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 District of Maine (Case No. 1:19-cv-410-NT)

BRIEF OF AMICUS CURIAE MOTION PICTURE ASSOCIATION, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES

James S. Blackburn
Oscar Ramallo
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
(213) 243-4000

Attorneys for Amicus Curiae
Motion Picture Association, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4), the Motion Picture Association, Inc. ("MPA") makes the following disclosures regarding its corporate status:

The MPA is a not-for-profit trade association that serves as the voice and advocate of the global film and television community. The MPA has no parent corporation. As a nonprofit, it has no owners or shareholders.

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INTEREST OF AMICUS CURIAE

The Motion Picture Association ("MPA") is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry.[1] It has since grown to serve as the voice of the global film and television community, and it represents its members primarily in their capacity as producers of movies and television programs. The MPA's members are Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc.

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[1] All parties have consented to the filing of this brief.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the MPA, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Certain plaintiffs are related corporate entities to members of the MPA, including Comcast of Maine/New Hampshire, Inc.; Disney Enterprises, Inc.; NBC Universal Media, LLC; and Viacom, Inc. A&E Television Networks is a joint venture of Disney/ABC International Television, Inc., Hearst Communications, Inc., Hearst Holdings, Inc., Cable LT Holdings, Inc., and Hearst LT, Inc. CBS Corp. is an associate member of the MPA for tax issues only.

The MPA's members and their affiliates create and own the copyrights to entertainment content. Most of the MPA's members individually license their content to the cable programmers and cable operators that are the plaintiffs in this case. Maine's H.P. 606–L.D. 832 ("Chapter 308")—a radical and surprising mandate that requires each cable channel and even each individual program on a channel to be offered à-la-carte—is fundamentally incompatible with both the existing structure of licensed programming relationships between content owners and distributors and the MPA members' exclusive rights under copyright law. Thus, the law will directly impact the MPA's members' interests as copyright holders. These harms are distinct from the harms faced by the plaintiff cable operators and programmers.

If Chapter 308 were to go into effect, the statute's interference with the MPA's members' copyright interests would also harm the public at large by reducing the quantity, quality, and diversity of programming produced by copyright owners, and subsequently made available to the viewing public via cable operators and programmers. While the plaintiffs have presented compelling reasons for affirming the District Court's preliminary injunction under both the First Amendment and the Cable Act,

the MPA's perspective as the representative of numerous leading content creators and content owners will assist the Court as it considers whether it should preserve the status quo and prevent the serious harm to the public interest that would inevitably occur if Chapter 308 were to take effect.

ARGUMENT

Appellants Janet Mills and Aaron Frey (collectively, "Maine") ask the Court to reverse the District Court's grant of a preliminary injunction, contending that Chapter 308 is a pro-consumer statute that "promotes the dissemination of information." Appellants' Opening Brief ("Me.Br."), at 13. They are incorrect. Chapter 308 will ***decrease*** the dissemination of copyrighted content, harming copyright owners and the consumers that enjoy their content.

Chapter 308 will immediately interfere with the dissemination of copyrighted television content because it conflicts with existing licenses to cable operators from programmers. Because most content would not be economically viable if it were offered à-la-carte, copyright owners only license a subset of content for à-la-carte dissemination to the programmers that sublicense copyright owners' content to cable operators. Chapter 308 requires cable operators to offer everything à-la-carte, including content for

which they do not have a license to do so. The only way for cable operators to comply simultaneously with the Copyright Act, their licenses from programmers, and Chapter 308 is to stop offering all content for which they lack an à-la-carte license.

