

**No. 20-1431**

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

NCTA – THE INTERNET & TELEVISION ASSOCIATION,  
*Plaintiff-Appellant,*

v.

AARON M. FREY, in his official capacity as Attorney General of the State of Maine,  
*Defendant-Appellee,*

TOWN OF FREEPORT, MAINE; TOWN OF NORTH YARMOUTH, MAINE,  
*Defendants.*

---

On Appeal from the United States District Court  
for the District of Maine  
No. 19-cv-00420 (NT)

---

**BRIEF OF THE COMMUNITY TELEVISION ASSOCIATION OF MAINE,  
ALLIANCE FOR COMMUNITY MEDIA, AND ALLIANCE FOR  
COMMUNICATIONS DEMOCRACY AS *AMICI CURIAE* IN SUPPORT  
OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE**

James N. Horwood  
Tillman L. Lay  
Jeffrey M. Bayne  
Spiegel & McDiarmid LLP  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 879-4000

Dated: September 22, 2020

*Counsel for Amici Curiae*

---

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Community Television Association of Maine, Alliance for Community Media, and Alliance for Communications Democracy submit that they are each a nonprofit organization with no corporate parents and no publicly held stock.

*/s/ James N. Horwood*

---

James N. Horwood

DATE: September 22, 2020

## TABLE OF CONTENTS

Corporate Disclosure Statement .....	i
Table of Contents .....	ii
Table of Authorities .....	iii
Identity and Interest of <i>Amici</i> and Source of Authority to File .....	1
Rule 29(a)(4)(E) Statement.....	2
Summary of Argument .....	3
Argument .....	6
I. The Maine Act’s requirements for nondiscriminatory treatment of PEG channels advance the fundamental purposes of federal law.....	6
II. States may regulate the local franchising process consistent with the federal Cable Act.....	11
III. None of the specific provisions of the Maine Act is preempted by the federal Cable Act.....	15
A. The Maine Act’s PEG-related requirements fit comfortably within the broad scope of franchising authority preserved in 47 U.S.C. § 531.....	16
B. The Maine Act’s prevention of inferior treatment of PEG channels is fully consistent with 47 U.S.C. § 541’s provision regarding “adequate” PEG support.....	18
C. The Maine Act’s PEG-related provisions are consumer protection laws not specifically preempted by the Cable Act.....	19
Conclusion .....	27
Certificate of Compliance.....	29

**TABLE OF AUTHORITIES**

	<u>Page</u>
 <b>FEDERAL COURT CASES</b>	
<i>City of New York v. FCC</i> , 486 U.S. 57 (1988) .....	24, 25
<i>Denver Area Educ. Telecomms. Consortium, Inc. v. FCC</i> , 518 U.S. 727 (1996).....	6
<i>FCC v. Midwest Video Corp.</i> , 440 U.S. 689 (1979).....	7
<i>NCTA-Internet &amp; Television Ass’n v. Frey</i> , No. 2:19-cv-420-NT, 2020 U.S. Dist. LEXIS 41682 (D. Me. Mar. 11, 2020).....	7, 10, 18, 20- 22, 24, 26
 <b>FEDERAL AGENCY CASES</b>	
<i>In re Implementation of Section 621(a)(1) of the Cable Commc’ns Policy Act of 1984</i> , 22 FCC Rcd. 5101 (2007), <i>aff’d sub nom. All. for Cmty. Media v. FCC</i> , 529 F.3d 763 (6th Cir. 2008).....	19
 <b>STATE AGENCY CASES</b>	
<i>Oceanic Time Warner Cable LLC</i> , Decision and Order No. 372 (Haw. Dep’t of Commerce & Consumer Affairs Mar. 23, 2018), <a href="https://cca.hawaii.gov/catv/files/2018/03/DO-372-OTWC-Amend-to-DO-291-346-366-368.pdf">https://cca.hawaii.gov/catv/files/2018/03/DO-372-OTWC-Amend-to- DO-291-346-366-368.pdf</a> .....	15
<i>Renewal of the Certificate of Pub. Good of Comcast of Conn./Ga./Mass./N.H./N.Y./N.C./Va./Vt., LLC, d/b/a Comcast, Expiring on December 29, 2016, to Provide Cable TV Serv.</i> , Docket No. 8301, 2019 VT. PUC LEXIS 1129 (Vt. Pub. Serv. Bd. Sept. 27, 2019) .....	15
 <b>FEDERAL STATUTES</b>	
47 U.S.C. § 521(2).....	6
47 U.S.C. § 521(4).....	6
47 U.S.C. § 522(10).....	11

