that the "[b]undling of channels is simply a business tactic" with no communicative import. State Br. 18 n.9. To the contrary, the decisions whether and how to aggregate channels and programs and whether to offer such channels and programs individually involve substantial editorial discretion—both by the programmers that decide how to license their programming

to cable operators and by the cable operators that decide how to present that programming to their subscribers.

In curating tiers, cable operators and programmers may evaluate channels to determine whether to include them as part of a category such as "Sports & News" or whether to treat them as "premium." *See* App. 96. They may also design tiers for particular audiences—for example, "Kids & Family" or "Xfinity TV Latino"—thereby making expressive choices about the assembly of such content. App. 96-97. And they may decide how best to promote a particular network by including it in a certain tier.

Similarly, the design of a programming lineup within a particular network also reflects important editorial judgments. For example, Cartoon Network airs certain programming at night as a part of the more mature "Adult Swim" block, which contains programming not suitable for young children. *See* Turner, *On-Air Schedule*, AdultSwim.com, https://www.adultswim.com/schedule (last visited May 27, 2020). And Freeform curates a near-continuous lineup of Christmas specials and movies for its "25 Days of Christmas" each year. *See* Freeform, *The Official 25 Days of Christmas 2019 Movie Schedule*, https://freeform.go.com/25-days-of-christmas/news/the-official-25-days-of-christmas-2019-movie-schedule (last visited May 27, 2020). Programmers also frequently use a popular show to "lead in" to a new show to maximize promotional opportunities. *See* Kelly Corbett,

HGTV's New Show '100 Day Dream Home' Will Take Clients on 'Inspiration Tours' to Help Create Their Perfect Home, House Beautiful (Jan. 31, 2020), https://www.housebeautiful.com/about/a30730168/hgtv-100-day-dream-home (noting that HGTV's *100 Day Dream Home* series premiere followed fan-favorite *Extreme Makeover: Home Edition*). And of course, many shows proceed along carefully scripted plotlines that make sense only when viewed in a linear order. Furthermore, programming networks carefully develop their brands to represent distinct values, and they curate their content to support those brands and to serve particular types of customers. All of this falls readily within the types of expressive, editorial discretion that the Supreme Court has repeatedly deemed to be a protected First Amendment activity.

Chapter 308, which mandates that every channel and every program be offered on a stand-alone basis, clearly is an attempt to substitute the State's own preferences for the editorial judgments of cable operators and programmers regarding the manner in which cable content should be made available to viewers. These are not merely "economic" decisions. For example, if a cable operator elects to offer a sports channel only as part of a sports tier, that judgment has editorial as well as economic import. And if a cable operator chooses to include new or niche networks in a package to help launch and support diverse content choices for viewers, that decision likewise has both editorial and economic import. The State

cannot override such editorial judgments without implicating the First Amendment. For the same reasons, it is no answer that Chapter 308 permits cable operators and programmers to provide channels and programs in packages *in addition to* providing them à la carte. The choice to offer a channel *only* as part of a tier (or to offer a program *only* as part of a channel's linear lineup) is itself an important editorial judgment, for all the reasons set forth above.

The First Amendment implications of Chapter 308 become all the more apparent when considering how such a mandate might apply to newspapers, magazines, or books. Newspaper and magazine publishers similarly make careful editorial judgments about what sections to offer and where to present individual articles, and they almost invariably require readers to purchase the entire paper or magazine, rather than offering for sale any individual section or article. It seems obvious that a state could not mandate that the *Boston Globe* sell the Metro section separately or Dan Shaughnessy's column individually—or that it offer *all* sections and articles for sale individually—to someone who does not wish to purchase the full newspaper. *See, e.g.*, *Pittsburgh Press*, 413 U.S. at 391 (explaining that "the protection afforded to editorial judgment" includes "layout"). And it seems equally obvious that a state could not require an author to sell her short stories individually to someone who does not wish to purchase the full anthology. Yet that is precisely what Chapter 308 does with respect to the presentation of cable content by

mandating that every network and every program be offered independently from a tier or package.