Not only would Chapter 308's à-la-carte mandate thus reduce the amount of content available to Maine's cable consumers, it would also impermissibly interfere with the legal rights of copyright owners. The Copyright Act grants copyright owners, not state governments, exclusive control over the terms of any license to exploit their works. *See Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3d Cir. 1999) (a state may not regulate copyright owner's "exclusive rights" to "distribute and perform" … copyrighted works). Chapter 308 purports to coerce copyright owners' exercise of their rights to license their works. Under Chapter 308, a license to a cable operator that does not include à-la-carte rights is worthless in Maine because it could not be lawfully exploited by the cable operator. Copyright owners must therefore choose between licensing cable programmers to make content available to cable operators for à-la-carte dissemination in Maine or not permitting any exploitation of their works by cable operators in Maine. States, however, may not put parties to the

choice of exploiting their rights under the Copyright Act or complying with local regulation. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711 (1984) (state could not force cable operators to choose between exploiting their right to a compulsory copyright license or complying with state advertising regulation). Because Chapter 308 impermissibly coerces the exercise of copyright owners' exclusive rights, it unlawfully conflicts with content owners' rights under the Copyright Act.

Maine wrongly argues that exerting pressure to make all content available à-la-carte would help consumers. Me.Br. at 27. But packaging television content in channels or tiers of channels results in numerous efficiencies, increasing the number and diversity of cable networks and programming available on any cable system. Without these advantages, much of the content on television would not be economically viable and would likely never be offered to cable operators, thus reducing the diversity, quantity, and quality of programming. Maine's contention that Chapter 308 would increase consumer's access to content is based on a fundamental misunderstanding of the market for television content and is not supported by any evidence.

In short, enforcing Chapter 308 would harm Maine's consumers and interfere with the rights of copyright owners. The District Court was correct to preliminarily enjoin enforcement of Chapter 308, and its judgment should be affirmed.

I. CHAPTER 308 IMPERMISSIBLY INTERFERES WITH COPYRIGHT OWNERS' EXCLUSIVE RIGHTS UNDER THE COPYRIGHT ACT.

In evaluating a district court's grant or denial of a preliminary injunction, this Court must assess whether the injunction is in the public interest. *Bl(a)ck Tea Soc'y v. City Of Bos.*, 378 F.3d 8, 15 (1st Cir. 2004). This determination "necessarily encompasses the practical effects of granting or denying preliminary injunctive relief." *Id.* In conducting this analysis, the Court has a "responsibility to consider the public interest and interest of third parties." *R.I. Comm. on Energy v. Gen. Servs. Admin.*, 411 F. Supp. 323, 327 (D.R.I. 1976), *aff'd in part, remanded in part*, 561 F.2d 397 (1st Cir. 1977). Because Chapter 308 would impermissibly interfere with copyright owners' exclusive right to control the licensing of their copyrighted television content, the public interest strongly favors affirming the District Court's injunction.

Studios, like the MPA's members, create and own copyrighted television content. The Copyright Act gives copyright owners "the exclusive rights … to distribute … [and] [publicly] perform" their copyrighted works. 17 U.S.C. § 106(3)–(4). Thus, before cable operators can transmit a studio's copyrighted content, they must obtain a license.

Studios that create content for cable television license their content to cable programming networks or channels, such as the Discovery Channel or Comedy Central. Ken Basin, The Business of Television, at 8 (2019) ("Basin"). Copyright owners grant licenses to programmers only after thoroughly negotiating the manner in which their content can be exploited, including whether content may be offered as part of the network's linear programming[2] or on a video-on-demand basis. A license to disseminate content on-demand may in some—but not all[3]—cases permit à-la-carte dissemination.

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[2] "Linear programming" refers to television programming broadcast on a set schedule on a single channel rather than on-demand.

[3] For instance, a license might permit a program to be disseminated to a certain network's subscribers either during a linear telecast or on a video-on-demand basis, but the same license might not permit on-demand dissemination to consumers who do not subscribe to the network.

After licensing content from studios, programmers enter into "affiliation agreements" with cable operators that permit the operators to transmit copyright owners' content to consumers. These agreements govern whether and on what terms individual programs or channels may be made available on an à-la-carte basis. Because a licensee cannot sublicense rights it does not have, programmers may not grant cable operators a license to disseminate content à-la-carte unless permitted by the underlying license between the content owner and the programmer. *See Photographic Illustrators Corp. v. Orgill, Inc.*, 118 F. Supp. 3d 398, 403 (D. Mass. 2015) (sub-licensor "could not give [sub-licensee] rights that went beyond those it in fact had, since a 'grantor may not convey greater rights than it owns.'") (quoting *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 20-21 (2d Cir. 1976)).