47 U.S.C. § 522(17)	22
47 U.S.C. § 522(18)	11
47 U.S.C § 531	4, 6, 11, 16, 17
47 U.S.C. § 531(a)	7, 16
47 U.S.C. § 531(b)	4, 16, 17
47 U.S.C. § 531(e)	7
47 U.S.C. § 541(a)(1)	12
47 U.S.C. § 541(a)(4)(B)	4, 7, 12, 17, 18
47 U.S.C. § 541(e)	12
47 U.S.C. § 542(g)(2)(C)	17
47 U.S.C. § 543	22
47 U.S.C. § 543(a)(2)	12
47 U.S.C. § 543(b)(7)	22
47 U.S.C. § 544(b)(1)	26, 27
47 U.S.C. § 544(e)	24
47 U.S.C. § 544(f)	25
47 U.S.C. § 544(f)(1)	25
47 U.S.C. § 544(f)(2)	25
47 U.S.C. § 546(a)(1)	11
47 U.S.C. § 546(c)(1)(D)	11
47 U.S.C. § 551(g)	12
47 U.S.C. § 552(d)(1)	3, 5, 12, 20, 21, 26
47 U.S.C. § 552(d)(2)	12

47 U.S.C. § 556(a) .....20  
47 U.S.C. §§ 521-573 .....3

**STATE STATUTES**

2019 Maine Pub. Law 469 .....2  
220 Ill. Comp. Stat. Ann. 5/21-601(c) .....14  
220 Ill. Comp. Stat. Ann. 5/21-601(f) .....14  
220 Ill. Comp. Stat. Ann. 5/21-601(g).....14  
Cal. Pub. Util. Code § 5870(b) .....14  
Cal. Pub. Util. Code § 5870(g)(3).....14  
Idaho Code Ann. § 50-3010(1)(d) .....14  
Me. Rev. Stat. tit. 30-A § 3010(5-B) .....24  
N.Y. Comp. Codes R. & Regs. tit. 16 §§ 895.1(f).....14  
N.Y. Comp. Codes R. & Regs. tit. 16 §§ 895.4(b)(1) .....14

**FEDERAL COURT RULES**

Fed. R. App. Proc. 29(a)(4)(E) .....2

**OTHER AUTHORITIES**

Brian Stelter, *Crystal-Clear, Maybe Mesmerizing*, N.Y. Times (May 23, 2010), <https://www.nytimes.com/2010/05/24/business/media/24def.html> .....10  
Charles B. Goldfarb, Cong. Rsch. Serv., R42044, Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues For Congress (2011).....6  
H.R. Rep. No. 98-934 (1984).....8, 11, 13, 23  
Melissa Lee & Kate Lindley, *Don't Touch That Remote! Consumers' TV Watching Habits Revealed*, Business Wire (July 7, 2005),

<https://www.businesswire.com/news/home/20050707005489/en/Dont-Touch-Remote!-Consumers-TV-Watching-Habits> ..... 9

Patricia Aufderheide, Antoine Haywood, Mariana Sánchez Santos, *PEG Access Media: Local Communication Hubs in a Pandemic*, Center for Media & Social Impact, School of Commc'ns, Am. Univ. (Aug. 2020), <https://cmsimpact.org/report/peg/>..... 8