Finally, the district court ignored uncontested evidence that Chapter 308 would in fact cause cable operators to lose access to a great deal of programming that they currently license and offer as part of curated packages and tiers—including popular sports programming—due to contractual restrictions on à la carte exhibition. *See* App. 79-81. And new and niche programmers would struggle to attract sufficient viewership under the à la carte mandate, forcing many of them off the air. *See* App. 27, 43-44, 70. Put simply, in addition to constraining cable operators' and programmers' editorial judgments, Chapter 308 would also effectively prohibit cable operators from including certain programming as part of their curated packages and tiers. That would in turn diminish diversity of content, contrary to Congress's directive to do just the opposite. *See* 47 U.S.C. § 521(4) ("cable communications . . . are encouraged to provide the widest possible diversity of information sources and services to the public").

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For both of these reasons, Chapter 308 triggers heightened scrutiny under the First Amendment. The district court's conclusion that Plaintiffs are substantially likely to succeed on merits of their First Amendment claim therefore was correct and should be affirmed.

II. CHAPTER 308 IS PREEMPTED BY FEDERAL LAW

This Court should affirm the district court's grant of a preliminary injunction for a second, independent reason: Plaintiffs have a substantial likelihood of success on the merits of their claim that Chapter 308 is preempted by federal law. *See SEC v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002) ("We may affirm the district court's grant of a preliminary injunction . . . on any grounds supported by the record."). Had the district court correctly analyzed this issue, it would not have been required to reach the First Amendment issues at all. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction . . . , the Court will decide only the latter." (first alteration in original) (citation omitted)). And if this Court agrees that Section 544(f) preempts Chapter 308, so holding will promote judicial economy by enabling the district court and the parties to forgo further litigation. *See, e.g.*, Order 33 n.14 (expressly reserving the question whether the State can meet its burden based on post-enactment evidence or whether legislative record must itself establish that "a problem actually exists and that the law is likely to solve that problem").

A. The Plain Language of Section 544(f) Preempts Chapter 308

Express preemption occurs when Congress, "in enacting a federal statute, has expressed a clear intent to pre-empt state law." *Capital Cities Cable, Inc. v. Crisp*,

467 U.S. 691, 698-99 (1984). One of the Communications Act's many express preemption provisions is Section 544(f), which provides that States "may not impose requirements regarding the provision or content of cable services," except as expressly provided in Title VI. 47 U.S.C. § 544(f)(1).

When interpreting express preemption provisions like Section 544(f), this Court "'focus[es] first on the statutory language, "which necessarily contains the best evidence of Congress' pre-emptive intent."'" *Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 17 (1st Cir. 2014) (citations omitted). And this Court has recognized that broad preemptive language—such as the term "regarding" in Section 544(f)—is "purposefully expansive" and consistent with a "broad preemption interpretation." *Id.* (interpreting a provision expressly preempting state laws "*related to* a price, route, or service of any motor carrier" (emphasis altered) (citation omitted)).

By contrast, the district court mistakenly assumed that Section 544(f) must be interpreted "narrowly," based on a "'presumption against the preemption of state police power regulations.'" Order 4 (quoting *Medtronic*, 518 U.S. at 485). But *Medtronic* does not justify applying a presumption against preemption in construing the scope of Section 544(f), an *express* preemption provision. The Supreme Court has recently made clear that when a "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus

on the plain wording of the clause.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (citation omitted).[14]

By its "plain wording," Section 544(f) preempts Chapter 308. Indeed, Chapter 308 is the archetype of a "requirement regarding the provision . . . of cable services," 47 U.S.C. § 544(f)(1). By mandating that cable operators "shall *offer* subscribers the option of purchasing access to cable channels, or programs on cable channels, individually," Chapter 308 necessarily regulates the manner in which cable operators *provide* services to their customers. That is, cable operators are prohibited from providing a service that is limited to tiers or packages, and are *required* to "provide" a service that includes the option of purchasing every channel and every individual program à la carte. Chapter 308 also constitutes a requirement regarding the *content* of cable services, because it supplants cable operators' and programmers' editorial judgments regarding the manner in which content is carried and also would result in the withdrawal of some content. *See supra* 38-42. And there is no dispute that Title VI of the Communications Act does not expressly authorize such an à la

[14] Neither of the Supreme Court's most recent cases on express preemption even mentions a presumption against preemption. *See Kansas v. Garcia*, 140 S. Ct. 791 (2020); *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019). Moreover, the Supreme Court has instructed that no presumption against federal preemption applies where, as here, a state imposes an obligation in an area that is subject to "an extensive federal statutory and regulatory scheme." *See United States v. Locke*, 529 U.S. 89, 108 (2000).

carte mandate, which would be necessary to save the provision. Chapter 308 thus is preempted because it "interfere[s] with programming and related decisions of cable operators" regarding their provision of content in a manner not authorized by Title VI. *MediaOne Grp., Inc. v. Cty. of Henrico*, 97 F. Supp. 2d 712, 716 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001).