Chapter 308 conflicts with the existing contractual arrangements among copyright owners, programmers, and operators. Chapter 308 provides that "[n]otwithstanding 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." 129 Pub. L. Ch. 308 (2019). The effect of this language is that if a cable operator offers a

cable channel or an individual program at all, it must offer that channel or individual program à-la-carte. Because existing licenses permit cable operators to offer only *some* content à-la-carte, while Chapter 308 requires cable operators to offer *all* content à-la-carte, Chapter 308 and existing cable licensing contracts are in irreconcilable conflict.

If Chapter 308 went into effect, copyright owners considering whether to license an item of content to cable television programmers operating in Maine would face a dilemma: they could either grant cable programmers a license to disseminate the content à-la-carte via cable operators, or they could refrain from licensing the content altogether for dissemination on Maine cable television.[4] *Cf.* Me.Br. at 10, 26-27 (arguing Chapter 308 does not impact editorial discretion because it "leaves plaintiffs free to offer whatever content they want" and only applies to "any content the cable operators do choose to provide"). The state of Maine, however, has no authority to put content owners to that choice. *See*

[4] Currently, content owners license television content at the national level rather than negotiating state-by-state licenses. The disruption that would occur if content owners were required to negotiate licenses at a state-by-state level provides further grounds to affirm the preliminary injunction. *See* Section II, *infra*, at 25-26.

Orson, 189 F.3d at 385 (state consumer protection law is preempted by Copyright Act).

In *Orson*, Pennsylvania enacted a consumer-protection statute that prohibited a film distributor "from entering into an exclusive first run arrangement [with a movie theatre] for more than forty-two days." *Id.* at 381. The Third Circuit held the Copyright Act preempted the state statute because "[a]mong the 'exclusive rights' granted under § 106 in the Copyright Act are the rights to 'distribute' and to perform the copyrighted work publicly.'" *Id.* at 385. The state statute violated the copyright owner's federal rights because it "require[d] the distributor to expand its distribution after forty-two days by licensing another exhibitor in the same geographic area, even if such expansion [was] involuntary and uneconomic." *Id.* The Court rejected the state's argument that "once a copyright holder …makes an initial distribution, a state is free to regulate the manner in which the work is thereafter distributed." *Id.* The Court explained that "the state may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under § 106." *Id.* at 386.

Chapter 308 likewise improperly mandates distribution of copyrighted works in derogation of copyright owner's exclusive rights under section 106 of the Copyright Act. This is because Chapter 308 impermissibly requires a copyright owner that licenses content for any form of dissemination on cable television to also license it for à-la-carte dissemination, in a manner that is both involuntary or uneconomic.

Capital Cities Cable, 467 U.S. at 711, is also instructive. In that case, the Copyright Act granted cable operators the right to a compulsory license to content from distant broadcasting signals if the cable operators rebroadcasted the content without alteration or deletion. *Id.* Oklahoma, however, required cable operators to delete alcohol advertisements pursuant to a state constitutional provision prohibiting such advertisements. *Id.* at 694-95. Although cable operators could comply with the Copyright Act and Oklahoma law "by simply abandoning their importation of the distant broadcast signals," the Supreme Court found Oklahoma's state constitution was preempted because it "would plainly thwart the policy" embedded in the Copyright Act's grant of a compulsory license "of facilitating and encouraging the importation of distant broadcast signals." *Id.* at 711.

Capital Cities Cable thus stands for the proposition that a state may not exact relinquishment of a right under the Copyright Act as the price for complying with state law or regulation. Chapter 308 does exactly that because it forces content owners into the Hobson's choice between granting à-la-carte licenses to cable operators, or granting no license at all.

By requiring copyright owners to choose between licensing all cable content à-la-carte or not licensing for cable distribution at all, Maine would effectively create a *de facto* compulsory-license regime. But only Congress has authority to create compulsory copyright licenses, *see Orson*, 189 F.3d at 385, and it has done so sparingly, resisting invitations to expand them or create new ones, significantly because of the potential harm to the programming marketplace.