Steven Waldman et al., *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC (July 2011), [https://www.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](https://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf)..... 8, 9

**IDENTITY AND INTEREST OF *AMICI* AND  
SOURCE OF AUTHORITY TO FILE**

*Amicus Curiae* Community Television Association of Maine (“CTAM”) was founded in 1982 as a networking organization for community cable television stations in Maine and has been incorporated as a 501(c)(3) non-profit since 1992. As an affiliate member of Maine Municipal Association, CTAM assists more than 150 towns in Maine with their public, educational, and governmental (“PEG”) access television channels. CTAM’s membership represents a variety of existing community television organizations throughout the State of Maine that have developed and manage local cable access channels.

*Amicus Curiae* Alliance for Community Media (“ACM”) is a national nonprofit membership organization representing over 3,000 PEG organizations, community media centers, and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG cable television programming in local communities across the United States.

*Amicus Curiae* Alliance for Communications Democracy (“ACD”) is a national membership organization of nonprofit PEG organizations that supports efforts to protect the rights of the public to communicate via PEG access and



promotes the availability of the widest possible diversity of information sources and services to the public.

2019 Maine Pub. Law 469 (the “Maine Act”), ensures nondiscriminatory treatment of PEG channels by cable operators. CTAM’s and ACM’s members in Maine would be adversely affected by reversal of the decision below, and ACM’s and ACD’s members across the country have a strong interest in preserving the federal Cable Act’s goal to promote localism and diversity of information sources through PEG requirements on cable operators and in defending state and local laws that further the Act’s goal.<sup>1</sup>

All parties have consented to the filing of this brief.

#### **RULE 29(a)(4)(E) STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* represent that their counsel drafted this brief. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

---

<sup>1</sup> *Amici* do not address the line extension aspects of the Maine Act, but they agree fully with the State of Maine’s discussion of that issue in its Brief.

## SUMMARY OF ARGUMENT

I. The Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 521-573 (“Cable Act”), recognizes the vital importance of PEG channels, which are essential for fulfilling Congress’s goals of ensuring that cable systems are responsive to the needs and interests of local communities and provide the widest possible diversity of information sources. Cable operators in Maine have attempted to undermine PEG channels by making it harder for viewers to find and access PEG programming and by refusing to carry PEG channels in the manner that they carry virtually all other channels. These discriminatory practices threaten the continued viability of PEG channels. Maine’s efforts to curb this discriminatory treatment of PEG channels through the Maine Act further the federal Cable Act’s goals.

II. The federal Cable Act does not, as NCTA—The Internet & Television Association (“NCTA”) suggests, restrict State regulation of cable television to the terms of individual local franchises. The Cable Act specifically provides that States may act outside the context of individual franchises, including by “enacting or enforcing *any consumer protection law*, to the extent not specifically preempted by [the Cable Act].” 47 U.S.C. § 552(d)(1) (emphasis added). There is nothing improper with Maine passing consumer protection laws consistent with the Cable Act that prevent cable operators from degrading the PEG viewing experience for

consumers. Indeed, many states have passed laws imposing requirements on cable operators similar to the Maine Act's PEG-related requirements.

III. None of the three PEG-related requirements of the Maine Act is preempted by the federal Cable Act. These requirements fall comfortably within the broad scope of franchising authority preserved in 47 U.S.C § 531 to “require rules and procedures for the use of the channel capacity designated [for PEG purposes].” 47 U.S.C. § 531(b). By designating where PEG channel capacity is to be located on a cable operator's system and that the capacity be carried in the same format (high definition (“HD”)) as other channels carried on the system, the Maine Act is consistent with the federal Cable Act. Moreover, the Cable Act permits various PEG-related requirements not expressly listed in 47 U.S.C. § 531, which disproves NCTA's argument that States are forbidden from imposing any requirements (like the Maine Act's three PEG-related requirements) not expressly stated in that section.

