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Maine's Cable Unbundling Law Violates the First Amendment

by

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I. Introduction and Summary

On June 15, 2019, a new law became effective in Maine that imposes à la carte unbundling obligations, in an extreme form, on cable operators. The Maine law (LD 832) requires cable operators – and cable operators only – to unbundle not just individual channels from tiers, but also individual programs from channels. Fortunately, in December 2019, the U.S. District Court in Maine granted, on First Amendment grounds, a motion for a preliminary injunction. However, the court improperly interpreted the Supreme Court's 1994 holding in the *Turner I* case far too narrowly, concluding that cable operators' editorial discretion does not include decisions regarding how they package programming.

Cable operators exercise editorial judgment, protected by the First Amendment, when making choices regarding the content, composition, and presentation of the products and services they market to consumers. That editorial discretion, without question, applies to decisions relating to the specific channels they carry. It also encompasses determinations as to which channels to provide as part of complete and integrated works – that is, curated tiers – and to determinations *not* to offer those channels individually. The Maine law, however, forces cable operators to disaggregate tiers and sell content in a manner not of their choosing: on a per-channel and per-

program basis. This necessarily and unavoidably implicates cable operators' First Amendment free speech rights. Regrettably, the district court concluded otherwise.

In *Turner I*, the Supreme Court acknowledged the fundamental constitutional principle that First Amendment protections apply to cable operators' programming decisions. Contrary to the district court's reasoning, however, that acknowledgement was not based on a finding of limited channel capacity. Rather, the relevance of channel capacity in *Turner I* arguably was limited to the issue of the appropriate level of scrutiny, strict or intermediate. As explained below, however, Maine has conceded that LD 832 would not satisfy either standard of scrutiny. Thus, the sole issue here is whether the First Amendment applies to tiering-related decisions such as those implicated by the Maine law. Numerous Supreme Court decisions, including *Turner II*, make plain that it does.

Furthermore, the district court erred in its attempt to draw a distinction between the ability to bundle channels into tiers, which LD 832 still permits, and the mandate to unbundle and sell the channels and programs that make up those tiers individually. As a practical matter, the latter not only eviscerates the former, but it also compels cable operators to speak in ways they otherwise would not.

The district court therefore was wrong to reject the claim that the Maine law, by interfering with cable operators' editorial discretion, infringes on their First Amendment rights.

The state's appeal of the preliminary injunction is now before the U.S. Court of Appeals for the First Circuit. In accordance with the constitutional avoidance canon, that court might well affirm on the narrow issue of federal preemption under Section 544(f) of the Cable Act. On the other hand, cable operators' free speech rights, as well as First Amendment jurisprudence, would benefit from an explicit rejection of the district court's unreasonably narrow reading of Supreme Court precedent.

II. Maine's Unbundling Statute and the District Court's Decision

Maine statute LD 832 is but one sentence long. "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."[1] LD 832 thus denies cable operators providing service within the state the ability to provide content *solely* as part of a tier of linear, curated channels. Instead, they must ("shall") make content available in a manner not of their own choosing: on a per-channel and per-program basis. Cable operators *also* may continue to offer that content via tiers, but that does not alter the fact that LD 832 imposes restrictions on their speech.

On September 6, 2019, a cable operator operating in Maine, Comcast of New Hampshire/Maine, Inc., along with nine (now eight) cable programmers (*hereinafter* "Comcast"), sought declaratory and injunctive relief in the U.S. District Court in Maine.[2] Comcast presented three arguments.

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[1] LD 832 became law on June 15, 2019, as Chapter 308 of the Public Laws of 2019, codified at 30-A M.R.S. § 3008(3)(F).

[2] *See Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Declaratory and Injunctive Relief Sought, Docket No. 1:19-cv-410-NT (filed September 6, 2019). Originally there were nine participating programmers: A&E Television Networks, LLC; C-SPAN; CBS Corp.; Discovery, Inc.; Disney Enterprises, Inc.; Fox Cable Network Services, LLC;

Two asserted First Amendment violations, the third that LD 832 is preempted by federal law. On December 20, 2019, the district court granted a preliminary injunction.[3]

Although the court concluded that LD 832 implicates cable operators' First Amendment rights, it did so due solely to the fact that the law is speaker based; as discussed more fully in the following sections of this *Perspectives*, the court erroneously rejected Comcast's argument that cable operators engage in speech protected by the First Amendment when compiling and presenting thematically consistent, indivisible tiers of content. It also improperly rejected Comcast's preemption argument under Section 544(f) of the Cable Act.[4]