Congress's reluctance is based on its express recognition that compulsory licenses are "in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and … it therefore needs to act as narrowly as possible to minimize the effects of the Government's intrusion on the broader market in which the affected property rights and industries operate." Satellite Home Viewers Improvements Act, S. Rep. No. 106-42, at 10 (1999). The Copyright Office

has similarly advised against expanding existing compulsory copyright licenses or creating new ones. Maria A. Pallante, Letter from the Register of Copyrights to Representatives Blackburn, Butterfield, Collins and Deutch at 10 (Aug. 3, 2016) ("The Copyright Office would caution against government action that would interfere with, rather than respect, the flexible legal framework Congress has set forth. In this regard it is important to remember that only Congress, through the exercise of its power under the Copyright Clause, and not the FCC or any other agency, has the constitutional authority to create exceptions and limitations in copyright law.").[5]

What is more, Congress has specifically considered mandating à-la-carte licensing for cable television and refused to do so. Indeed, in 2004 the FCC analyzed the likely impact of an à-la-carte proposal and concluded it would have numerous negative consequences to the public. *See, e.g.*, FCC, Report on the Packaging and Sale of Video Programming Services to the

[5] https://www.copyright.gov/laws/hearings/fcc-set-top-box-proposal.pdf.

Public, at 6 (2004) ("FCC Report")[6] ("The loss of cost savings, combined with the loss in advertising revenue and the likely rise in license fees to compensate such losses, may cause many program networks to fail, thus adversely affecting diversity."); *id*. at 56 ("À la carte would likely have a significant negative impact on consumer choice."). Subsequently, a bill to require à-la-carte internet dissemination was introduced in the Senate in 2013, but the bill failed to attract enough support to move beyond even the committee stage. Television Consumer Freedom Act of 2013, S.912, 113th Cong. (2013); Congress.gov, All Information for S.912-Television Consumer Freedom Act of 2013.[7]

Allowing Chapter 308 to go into effect would thus impermissibly interfere with copyright owners' rights under the Copyright Act and undermine the Congressional policy giving copyright owners complete discretion to control the manner of dissemination of their works.

[6] https://docs.fcc.gov/public/attachments/DOC-254432A1.pdf.

[7] https://www.congress.gov/bill/113th-congress/senate-bill/912/all-info#actionsOverview-content.

Preventing Chapter 308's interference with the Copyright Act militates strongly in favor of affirming the District Court's preliminary injunction.

II. REVERSING THE PRELIMINARY INJUNCTION WOULD HARM COPYRIGHT OWNERS AND THE ORDINARY CONSUMERS WHO ENJOY THEIR TELEVISION CONTENT.

Maine urges the Court to reverse the District Court's preliminary injunction, arguing that Chapter 308 "does not interfere with the ability of programmers to decide what content to create or of cable operators to decide what programs and channels to carry," Me.Br. at 18, and that Chapter 308 "[i]f anything promotes dissemination of information," *id.* at 13. Maine is mistaken. Chapter 308 will limit the dissemination of television content and make it more expensive to purchase, causing significant harm to copyright owners and the members of the public that consume their works. These practical harms are in addition to Chapter 308's interference with copyright owners' legal rights and provide additional grounds for affirming the District Court's grant of a preliminary injunction.

If enforced, Chapter 308 would immediately limit dissemination of content to cable subscribers of any content that is not licensed for à-la-carte dissemination. If cable operators disseminated copyrighted content

outside the scope of their license, they would be infringing the content owner's copyrights. *Montalvo v. LT's Benjamin Records, Inc.*, 56 F. Supp. 3d 121, 129 (D.P.R. 2014) ("[W]hen the licensee acts outside the scope granted, the licensor can bring an action for copyright infringement."). If cable operators disseminated copyrighted content but did not make it available à-la-carte on a program-by-program and channel-by-channel basis, they would be violating Chapter 308. 129 Pub. L. Ch. 308 (2019). The only way cable operators could simultaneously comply with the Copyright Act and Chapter 308 is to stop disseminating large swaths of content to Maine's consumers. If cable operators decided to disseminate content à-la-carte without a license to do so, copyright infringement and contractual disputes among content owners, programmers, and cable owners would inevitably follow.