The Maine Act is also fully consistent with the Cable Act's language permitting franchising authorities to require “adequate” PEG support. 47 U.S.C. § 541(a)(4)(B). As the district court found based on evidence in the record, the Maine Act's PEG requirements prevent cable operators from treating PEG channels in a manner that is *inadequate*. The Court should reject NCTA's

argument that it is “adequate” for a cable operator to treat PEG channels in a manner inferior to virtually all other channels on its system.

Finally, each of the PEG-related provisions of the Maine Act falls well within the scope of consumer protection laws, which States have wide latitude to enact so long as they are not “*specifically preempted*” by the Cable Act. 47 U.S.C. § 552(d)(1) (emphasis added). The electronic programming guide provision ensures that viewers are able to find and access critical local PEG programming in the same manner as they do for other channels, preventing cable operators from artificially steering consumers away from PEG programming. The same is true of the Maine Act’s provision regarding the numerical location of PEG channels, which responds to consumers’ complaints that they were unable to locate PEG channels after cable operators moved them from their historic numbers to remote, high numbers. The HD provision protects consumers by preventing cable operators from down-converting HD PEG programming to Standard Definition (“SD”), which singles out PEG channels for substandard treatment vis-à-vis other programming that the operator carries in an HD format. Nothing in the Cable Act specifically preempts these requirements.

## ARGUMENT

### I. THE MAINE ACT'S REQUIREMENTS FOR NONDISCRIMINATORY TREATMENT OF PEG CHANNELS ADVANCE THE FUNDAMENTAL PURPOSES OF FEDERAL LAW.

PEG channels play a unique and vital role in fulfilling several of Congress's central goals in enacting the Cable Act. Among the purposes Congress expressly identified are “assur[ing] that cable systems are responsive to the needs and interests of the local community” 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(2), (4). The Cable Act's PEG provision, 47 U.S.C. § 531, is the “primary vehicle for fostering in cable systems the long-standing U.S. media policy goal of localism.” Charles B. Goldfarb, Cong. Rsch. Serv., R42044, Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues For Congress 1 (2011).

PEG channels first emerged in the 1960s and 1970s out of franchise agreements between local governments and cable operators, which granted cable operators authority to install and operate their cable systems in the public rights-of-ways. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 788 (1996) (Kennedy, J., concurring in part, dissenting in part) (citing D. Brenner, M. Price, & M. Meyerson, *Cable Television and Other Nonbroadcast Video* § 3.01[3] (1996)). After the Supreme Court held that the Federal Communications

Commission (“FCC”) exceeded its authority in promulgating rules that required all cable television systems of a certain size to carry public access channels, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), Congress expressly enshrined in the 1984 Cable Act franchising authorities’ ability to require cable operators to set aside channel capacity for PEG use, require rules and procedures for the use of channel capacity designated for PEG use, and require cable operators to provide financial support for these PEG channels. 47 U.S.C. §§ 531(a)-(b), 541(a)(4)(B).<sup>2</sup> Cable operators are prohibited from “exercis[ing] any editorial control over any public, educational, or governmental use of channel capacity.” 47 U.S.C. § 531(e).<sup>3</sup>

The legislative history of the Cable Act summarizes the critical importance of PEG channels:

Public access channels are often the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local

---

<sup>2</sup> See also *NCTA-Internet & Television Ass’n v. Frey*, No. 2:19-cv-420-NT, 2020 U.S. Dist. LEXIS 41682, Addendum to NCTA Br. 5 (“Add.”) (D. Me. Mar. 11, 2020) (“District Court Order”) (explaining that after enactment of the Cable Act, “[f]ranchising authorities retained the rights to include requirements for the designation and use of PEG channels”) (citing 47 U.S.C. § 531(b)).

<sup>3</sup> The one exception, not relevant here, is that a cable operator “may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.” *Id.*

schools into the home, and by showing the public local government at work.

H.R. Rep. No. 98-934, at 30 (1984).