Specifically, the court found that, because LD 832 does not apply to similarly situated speakers – that is, competing video distribution platforms, such as Direct Broadcast Satellite (DBS) operators and other traditional, facilities-based Multichannel Video Programming Distributors (MVPDs); virtual MVPDs (vMVPDs) that deliver competing services over the public Internet; and other online streaming services (Online Video Distributors (OVDs)) – it is subject only to First Amendment intermediate scrutiny. It then held that, because the state did not provide adequate evidence to demonstrate that singling out cable operators in fact would further the asserted problem (cable rates alleged to be increasing faster than the rate of inflation), Comcast was entitled to a preliminary injunction. Significantly, the court emphasized that the state, by its own admission, failed to demonstrate "that LD 832 will, in fact, be likely to reduce prices and increase affordable access to cable."[5]

Thus, and somewhat unusually, the issue here is not whether strict or intermediate scrutiny applies; the state has conceded that, even under the latter, less stringent standard, LD 832 would not survive.[6] Rather, the threshold question before the court is whether the law in any way implicates cable operators' First Amendment editorial discretion. The district court, interpreting *Turner I* in an overly narrow and logically flawed fashion, came to the incorrect conclusion that it does not.

NBCUniversal Media, LLC; New England Sports Network, LP; and Viacom Inc. On December 4, 2019, however, CBS Corp. and Viacom Inc. merged into ViacomCBS Inc., leaving only eight.

[3] *See Comcast of* New *Hampshire/Maine, Inc. v. Janet Mills*, Order on Plaintiffs' Motion for Preliminary Injunction, Docket No. 1:19-cv-410-NT (December 20, 2019) (*Preliminary Injunction*).

[4] *See* 47 U.S.C. § 544(f)(1) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the *provision* or content of cable services, except as expressly provided in this subchapter.") (emphasis added). As the Washington Legal Foundation explained in its amicus brief, the district court "acknowledged [that] when given 'its plain meaning,' § 544(f) preempts LD 832" but "then *diverged* from § 544(f)'a plain meaning" to dismiss impermissibly the word "provision" as surplusage. *Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Appellees and Affirmance, No. 20-1104 (filed June 3, 2020) (emphasis in original), at 2-3.

[5] *Preliminary Injunction* at 33 ("The State candidly conceded at oral argument that 'there may well not be enough in the … factual record at this point for us to have met our burden.") (citation omitted). Significantly, the court highlighted the fact that "there is no mechanism in the law that would stop cable operators from pricing individual channels at the same price as an entire tier."). *Id.*

[6] *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that a regulation will satisfy intermediate scrutiny only if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

The state appealed the district court's decision to the United States Court of Appeals for the First Circuit and briefs have been filed.

III. Supreme Court Precedent Is Clear: Cable Operators' Editorial Discretion Is Not Limited to Carriage Decisions

As the district court and the state acknowledge, it is well-settled that cable operators have First Amendment rights. However, both contend erroneously that *Turner Broadcasting System, Inc. v. FCC* (*Turner I*) acknowledges editorial judgment rights solely with respect to the selection of channels – not also with respect to the curation of tiers.[7]

Specifically, the district court held that "[t]here is no question that *Turner I* is distinguishable from the instant case" because "LD 832 requires no … addition of content …. Nor does LD 832 prohibit [Comcast] from packaging programming in bundles; it merely requires [it] to also provide channels and programming individually."[8] The court went on to conclude that Comcast "do[es] not explain why cable operators' editorial discretion to choose what channels or programs to offer, which is protected by the First Amendment, should extend to cable operators' discretion in *how* to sell that programming."[9]

Maine, meanwhile, acknowledged in its appellate brief that cable operators' editorial discretion is entitled to First Amendment protection – but only "when they decide what programs and stations they will carry."[10] Having conceded, as noted above, that its factual case cannot survive even intermediate scrutiny, the state had no choice but to make the unsupported claim that "there is no suggestion that the selection of programs and channels itself constitutes any First Amendment expression."[11] In fact, however, Comcast made clear in its initial request for relief that:

> As the federal government recognized in declining to impose an à la carte mandate, tiers and bundling are not just a product of unilateral decision-making by cable operators or an exercise of purely contractual rights. Tiers and bundling reflect the exercise of First Amendment rights – both by the programmers who decide how to license their programming to cable operators, and by the cable operators who decide how to provide that programming to the public.[12]

Accordingly, both the district court and the state are mistaken. Cable operators' First Amendment rights encompass decisions regarding not just what specific channels they carry, but also how they present programming to subscribers: decisions regarding tiering, channel placement, display menus, and more. Supporting (and oft-cited) case law on this point includes:

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[7] *See generally Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).
[8] *Preliminary Injunction* at 25.
[9] *Preliminary Injunction* at 25-26 (emphasis in original).
[10] *Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Brief of Defendants-Appellants Janet Mills and Aaron Frey, No. 20-1104 (filed April 28, 2020) (*Maine Appellate Brief*), at 17.
[11] *Maine Appellate Brief* at 18 n.9 ("Rather, taking [Comcast's] word for it, cable operators use tiers of channels either because of contractual requirements or 'to provide value to their subscribers.' Complaint, ¶¶ 42-43 (App. 37-39). Bundling of channels is simply a business tactic, and it is not protected by the First Amendment.").
[12] *Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Declaratory and Injunctive Relief Sought, Docket No. 1:19-cv-410-NT (filed September 6, 2019), at 5.

- 1986's *Los Angeles v. Preferred Communications, Inc.*, in which the Supreme Court held that, "through original programming or by exercising discretion over which stations or programs to include in its *repertoire*, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats."[13] Merriam-Webster defines "repertoire" in relevant part as "*a list or supply* of dramas, operas, pieces, or parts that a company or person is prepared to perform " or "*the complete list or supply* of dramas, operas, or musical works available for performance."[14]
- 1994's *Turner I*, where the Court, citing *Leathers v. Medlock*, declared that "[t]here can be no disagreement on an initial premise: Cable 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."[15]
- 1997's *Turner Broadcasting System, Inc. v. FCC (Turner II)*, in which the Court, citing *Turner I*, acknowledged that "must-carry provisions have the potential to interfere with protected speech" because they "restrain cable operators' editorial discretion *in creating programming packages* …."[16]
- 1998's *Arkansas Educational Television Commission v. Forbes*, where the Court, citing *Turner I*, held that "[w]hen a public broadcaster exercises editorial discretion in the selection *and presentation* of its programming, it engages in speech activity" and that "[a]lthough programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."[17]

Despite this abundance of Supreme Court guidance, the district court nevertheless concluded that cable operators' First Amendment rights are implicated only when regulation inhibits their ability to carry channels – not when it forces them to offer channels and individual programs in a certain manner.[18]

IV. Cable Operators' First Amendment Rights Are Based on Principle, Not Channel Capacity

The district court focused far too narrowly on the specific facts of *Turner I*. Yes, it is true that, back in 1994, the channel capacity of analog cable systems was much more limited, and carriage decisions often were made in a zero-sum environment: the addition of one service frequently required the deletion of another in order to make room. The Court in *Turner I*, however, affirmed that, as a fundamental principle, cable operators have First Amendment rights – and that the

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[13] *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (emphasis added).
[14] Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/repertoire (emphasis added).
[15] *Turner I* at 636 (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).
[16] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 214 (1997) (*Turner II*) (emphasis added).
[17] *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 674 (1998) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 570 (1995) (a speaker need not "generate, as an original matter, each item featured in the communication")) (emphasis added).
[18] Interestingly, the court notes that Supreme Court Justice Brett Kavanaugh, in a dissenting opinion while serving on the United States Court of Appeals for the District of Columbia Circuit, interpreted *Turner I* and *II* to "mean that Internet service providers possess a First Amendment right to exercise their editorial discretion over what content to carry *and how to carry it*.") (emphasis added). *See Preliminary Injunction* at 26 n.11.

existence of those rights is not contingent upon the amount of available channel capacity. Arguably, the limited channel capacity of the analog cable systems prevalent at that time was a factor only in the choice between strict and intermediate scrutiny.[19] The decisive issue here, by contrast, is whether the First Amendment applies at all.

While the First Amendment applies in any event, it is worth considering the transformation that video content distribution has experienced over the intervening quarter century. Due to technological advances, the number of channels that cable operators are able to carry has increased dramatically, thereby mitigating concerns relating to capacity. Marketplace changes, however, have been even more extreme in creating an abundance of programming outlets. As a consequence, cable operators' alleged "bottleneck" control, a major factor in the Court's decision to apply intermediate rather than strict scrutiny,[20] no longer exists.

