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Maine Law Requires Cable Providers Offer an À La Carte Option for Television Channels

BY AMANDA GUZMAN/ ON OCTOBER 27, 2019

This past February, Maine passed a new law in an attempt to require cable providers to allow customers to purchase cable channels à la carte.[1] This law came after Maine Representative Jeffery Evangelos talked with Maine residents during his campaign.[2] Representative Evangelos learned that many people were no longer able to afford cable television packages.[3] The biggest complaint from those that he spoke with was that they could no longer afford to watch Boston Red Sox games as the cable packages that provided the channel that aired the games were just too expensive.[4]

The new law, L.D. 832 titled "An Act to Expand Options for Consumers of Cable Television in Purchasing Individual Channels and Programs," was scheduled to take effect on Friday, September 19, 2019.[5] Many of the large cable providers and television networks are unhappy with this law because of the potential impact it could have on their business. Comcast and several TV networks, including Comcast subsidiary NBCUniversal, A&E Television Networks, C-Span, CBS Corp., Discovery, Disney, Fox Cable Network Services, New England

Sports Network, and Viacom, filed a complaint early October in the US District Court in Maine seeking an injunction to prevent the enforcement of the law.[6] The complaint asserts that L.D. 832 is preempted by both the First Amendment and various other federal laws.[7]

The Supreme Court first recognized in *FCC v. Midwest Video Corp.* that because cable television is seen as a means of communication, cable television shares the freedom of expression protected by the First Amendment.[8] While it was only dictum of the Supreme Court in *FCC v. Midwest Video Corp.*, in *City of Los Angeles v. Preferred Communications, Inc. (Preferred I)*, the Supreme Court affirmed that cable television enjoys First Amendment rights.[9] In *Preferred I*, the Supreme Court held that cable television "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, seeks to communicate messages on a wide variety of topics and in a wide variety of formats" and is therefore subject to First Amendment protection.[10] But such protection is not absolute and "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing social interests."[11]

When governments have placed restrictions on cable providers, courts, in assessing the constitutionality of those restrictions, have used varying levels of review. When the restrictions that are placed on cable providers are content-neutral, the restriction should be measured by the intermediate scrutiny test that the Supreme Court articulated in *United States v. O'Brien*.[12] In *O'Brien*, the Supreme Court held that content-neutral restrictions can be constitutionally permissible if they are within the Government's constitutional power, they further an important or substantial government interest, the interest of the government is unrelated to the suppression of free expression, and the restriction is no greater than is essential to the furtherance of that interest.[13] On the other hand, when the restrictions that are placed on cable providers are content-based speech restriction, the Supreme Court has articulated that strict scrutiny should be used to analyze the constitutionality of such restrictions.[14] Under strict scrutiny review, "if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."[15] If a less restrictive alternative would serve the Government's purpose, than the less restrictive measure must be used.[16]

To determine whether intermediate scrutiny or strict scrutiny will be applied in reviewing the constitutionality of L.D. 832 it will turn on whether the restriction is considered a content-based or content-neutral restriction. Previously, the Supreme Court has held that "must-carry" requirements, which required cable providers to carry commercials and public television stations, were constitutionally permissible because they were content-neutral restrictions.[17] The Supreme Court has held that a federal restriction placing regulations on sexually oriented programs to protect children, either by requiring cable providers to fully scramble or fully block these channels, or to only provide such programs between hours of 10pm and 6am, when children were typically not watching TV, was unconstitutional because it was a content-based restriction.[18] The question in *Comcast* turns on whether requiring the

purchase of à la carte channels is more like a "must-carry" restriction or a restriction on sexual content.

In determining the scope of the First Amendment protection for cable television it depends on whether cable television is analogized to newspapers, the print model, or broadcast stations, the broadcasting model.[19] With the print model, the government is "severely" limited in the regulations it can place on expression.[20] In addition, with the print model, when the government does place regulations on expression, the government is required to show compelling reasons to justify such restriction.[21] The broadcast model, on the other hand, allows for greater governmental regulation.[22]

Past court decisions are evidence that governmental restriction on the operation of cable systems will be tested under a more similar standard to the First Amendment protection afforded to print media.[23] *Turner I* and *II* clearly show that where "governmental regulations impinge on the First Amendment right of cable operators, or programmers, or of viewers," proving the necessity of such regulation will impose a burden on the government.[24] The power of state and local laws are limited by the Cable Act of 1984 and the Cable Act of 1992.[25] Such power has been limited to apply to constitutionally unprotected speech, such as libel, obscenity, and slander.[26]

L. D. 832 imposes a requirement on cable providers to permit customers to purchase television network channels à la carte.[27] By imposing this regulation on cable providers, the state government of Maine is placing restrictions on cable providers opportunities to exercise "editorial discretion over which stations or programs to include in its repertoire."[28] This new law no longer allows cable providers the editorial discretion to decide how to incorporate various channels into program packages. Instead, if asked by a consumer, cable providers would have to give consumers the opportunity to purchase specific channels. The importance of the decisions cable providers once made in deciding how to offer grouping of channels no longer have the impact it once did because with the à la carte option, consumers no longer have to contemplate what is the best cable package to buy in order to get the channels that they utilize the most. Instead of making this decision, consumers could simply request specific channels à la carte and that in effect will take away from cable providers their editorial discretion and is in violation of the First Amendment.

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[1] Me. Rev. Stat. Ann. tit. 30-A, § 3008(3)

[2] Eriq Gardner, *TV Giants Say Forcing Cable Companies to Sell "A La Carte" Violates First Amendment*, The Hollywood Reporter (Sept. 13, 2019, 12:12pm), https://www.hollywoodreporter.com/thr-esq/tv-giants-say-forcing-cable-companies-sell-la-carte-violates-first-amendment-1239518 [https://perma.cc/4A4H-KR6V].

[3] *Id.*

[4] *Id.*

[5] Jon Brodkin, *Comcast sues Maine to stop law requiring sale of individual TV channels*, arsTechnica (Sept. 10, 2019, 12:54pm) https://arstechnica.com/tech-policy/2019/09/comcast-tv-networks-sue-maine-to-stop-law-requiring-a-la-carte-channels/ [https://perma.cc/HG7M-KSTV].

[6] *Id.*

[7] *Id.*

[8] FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

[9] Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

[10] *Id.* at 494.

[11] *Id.* at 495.

[12] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. of Chi. L. Rev. 46, 49 (1987).

[13] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[14] *See* United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (where the Court determined a federal statute that required cable providers to follow specific rules regarding showing sexually oriented programs on channels to be a content-based restriction on cable providers and viewed it under strict scrutiny and struck it down).

[15] *Id.*

[16] *Id.*

[17] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1944) (where regulations required cable companies to air local commercials and carry public television networks and the Court found such regulations constitutionally permissible because they were not a restriction on the content messaged conveyed, but instead was a content-neutral regulation).

[18] Playboy Entm't Group, 529 U.S. at 813 (2000).

[19] 1 Telecommunication & Cable Regulation P 13.11(2019).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Me. Rev. Stat. Ann. tit. 30-A, § 3008(3).

[28] Los Angles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).