The public interest roles of PEG channels are just as vital today as they were in 1984. As a recent example, PEG channels are playing a significant part in many local communities' responses to the COVID-19 pandemic. *See* Patricia Aufderheide, Antoine Haywood, Mariana Sánchez Santos, *PEG Access Media: Local Communication Hubs in a Pandemic*, Center for Media & Social Impact, School of Commc'ns, Am. Univ. (Aug. 2020), <https://cmsimpact.org/report/peg/>. PEG channels are a critical source of community-specific news, cablecasting important local government meetings related to the pandemic. *Id.* at 9-10. During times when physical gatherings are canceled or limited, PEG channels maintain a sense of community by providing residents with programming related to local graduations, scholarship and award ceremonies, Memorial Day and Fourth of July celebrations, and other virtual community events. *Id.* at 10-11. This type of PEG programming has been particularly embraced by those vulnerable to isolation, such as seniors and those with limited access to the internet. *See id.* at 11.

Despite the congressionally-recognized importance of PEG, many cable operators have recently taken an increasingly hostile position towards PEG. *See, e.g.,* Steven Waldman et al., *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC, 173 (July 2011),

[https://www.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](https://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf)

(“PEG leaders also say that cable operators are treating PEG channels progressively worse as the environment becomes more competitive.”). Indeed, NCTA’s Complaint for Declaratory Judgement and Preliminary and Permanent Injunctive Relief in the court below was frank in stating that its members “would prefer to deliver” other services and content rather than PEG channels. Compl. (J.A.24).

To that end, cable operators in Maine and elsewhere across the country have taken steps to make PEG programming more difficult for viewers to find compared to other channels. PEG channels are subject to channel slamming (the practice of relocating PEG channel locations from lower-numbered positions to little-viewed, high-numbered locations), which is precisely what NCTA member Charter has done in Maine. *See* NCTA Br. at 15.

In addition, unlike virtually every other cable channel, PEG channels typically do not have their specific program information listed on the electronic programming guide, which is viewers’ preferred way to locate specific programming and determine what is available to watch.<sup>4</sup> Although NCTA claims

---

<sup>4</sup> *See, e.g.,* Melissa Lee & Kate Lindley, *Don’t Touch That Remote! Consumers’ TV Watching Habits Revealed*, Business Wire (July 7, 2005), <https://www.businesswire.com/news/home/20050707005489/en/Dont-Touch-Remote!-Consumers-TV-Watching-Habits> (noting in 2005 the “important role” and growing use of interactive programming guides).



that its “members in Maine list PEG channels in their so-called ‘electronic programming guides,’” NCTA Br. at 14, it glosses over “the fact that the electronic programming guide identifies PEG channels only as ‘LOCAL’ and without a description of programming that is seen for other channels,” District Court Order, Add.6 (citing Decl. of Anthony Vigue ¶¶ 14-19 (J.A.69-71)). By not listing either PEG channels’ individual names or information about their programming, cable operators frustrate consumers’ attempts to find and view PEG programming.

Also unlike virtually all commercial channels, PEG channels are carried only in Standard Definition (“SD”), not in High Definition (“HD”). Viewers have long had a clear and strong preference for programming that is in HD.<sup>5</sup> Many PEG channels produce programming in HD, but “cable operators refuse to retransmit that content in HD, instead down converting it to [SD].” District Court Order, Add.6 (citing Decl. of Anthony Vigue ¶¶ 21–22 (J.A.71-72)). This practice denies viewers the ability to view PEG channel programming that is produced in HD in that viewer-preferred format and in a manner comparable to other channels.