When the Supreme Court decided *Turner I* in 1994, it relied upon a congressional finding that over 60 percent of television households subscribed to cable.[21] In stark contrast, according to NCTA – The Internet & Television Association, at the end of 2019 "only 38% of occupied households had cable video service."[22]

More relevant to this discussion, consumers today increasingly subscribe to multiple OVDs, whether in addition to or in place of cable, other traditional MVPDs, or vMVPDs. According to Parks Associates, last year "forty-six percent of US broadband households subscribe[d] to two or more OVD services."[23]

Thus, the Court in *Turner I* justified its application of intermediate scrutiny largely on a perceived cable-specific "bottleneck" that the subsequent emergence of robust competition, without question, has eliminated.[24] Should the Court revisit the issue of the appropriate standard to apply in the context of current marketplace conditions, it presumably would – and should – choose strict scrutiny. The significance of the explosion in the number of sources for video content would far overweigh any outdated concerns regarding limited channel capacity.[25]

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[19] *See Turner I* at 637 (noting that the must-carry rules "reduce the number of channels over which cable operators exercise unfettered control" but concluding that, "because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable").
[20] *See id*. at 661 ("The must-carry provisions … are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.").
[21] *Id*. at 633.
[22] Comments of NCTA – The Internet & Television Association, *Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), available at https://ecfsapi.fcc.gov/file/1042700221723/042720%2020-60%20NCTA%20Comments%20On%202020%20Competition%20Report%20-%20FINAL.pdf, at 15.
[23] "Sharp increase in number of OTT subscribers in the US," *Broadband TV News* (October 4, 2019), available at https://www.broadbandtvnews.com/2019/10/04/sharp-increase-in-number-of-ott-subscribers-in-the-us/.
[24] *See Turner I* at 661 ("Appellants do not argue, nor does it appear, that other media – in particular, media that transmit video programming such as MMDS and SMATV – are subject to bottleneck monopoly control, or pose a demonstrable threat to the survival of broadcast television."). Tellingly, neither DBS nor telephone companies provided competition to cable at that time, to say nothing of online video services.
[25] *See, e.g., Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 994 (2013) (Kavanaugh, Circuit Judge, concurring) ("In light of the Supreme Court's precedents interpreting the First Amendment and the massive changes to the video programming distribution market over the last two decades, … the FCC cannot continue to implement a regulatory model premised on a 1990s snapshot of the cable market.").

At any rate, the district court here was wrong to interpret *Turner I*'s discussion of channel capacity as the sole basis for its holding that cable operators have First Amendment rights. As the Supreme Court cases listed above demonstrate, a regulation need not implicate channel additions or deletions in order to raise First Amendment concerns.

Indeed, First Amendment infringement in the instant context results from the Maine law compelling cable operators to make available the channels and programs that together make up the "repertoire" they offer to potential customers in a way that is contrary to their chosen method of expression – that is, on a per-channel and per-program basis. Print publications offer a compilation or repertoire of sections and stories, cable operators one of channels and programs. A requirement that newspapers and magazines offer individual articles for sale almost certainly would interfere with their editorial discretion and, thus, violate the First Amendment. As WarnerMedia points out in its amicus brief, the impact of LD 832 is "equivalent to requiring a corner newsstand to have scissors at the ready to sell single articles from inside each publication on the rack – an obvious interference with the rights of the speakers who create those curated compilations."[26] So, too, does a requirement that cable operators have the technological equivalent of scissors at the ready to unbundle tiers – even down to unbundling and selling individual programs – almost certainly violate the First Amendment.

V. The District Court Relied Upon a False Distinction Between Curating and Selling

In addition, the district court made much of the fact that, while LD 832 requires cable operators to sell the content it carries on a per-channel and per-program basis, it does not prevent them from also offering integrated tiers. In doing so, the court imagined a practical and determinative line between (1) curating channels into tiers, and (2) selling content to subscribers. This distinction does not exist in the real world. Cable operators do not make channel-carriage decisions, or choices relating to tiering, in the abstract; they make such decisions exercising such editorial judgment for the sole purpose of marketing that content to consumers. LD 832 frustrates cable operators' freedom to make channels available *only* within tiers in the exercise of their editorial judgment, thereby implicating their First Amendment speech rights.[27]

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[26] *Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Brief of Amicus Curiae WarnerMedia, LLC in Support of Plaintiffs-Appellees, No. 20-1104 (filed June 4, 2020), at 18. In its Reply Brief, the state argues that "[a] better analogy might be if a newsstand refused to sell individual publications and instead, for example, required that customers who only want the Boston Globe must also purchase 68 other newspaper and magazines." *Comcast of New Hampshire/Maine, Inc. v. Janet Mills*, Reply Brief of Defendants-Appellants Janet Mills and Aaron Frey, No. 20-1104 (filed June 18, 2020) (*Maine Appellate Reply Brief*), at 7. This is flawed logic. As noted above, the Supreme Court has held consistently that cable operators in fact do have similar First Amendment rights to publishers of newspapers and magazines. Whether or not a newsstand likewise engages in protected editorial decision-making when choosing what periodicals to carry, and how to offer them to the public, is beside the point. Moreover, the state's analogy breaks down even more dramatically when applied to the requirement to unbundle individual programs from channels; without question, a cable programmer stands in the shoes of the periodical publisher, not the newsstand.