The District Court speculated that this outcome might be avoided by severability clauses in contracts or by "procedures regarding renegotiation of agreements that violate state law." Add. at 17-18. The District Court's speculation was unfounded because Chapter 308 does not make it illegal for content owners (or programmers) to license content to cable operators for non- à-la-carte dissemination. No one, not even Maine, contends that

Chapter 308 directly prohibits any particular form of copyright license. *See Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1536 (M.D. Ala. 1992) ("A copyright holder cannot be subject to a state-law created liability simply because it engaged in protected copyright activity."). Rather, what Chapter 308 does is prohibit cable operators from doing what they are entitled to do pursuant to the licenses they have paid for, unless cable operators offer the content à-la-carte (which may be prohibited by the license agreement). *See* Section I, *supra*, at 9-12. Thus, the problem with Chapter 308 is not that it makes non-à-la-carte licenses illegal under state law. The problem with Chapter 308 is that it makes non-à-la-carte licenses economically worthless in Maine.

Furthermore, Chapter 308 would create a strong disincentive for content owners to grant licenses to cable programmers that would permit sublicenses to Maine cable operators for any content that is not economically viable when offered à-la-carte. Cable television subscriptions represent a declining portion of the market, facing strong competition from satellite and online providers that Chapter 308 does not regulate. Motion Picture Association, Theme Report, at 39 (March 2020)

("Theme Report").[8] Thus, content owners are not dependent on cable operators for dissemination of their content. In light of the numerous competing channels of dissemination available to content owners, Chapter 308 would incentivize content owners to license content that is not economically viable in à-la-carte form to cable's competitors, including satellite and online subscription services, but not to cable operators. Consequently, Maine's cable customers would lose, rather than gain, access to content.

Consumers would be increasingly worse-off the longer Chapter 308 were enforced, especially if more jurisdictions followed Maine's example and began to regulate the manner of dissemination of copyrighted works. As mandatory à-la-carte regimes spread, the deleterious effects of such regulation would also spread, eliminating the economic viability of more and more content. Thus, for example, networks and individual programs that could not support the large marketing budgets needed to compete in à-la-carte distribution channels would simply no longer be maintained or

[8] https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf

produced. *See* FCC Report at 118 (concluding that the financial impact of providing à-la-carte sales would likely lead to the demise of a substantial number of program networks, especially smaller ones, "which will reduce the overall universe of channels"); *id.* at 45-46 (noting an à-la-carte mandate "would undermine the ability of program networks to garner the advertising revenue needed to remain viable" because an à-la-carte system will decrease viewership of many networks and programs). The resulting reduction in diversity of content would be contrary to one of the basic policies of communications law and "a governmental purpose of the highest order:" to "assur[e] that the public has access to a multiplicity of information sources." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663-64 (1994).

Mandatory à-la-carte would also diminish the quality of programs produced for mass appeal. Because of the fierce competition for television viewers, content creators compete by producing high-quality, big-budget programming that appeals to wide audiences. Indeed, as of 2017, content creators typically spent $5 million to $7 million to create just one hour of a high-end drama. Maureen Ryan & Cynthia Littleton, TV Series Budgets Hit the Breaking Point as Costs Skyrocket in Peak TV Era, Variety (Sept. 26,

2017).[9] The spend needed to produce high quality programming is possible only because of the broader revenue base that comes from including content as part of channels or tiers of channels. With that broader revenue base eliminated, content creators will need to reduce their production spend, reducing quality. Booz Allen Hamilton, The à la Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity at 2 (July 2004)[10] ("[E]ven the most established networks would likely have to reduce expenditures on programming.").

Thus, when Maine argues that mandatory à-la-carte "poses no risk of censorship or distorting the 'marketplace of ideas,'" it is gravely mistaken. Me.Br. at 26. Chapter 308 would effectively censor any content that lacks economic viability for à-la-carte distribution, and it would eliminate the revenue base needed to produce the expensive, high quality content that consumers want most.