---

<sup>5</sup> See, e.g., Brian Stelter, *Crystal-Clear, Maybe Mesmerizing*, N.Y. Times (May 23, 2010), <https://www.nytimes.com/2010/05/24/business/media/24def.html> (“[O]nce [viewers] can watch programs in HD, they have little desire to watch anything of a lower quality. ‘HD is the new basic cable,’ said David M. Zaslav, the chief executive of Discovery Communications, which owns Animal Planet and TLC, among other channels.”);

This intentionally substandard treatment of PEG channels, if unaddressed, threatens the sustainability of PEG. The federal Cable Act requires that cable franchise terms must be based on the local cable-related needs and interests of the community. *See* 47 U.S.C. § 546(a)(1), (c)(1)(D). To the extent cable operators are able to suppress consumer interest in, and thus demand for, PEG programming by manipulating PEG channel location, format, and program guide listings, they can point to that operator-suppressed interest in PEG to justify reduced, minimal PEG requirements in their renewal franchises in an effort to free up greater channel capacity for uses that cable operators “prefer.” Compl. (J.A.24). The Maine Act represents a valid and necessary effort to curb such discriminatory treatment of PEG channels, thereby furthering the federal Cable Act’s goals.

## **II. STATES MAY REGULATE THE LOCAL FRANCHISING PROCESS CONSISTENT WITH THE FEDERAL CABLE ACT.**

A central purpose of the Cable Act is to “clarif[y] the current system of local, state and Federal regulation of cable television.” H.R. Rep. No. 98-934, at 19 (1984). The Cable Act separately defines “State” and “franchising authority,”<sup>6</sup> and Congress was explicit in stating whether particular provisions apply to States or franchising authorities or both.<sup>7</sup>

---

<sup>6</sup> 47 U.S.C. § 522(10), (18). Although “State” and “franchising authority” are distinct terms, they are not mutually exclusive. A franchising authority can be the State, although that is not the case in Maine.

<sup>7</sup> *See, e.g., id.* § 531 (addressing PEG-related requirements that a “franchising

Despite this clear language, NCTA claims that individual local cable franchises, rather than State statutes, are the exclusive means by which a State can regulate cable services. NCTA Br. at 28. But NCTA’s claim cannot be squared with the Act’s plain language and structure.

The Cable Act specifically provides that States can act outside of the context of individual franchises. Particularly relevant to the Maine Act, the Cable Act makes clear that it does not prohibit States from “enacting or enforcing *any consumer protection law*, to the extent not specifically preempted by this subchapter.” 47 U.S.C. § 552(d)(1) (emphasis added); *see also* 47 U.S.C. § 552(d)(2) (“Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements [beyond

---

authority” may establish); *id.* § 541(a)(1) (providing that franchising authorities may award one or more franchises, but that they cannot unreasonably refuse to award an additional competitive franchise); *id.* § 541(a)(4)(B) (“[T]he franchising authority . . . may require adequate assurance that the cable operator will provide adequate [PEG] access channel capacity, facilities, or financial support.”); *id.* § 541(e) (preserving state authority to license or regulate facilities which serve only subscribers in certain multiple unit dwellings); *id.* § 543(a)(2) (providing that if the FCC finds a cable system to be subject to effective competition, the rates for that system “shall not be subject to regulation . . . by a State or franchising authority”); *id.* § 551(g) (“Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.”).

those established by the FCC].”).<sup>8</sup> There is nothing improper with Maine passing consumer protection laws consistent with the Cable Act that prevent cable operators from degrading the PEG viewing experience for consumers, rather than imposing these requirements through individual cable franchises.

Many States impose requirements related to cable television through State statutes and regulations, rather than imposing such requirements through individual franchises issued by a state agency or a locality. Indeed, as Maine notes in its Brief (at 12-13 n.3), a number of these State laws impose PEG-related requirements that are similar to those in the Maine Act:

- California requires that PEG channels (1) “not be separated numerically from other channels carried on the basic service tier,” to the extent feasible, and (2) “shall be of similar quality and functionality to that offered by commercial channels on the lowest cost tier of service” unless the PEG programmer delivers a lower

---

<sup>8</sup> NCTA’s claim (NCTA Br. at 29) that the legislative history supports its reading of the Cable Act is also misplaced. The part of the legislative history it cites merely states that “[i]f . . . a requirement imposed upon a cable operator must be *reflected in a franchise*,” then a State can exercise authority by either establishing a State franchising authority or place conditions on local franchising authorities. H.R. Rep. No. 98-934, at 94 (1984) (emphasis added). This statement recognizes that some requirements are *not* required to be reflected in a franchise, in which case a State is free to exercise its authority outside of the context of cable franchises.

quality signal to the cable operator. Cal. Pub. Util. Code § 5870(b), (g)(3).