Whatever the outer limits of Section 544(f), Chapter 308 is within the core of that provision's preemptive effect because it *directly* regulates a fundamental aspect of the provision of cable services. At a minimum, Section 544(f) preempts regulations that "expressly reference[], or ha[ve] a significant impact on," the video programming that cable operators provide to their customers. *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187, 191 (1st Cir. 2016) (quoting *Coakley*, 769 F.3d at 17). Indeed, one of the principal authorities relied on by the State and the district court recognizes that such direct regulations of cable service are preempted. *See Morrison v. Viacom, Inc.*, 61 Cal. Rptr. 2d 544, 556 (Ct. App. 1997) (contrasting generally applicable regulations that merely implicate cable services incidentally with regulations that "expressly and directly regulate[] cable services").

Importantly, this plain meaning interpretation of Section 544(f) reinforces the First Amendment's protection of editorial judgments underlying cable operators' and programmers' decisions whether and how to package channels and programs. By eliminating a key aspect of cable operators' editorial discretion, Chapter 308

strikes at the heart of what Section 544(f) was codified to protect. *See, e.g.*, *Time Warner Cable of N.Y. City v. City of N.Y.*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996) (emphasizing that Section 544(f) "safeguards the editorial autonomy of [cable] operators"), *aff'd sub nom. Time Warner Cable of N.Y. City v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997).

It is therefore unsurprising that Chapter 308 is a "first-in-the-nation law." Order 19. Indeed, it is hard to imagine that, in enacting legislation to "establish a *national policy* concerning cable communications," 47 U.S.C. § 521(1) (emphasis added), Congress wanted 50 different states to impose unique and disruptive requirements regarding the manner in which content is provided to consumers—including Maine's requirement dictating that hundreds of channels and many thousands of programs all be offered individually.[15] Section 544(f) furthers Congress's stated purposes by preempting requirements like Chapter 308 that would upend this national policy and allow one State to force fundamental changes to the cable industry nationwide. App. 89-90.

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[15] Even the Maine Office of the Public Advocate recognized that Chapter 308 implicated substantial preemption concerns. *See* App. 112-13 (testimony of Barry Hobbins, Office of the Public Advocate) ("[A] serious impediment to legislation that involves cable companies is that to the extent cable is regulated, it is at the federal level.").

B. The District Court's Rejection of Preemption Effectively Rewrites the Statute

The district court acknowledged that, under Section 544(f)'s "plain meaning, Chapter 308 would be preempted." Order 5. But rather than give effect to that plain meaning, as this Court's (and the Supreme Court's) precedent requires, *see, e.g.*, *Coakley*, 769 F.3d at 17; *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1946, the district court rejected it in favor of an unduly narrow interpretation of Section 544(f). In particular, the district court read Section 544(f) to prohibit States only from "imposing content-based requirements or mandates that have the effect of restricting or requiring particular content." Order 16.

As an initial matter, Chapter 308 *does* regulate content impermissibly. *See supra* 38-42, 45. Moreover, although the district court acknowledged the inherent "problem" with an interpretation of Section 544(f) that would "not giv[e] some work to the word provision," PI Hrg. Tr. 45 (ECF No. 87), its interpretation of Section 544(f) reads "provision" out of the statute. Rewriting Section 544(f) in this way violates the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Purporting to give some meaning to "provision," the district court suggested that Section 544(f) might preempt a state law that is content-neutral on its face but "target[s] a particular talk show." Order

15-16. But the very case from which the district court drew this example held that such a law was preempted as a restriction on "the . . . *content* of cable services"—not the *provision* of cable services. *Lafortune v. City of Biddeford*, No. 01-250-P-H, 2002 WL 823678, at *8 (D. Me. Apr. 30, 2002) (emphasis added) (citation omitted), *report and recommendation adopted*, 222 F.R.D. 218 (D. Me. 2004), *aff'd*, 142 F. App'x 471 (1st Cir. 2005). Nor has the State ever suggested what independent "work" the term "provision" does under its proposed reading of Section 544(f).