[9] https://variety.com/2017/tv/news/tv-series-budgets-costs-rising-peak-tv-1202570158/.

[10] http://www.wicable.tv/aws/WCCA/asset_manager/get_file/36501.

In an attempt to downplay and deny the disruption Chapter 308 would cause, Maine relies heavily on the FCC's 2006 Further Report. Me.Br. at 4 (citing FCC, Further Report on the Packaging and Sale of Video Programming Services to the Public (Feb. 9, 2006) ("Further Report")). Maine's reliance on the Further Report to justify Chapter 308's extreme à-la-carte mandate is puzzling given that, "*[a]t no point does the Further Report state that an a la carte mandate of any kind would benefit consumers or increase economic welfare*." Jeffrey A. Eisenach & Richard E. Ludwick, CAP Analysis, The FCC's Further Report on a la Carte Pricing of Cable Television, at 2 (March 7, 2006) ("CAP Analysis").[11] Instead, after FCC staff were instructed to issue a report finding à-la-carte would have consumer benefits,[12] the most they could offer was a "[p]reliminary analysis" of "several alternatives for increasing choice [that] merit further

[11] https://ecfsapi.fcc.gov/file/6518330656.pdf.

[12] Majority Staff, House Committee on Energy & Commerce, Deception and Distrust: The Federal Communications Commission under Chairman Kevin J. Martin, at 9 (Dec. 2008) (finding FCC Chairman's office "directed the FCC staff to find the First Report was deficient" and that "staff … struggled with the problem of rewriting the original report, because the First Report contained what they believed to be their best analysis of the issue").

consideration." Further Report ¶¶ 111-12. This Court should not overturn the District Court's injunction based on a "[p]reliminary analysis" that does not even purport to vouch for the benefits of mandatory à-la-carte.[13]

Indeed, Chapter 308's strict à-la-carte mandate would dismantle the current system for producing television content. "Scripted television is generally based on a deficit model, meaning that the initial license fee that a domestic network pays to a studio to commission a series is less than the full cost of production." Basin, at 191. Pursuant to this model, studios divide their copyrights and license their rights in various distribution channels for different time periods. This ability to divide a copyright into

[13] The Further Report was also premised on the assumption that cable providers could exercise monopoly power to force consumers to buy economically inefficient bundles of content. Further Report, at 12 n. 30; CAP Analysis, at 10 ("[T]he Further Report's negative conclusions with respect to bundling rely on models that apply only in the case of monopoly, an assumption that flies in the face of the Commission's many findings (which the Further Report seems to acknowledge) that the MVPD market is competitive and that competition is increasing."). That assumption was dubious in 2006 when the Further Report was written and is completely unsupportable now fourteen years later in a very different and increasingly competitive market. Consumers who do not want cable service can choose instead from satellite television or one of the more than 140 online services providing movies and television shows to U.S. consumers. Theme Report, at 38.

numerous licenses "provides the foundation of the distribution and profit-making strategy of the studio." Basin, at 48. "The business of a television studio is to sell that same product over and over, enough times to enough buyers, to recoup its investment in the cost of production and finally make a profit." *Id.* Chapter 308 would be ruinous to television production because it effectively makes the right to license content for à-la-carte dissemination indivisible from the right to license content for any form of dissemination on cable television.

For example, many shows follow a windowing model where each episode will only be available initially in a traditional linear telecast, *i.e.* at a fixed time on a single television channel. An episode will be available for on-demand streaming only after it appears in a linear telecast. For content owners that follow this windowing model, it is important to structure the distribution in this way because programmers earn money from advertising revenue, and a television episode is most valuable the first time it is aired. If the episode were telecast on a linear channel and made available on-demand at the same time, the on-demand streams would cannibalize revenue from the linear telecast at exactly the moment when the episode has its highest value. By contrast, when the first linear telecast

and on-demand streams are separated in time, the revenues from such telecasting and streaming are additive of each other instead of cannibalistic. *See, e.g.,* Basin, at 53 n. 24 (discussing "[t]he classic second-window streaming success story" in which streaming of archival seasons of *Breaking Bad* enhanced success of AMC's linear telecast of current seasons). If Chapter 308 were interpreted to require on-demand access simultaneous with any linear telecast, this important windowing model would be unavailable to content owners.[14]