- Idaho requires that “PEG channels shall be of similar quality and functionality to that offered by commercial channels on such tier of service unless the signal is provided to the system operator at a lower quality or with less functionality.” Idaho Code Ann. § 50-3010(1)(d).
- Illinois requires cable operators to (1) carry PEG channels in an “equivalent visual and audio quality . . . , from the viewing perspective of the subscriber” to that of commercial channels; (2) not separate PEG channels numerically from other channels on operator’s basic tier, to the extent feasible; and (3) “provide a listing of public, education, and government programming on its electronic program guide,” if the cable operator uses such a guide. 220 Ill. Comp. Stat. Ann. 5/21-601(c), (f), (g).
- New York has established minimum standards regarding PEG access, such as a minimum number of channels, which municipalities must then include in their local cable franchise. N.Y. Comp. Codes R. & Regs. tit. 16 §§ 895.1(f), 895.4(b)(1).

These examples belie NCTA’s claim that States cannot address PEG-related issues outside of the context of individual franchise agreements.<sup>9</sup> As is the case with other actions by State agencies and political subdivisions, State legislatures may enact statutes that regulate the authority of State agencies and political subdivisions to set the terms of the franchises they issue. Such State laws are valid so long as the substantive requirements they impose are consistent with the Cable Act. As explained in Part III below, the Maine Act’s PEG-related provisions are.

### **III. NONE OF THE SPECIFIC PROVISIONS OF THE MAINE ACT IS PREEMPTED BY THE FEDERAL CABLE ACT.**

NCTA fails to identify any ways in which the three PEG-related requirements of the Maine Act conflict with specific provisions of the Cable Act. Perhaps recognizing this lack of conflict, NCTA makes the sweeping—and unsupported—claim that “any regulation of PEG channels must be expressly authorized by the Cable Act and limited to require only ‘adequate’ PEG capacity,

---

<sup>9</sup> Other States have addressed these PEG-related issues in a similar way, which further confirms that the substance of Maine’s PEG-related requirements is consistent with the Cable Act. *See Renewal of the Certificate of Pub. Good of Comcast of Conn./Ga./Mass./N.H./N.Y./N.C./Va./Vt., LLC, d/b/a Comcast, Expiring on December 29, 2016, to Provide Cable TV Serv.*, Docket No. 8301, 2019 VT. PUC LEXIS 1129 (Vt. Pub. Serv. Bd. Sept. 27, 2019) (amending franchise, pursuant to mediated settlement agreement with the cable operator, to address issues including PEG access to electronic program guides and PEG channel reassignment); *Oceanic Time Warner Cable LLC*, Decision and Order No. 372 (Haw. Dep’t of Commerce & Consumer Affairs Mar. 23, 2018), <https://cca.hawaii.gov/catv/files/2018/03/DO-372-OTWC-Amend-to-DO-291-346-366-368.pdf> (prohibiting the relocation of PEG channels without prior approval until 2036).

facilities, and support.” NCTA Br. at 30. NCTA’s position is contrary to the text and structure of the Cable Act.

***A. The Maine Act’s PEG-related requirements fit comfortably within the broad scope of franchising authority preserved in 47 U.S.C. § 531.***

NCTA is correct that 47 U.S.C. § 531(a) provides that “[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.” But NCTA overlooks that the language of Section 531 is in fact broad, authorizing franchising authorities (either directly, or through State laws that empower them) to require “that channel capacity be designated for [PEG] use” and “require rules and procedures for the use of the channel capacity designated pursuant to this section.” *Id.* § 531(b).