The district court offered three reasons for departing from the statutory text: the structure of the Communications Act, the Act's legislative history, and cases that have interpreted Section 544(f). None holds up under scrutiny.

First, the district court indicated that the structure of the Communications Act "suggest[s] that Congress did not intend 'provision' in 544(f) to have a broad meaning." Order 6. In particular, the district court posited that applying Section 544(f)'s plain text would create tension with two other provisions of the Communications Act: Section 552(d), which provides that certain "consumer protection law[s]" are not preempted, *id.* (quoting 47 U.S.C. § 552(d)(1)), and Section 544(e), which preempts restrictions on a "cable system's use of any type of subscriber equipment or any transmission technology," Order 5-6 (quoting 47 U.S.C. § 544(e)). The district court is mistaken on this point.

As a preliminary matter, no such tension exists. The regulations that implicate Sections 552(d) and 544(e) generally have only an incidental effect on the provision of cable services and, for that reason, are likely to fall outside Section 544(f)'s preemptive scope. *Compare Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 93 (1st Cir. 2013) (recognizing that even broadly worded preemption provisions may permit state regulations that have only a "tenuous, remote or peripheral" effect on protected activity (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)), *with Coakley*, 769 F.3d at 17-18 (recognizing that an express preemption provision with purposefully expansive language necessarily applies to direct regulations of the relevant activity).

In fact, the overall regulatory scheme established by the 1984 and 1992 Cable Acts evinces Congress's purpose of preserving cable operators' and programmers' editorial discretion over the content they offer *and the manner in which they provide it*. Section 544(f) is one of several broad preemption provisions that specifically and deliberately protect cable operators' editorial discretion from state regulation. *See, e.g.*, 47 U.S.C. § 544(a) (preempting "regulat[ions] [of] the services . . . provided by a cable operator"); *id.* § 544(b)(1) (preempting requirements for video programming or other information services"); *id.* § 556(c) (codifying general conflict preemption standard).

Furthermore, even if there were some instances in which Section 544(f) could overlap with Sections 552(d) and 544(e), that would not justify the district court's interpretation of Section 544(f). *See, e.g.*, *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 581 (1994) ("[W]e find no authority for 'suggesting that . . . tension [in a statutory scheme] can be resolved' by distorting the statutory language . . . ." (citation omitted)). The text of Section 544(f) does not permit a construction that allows a regulation of cable service to escape preemption even though it encroaches directly and substantially on the manner in which cable operators provide programming to their customers. Such programming-related decisions go to the heart of the "provision" of cable service, and thus must be protected from state mandates that exceed the level of regulation authorized by Title VI. Nothing in Section 552(d) overrides this protection. *See* 47 U.S.C. § 552(d)(1) ("Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, *to the extent not specifically preempted by this subchapter*." (emphasis added)).

Second, the district court stated that the Communications Act's legislative history suggests that Section 544(f) is concerned only with "preventing government officials from controlling the content of cable programming." Order 8. That, too, was erroneous.

As an initial matter, given the plain meaning of Section 544(f), it was unnecessary for the district court to turn to legislative history at all. *See Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 919 F.3d 121, 128 (1st Cir. 2019) (If "'the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))), *cert. denied*, 140 S. Ct. 855 (2020).

The district court compounded that error by relying on general snippets of legislative history—regarding the 1984 Cable Act as a whole, rather than Section 544(f) in particular—that do not support the court's unduly narrow interpretation. The district court emphasized that Congress included preemption provisions in the Communications Act in part "to ensure that government officials not be able to 'dictate the specific programming to be provided over a cable system.'" Order 7 (quoting H.R. Rep. No. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4663). But that merely confirms what is already clear from the statutory language: State requirements or restrictions on "content" are preempted. It does not support reading the term "provision" out of the statute entirely, particularly when the state law in question supplants cable operators' editorial discretion to determine how to present content to subscribers. Indeed, the legislative history confirms Congress's intent to preempt restrictions on cable operators' and programmers'

editorial discretion over the *manner* in which video programming is presented. *See* H.R. Rep. No. 98-934, at 69 (specifically disapproving requirements that "cable operator[s] . . . offer certain program services *or service packages*" (emphasis added)). In other words, Chapter 308 is the very sort of regulation Congress intended to prohibit.