[27] In its appeal of the preliminary injunction, the state claims that "[c]able operators remain free to exercise unfettered discretion over the choice of content. The State is simply attempting to prevent cable operators from using what is nothing more than a mercenary business tactic to force Maine consumers to purchase content they do not want." (Pages 6-7). For the reason just stated, this argument must fail. *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) ("The State contends that its law is a mere commercial regulation. Far from having only an

Consider the very real possibility that a cable operator might decide to obtain the rights to carry a certain channel solely because its content complements a specific tier. LD 832's mandate to sell that channel à la carte undermines not just the cable operator's efforts to define the identity of that tier, but also – more broadly, and more relevant to the narrow interpretation of *Turner I* that the district court embraced – its ability to decide what to carry. To the extent that a cable operator seeks to offer a channel only as part of a tier, LD 832 stands in its way of carrying that channel.[28] Thus, the distinction relied upon by the district court – between protected channel-carriage decisions and unprotected tiering choices – in reality does not exist. Cable operators' inability to exercise editorial discretion with respect to the latter necessarily implicates the former.

VI. Forcing Cable Operators to Unbundle and Sell Individual Channels and Programs Raises Issues Regarding Compelled Speech

It also is the case that forcing cable operators to sell channels and programs in a manner that they otherwise would not – that is, on an à la carte basis – implicates compelled speech. As the Supreme Court proclaimed in *Pacific Gas & Electric Company v. Public Utility Commission*, "[c]ompelled access … both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[29] The Court went on to explain that the "essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas.… There is necessarily … a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[30]

By choice, and consistent with the carriage rights they obtain from cable programming suppliers, cable operators provide some channels à la carte, others as part of curated tiers. The composition of those tiers reflects their editorial discretion: the specific services included, the sequential channel positions assigned, even the name attached. So, too, does the choice to provide those channels *only* as part of a tier. LD 832, by forcing cable operators to make available those channels (as well as the specific programs offered on those channels) on an individual basis, thus compels them to speak in a manner in which they otherwise would not.

In *Miami Herald Publishing Company v. Tornillo*, the Supreme Court overturned a Florida statute that required newspapers to provide candidates criticized in editorials an opportunity to respond. In doing so, the Court noted that:

> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question.

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incidental effect on speech, however, § 4631(d) imposes a burden based on the content of speech and the identity of the speaker.").

[28] A similar result would occur in practice where a cable programmer, exercising its exclusive copyright interests, prohibits the carriage of a specific channel on an à la carte basis.

[29] *Pacific Gas & Electric Company v. Public Utility Commission*, 475 U.S. 1, 9 (1986).

[30] *Id*. at 11 (quoting *Harper & Row Publishers, Inc., v Nation Enterprises*, 471 U.S. 539, 559 (1985), quoting *Estate of Hemingway v. Random House*, 23 N.Y. 2d 341, 348, 244 N.E. 2d 250, 255 (1968)) (emphasis in original).

> Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.[31]

The statute in *Tornillo* did not stop the newspaper "from saying anything it wished," just as the district court here noted that LD 832 does not "prohibit [Comcast] from packaging programming in bundles."[32] Nevertheless, in each case speech is compelled, contrary to the First Amendment.

VII. Conclusion

Turner I and *II* affirmed the fundamental constitutional principle that cable operators exercise editorial discretion protected by the First Amendment when they make decisions regarding *both* what *and* how they carry content on their systems. The district court was wrong to limit the application of cable operators' First Amendment rights only to decisions regarding which specific channels to carry. The content that cable operators choose to assemble and market to consumers transcends the individual channels and programs involved to include menus, displays, and – critically – packaging decisions. The creation of tiers necessarily involves editorial judgment. The Maine law impedes cable operators' creative autonomy and editorial discretion and compels them to speak in ways that they otherwise would not. Cable operators' free speech rights, as well as First Amendment jurisprudence, would benefit from a clear rejection by the First Circuit of the district court's flawed analysis.

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Further Readings

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Seth L. Cooper, "Tennis Channel Ruling a False Start Under First Amendment," *FSF Blog* (March 5, 2012).

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[31] *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 256 (1974) (citation omitted).
[32] *Preliminary Injunction* at 25.

Randolph J. May, "The Tennis Channel Ruling: No Mere Foot Fault," *FSF Blog* (December 21, 2011).

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