In addition to limiting content, Chapter 308 would increase costs to consumers. Packaging content together allows consumers to cross-subsidize each other's viewing, reducing marketing costs and increasing advertising revenue. Jeffrey A. Eisenach, The ABCs of 'Pick-and-Pay', at 5-

[14] The ability to divide the right to disseminate on-demand from the right to disseminate on linear cable television is also important to the ability of copyright owners to sell content to subscription on-demand services, like Netflix, that stream episodes from the archives of shows originally broadcast on linear television. The unique value to consumers of these services is that they allow on-demand access to all of their content. If the law mandated cable operators to carry all content à-la-carte, the value of on-demand services to consumers would drop, diminishing the value of licenses to these services and reducing the resources available to support a healthy market for content creation.

10 (June 2014) ("ABCs").[15] Mandatory à-la-carte reduces all of these pro-consumer benefits, which will result in the need to pass increased costs to consumers. Bruce M. Owen & John M. Gale, Economists Incorporated, Cable Networks: Bundling, Unbundling, and the Costs of Intervention, at 2 (July 2004); FCC Report at 6 (noting that increased operational costs of eliminating tiers "would likely be passed on to subscribers, resulting in higher subscriber fees" of between 14% to 30% for the average household).

Chapter 308 would also increase costs by balkanizing the exploitation of copyrights in the United States. A fundamental purpose of the copyright clause in the Constitution is "to promote national uniformity in the realm of intellectual property." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989). Currently, that purpose is served because content owners seeking to disseminate any particular item of content are free to decide whether or not to license it for à-la-carte dissemination throughout the United States. Today, content owners typically license their content uniformly at the national level rather than negotiating state-by-

[15]https://www.nera.com/content/dam/nera/publications/2014/EisenachALaCarteReportFinal062614.pdf.

state licenses. Basin, at 202 ("For most U.S. networks, the applicable territory is the United States, its territories and possessions.").

Chapter 308 upsets that uniformity because any license to a cable programmer that does not allow à-la-carte distribution in Maine would be economically worthless if Chapter 308 were enforceable. As a result, the transaction costs of negotiating special licenses just for Maine—first, between content owners and programmers and, second, between programmers and cable operators—would need to be passed on to the consumer. If other jurisdictions followed Maine's example and passed their own regulations—such that all 50 states or all of the thousands of municipalities in the United States began to regulate what kinds of copyright licenses could be exploited in their jurisdiction—the results would be calamitous, and the ability to effectively license copyrights on a national scale would be eliminated.

To be sure, à-la-carte distribution has its place in the television market. There are vast and growing libraries of content available today on multiple Internet-based on-demand services, such as Netflix and Amazon Prime, where consumers can access television programming, even on an episode-by-episode basis. But the system that works best—and the system

that is mandated by the Copyright Act—for determining what content should be offered à-la-carte is for copyright owners, operating in a highly competitive marketplace, to make those decisions. Clumsily designed state-level à-la-carte mandates are neither consistent with copyright owner's rights under the Copyright Act nor beneficial to ordinary consumers. The Court should preserve the ability of content owners to create diverse and high quality television content for Maine's consumers and affirm the District Court's grant of a preliminary injunction.

CONCLUSION

MPA requests the Court affirm the District Court's preliminary injunction.

Dated: June 8, 2020

Respectfully submitted,
ARNOLD & PORTER KAYE SCHOLER, LLP

By: /s/ James S. Blackburn
James S. Blackburn
Oscar Ramallo

Attorneys for Amicus Curiae
Motion Picture Association, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,528 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antigua 14 pt font.

Dated: June 8, 2020

/s/ James S. Blackburn
James S. Blackburn

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I, James Blackburn, hereby certify that on June 8, 2020, I filed the above brief electronically via the ECF syste m and the foregoing via the CM/ECF system on all counsel who are regist ered CM/ECF users.

Dated: June 8, 2020

/s/ James S. Blackburn
James S. Blackburn