Third, the district court relied on inapposite case law that is neither binding nor persuasive in this case. The district court relied primarily on three cases involving regulations that bear no resemblance to Chapter 308—regulations that only incidentally or indirectly affected some aspect of cable services. *See* Order 8-15 (citing *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) (upholding FCC rules protecting *broadcasters'* exclusivity rights over syndicated programming against various challenges, including under Section 544(f)); *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp. 1518 (M.D. Ala. 1992) (upholding local ordinance prohibiting anticompetitive licensing agreements against preemption challenge); *Morrison*, 61 Cal. Rptr. 2d at 556-57 (finding that lawsuit under generally applicable state antitrust law was not preempted)). Because those cases involved fundamentally different laws, and none of them explicitly addressed the "provision" prong of Section 544(f), their reasoning does not extend to a law like Chapter 308 that "expressly and directly regulate[s]" the provision of cable services. *Morrison*, 61 Cal. Rptr. 2d at 556 (distinguishing such a regulation from the law it

considered, which had at most an "incidental" effect on tiering decisions); *see United Video*, 890 F.2d at 1189 n.13 (noting that the regulation at issue "turns only on whether a broadcaster owns the exclusive right to a program"); *Storer Cable Commc'ns*, 806 F. Supp. at 1546 (emphasizing that the regulation at issue turns on "market effects of the targeted licenses" and does not "interfere with . . . editorial decisions"). The district court placed undue weight on statements in those cases suggesting that Section 544(f) is concerned exclusively with restrictions on "content." Order 8-9, 11-12. This Court should recognize those statements for what they are—generalized statements made in cases involving laws that differ in kind from Chapter 308 (and at a time before the Supreme Court made it abundantly clear that a statute's text is controlling in express preemption cases).

Notably, no case holds that a state law that directly regulates the manner in which a cable operator provides video programming falls outside the preemptive scope of Section 544(f). Nor has any court upheld a state law that would result in content being withdrawn from cable operators' programming lineups, as the undisputed evidence established would occur here. App. 27, 43-44, 70, 79-81. To the contrary, the cases that have addressed such regulations have uniformly held or suggested in dicta that they *are* preempted. *See MediaOne Grp., Inc.*, 97 F. Supp. 2d at 716 (holding that Section 544(f) preempted ordinance imposing direct requirements on cable operator as precondition to its "'provision' of . . . cable

services"); *Time Warner Cable of N.Y. City*, 943 F. Supp. at 1391 (recognizing that Section 544(f) forbids regulations that "violate[] . . . editorial autonomy"); *Morrison*, 61 Cal. Rptr. 2d at 556 (indicating that direct regulations of cable services are preempted by Section 544(f), unlike laws that have only an incidental effect); *cf. Cablevision Sys. Corp. v. Town of E. Hampton*, 862 F. Supp. 875, 886 (E.D.N.Y. 1994) (interpreting Section 544(a) and (b) to preclude franchising authorities from "determin[ing] the details and particulars of the provision of cable service," based on precedent construing "Section 544" as a whole), *aff'd*, 57 F.3d 1062 (2d Cir. 1995).[16] In short, the plain language of Section 544(f) preempts Chapter 308, and a proper understanding of the case law only bolsters that conclusion.

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[16] For similar reasons, Chapter 308 also may be preempted by Section 544(a) and (b), which prohibit "[a]ny franchising authority" from regulating the "services" or establishing any requirements for "video programming" offered by cable operators. 47 U.S.C. §§ 544(a), (b)(1). The State argued below, however, that it could still enact and enforce Chapter 308 even if Section 544(a) and (b) might prevent local franchising authorities from enforcing it. State PI Opp. 14 n.8, ECF No. 69. Although Plaintiffs do not concede that Section 544(a) and (b) are inapplicable, our arguments in this appeal focus on Section 544(f) because there is no dispute that it preempts requirements imposed by the State regarding the provision or content of cable services.

CONCLUSION

For all of the foregoing reasons, this Court should affirm.

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