Thus, that Section 531 does not explicitly reference channel location, signal quality, or electronic programming guide requirements does not, as NCTA claims, mean that requirements of these kinds do not fall within Section 531’s broad language. NCTA offers no logical or textual reason why “designating” PEG channel capacity should be construed to exclude designating where that capacity is located on the system, or designating that the capacity would be in the same format (HD) as other channels on the system.<sup>10</sup>

---

<sup>10</sup> NCTA also offers no argument as to why the Maine Act’s PEG-related

Moreover, the Cable Act also permits other PEG-related requirements not expressly listed in 47 U.S.C. § 531. For instance, Section 531 does not specifically state that franchising authorities can require cable operators to provide financial support for PEG channels. Yet elsewhere the Cable Act expressly provides that that franchising authorities “may require adequate assurance that the cable operator will provide adequate [PEG] . . . financial support.” *Id.* § 541(a)(4)(B). *See also id.* § 542(g)(2)(C) (exempting “capital costs which are required by the franchise to be incurred by the cable operator for [PEG] access facilities” from the definition of franchise fee). The Maine Act’s PEG-related requirements therefore fall well within the scope of authority that Sections 531, 521, and 542 leave to States and local governments.

---

requirements do not fall within the “rules and procedures for the use of the channel capacity designated pursuant to this section” expressly provided for in 47 U.S.C. § 531(b). Instead, it wrongly claims that “Maine conceded that the challenged provisions are not ‘rules and procedures for the use of [PEG] channel capacity’ within the meaning of Section 531(b).” NCTA Br. at 32 (citing Tr. of Oct. 23, 2019 Motion Hearing (J.A.196-97)). In the part of the transcript cited by NCTA, however, counsel for the State of Maine was merely describing “just my initial reaction” to the statute without having yet “done any research regarding that provision.” Tr. of Oct. 23, 2019 Motion Hearing (J.A.196-97). NCTA has identified no precedent to support its claim that the Maine Act’s PEG-related requirements are inconsistent with the PEG rules and procedures allowed under 47 U.S.C. § 531(b).



***B. The Maine Act’s prevention of inferior treatment of PEG channels is fully consistent with 47 U.S.C. § 541’s provision regarding “adequate” PEG support.***

NCTA is also wrong to claim that the district court’s decision is contrary to 47 U.S.C. § 541, which provides that franchising authorities “may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support.” *Id.*

§ 541(a)(4)(B). Although NCTA baldly asserts that the Maine Act’s PEG-related requirements go beyond what is “adequate,” this assertion is untethered from the record, as well as common sense.

Unlike NCTA, the district court pointed to actual evidence in the record demonstrating that the Maine Act prevents cable operators from treating PEG channels in a manner that is inadequate. Relocating PEG channel locations to “digital Siberia” makes it difficult for viewers to locate PEG channels, leading “[p]ublic participation in and engagement with local government [to] decline[.]” District Court Order, Add.22-33 (citing Decl. of Anthony Vigue ¶¶ 4-5, 9 (J.A.65-66, 68), Decl. of Christopher Hall ¶¶ 11-12 (J.A.95)). Similarly, the downgrading of PEG programming transmitted in HD format to SD format “result[s] in a smaller, grainier picture than other channels,” causing viewers to ignore PEG channels and harming “the credibility of PEG channels with subscribers.” *Id.*, Add.25-26 (citing Decl. of Anthony Vigue ¶¶ 21, 23 (J.A.71, 72); Decl. of Patrick

Bonsant ¶ 10 (J.A.91); Decl. of Andrew Collar ¶ 6 (J.A.99); Decl. of William Bridgeo ¶ 6 (J.A.119)). The district court also explained that “PEG channels and their programming *are not adequately identified* in the electronic programming guide,” which is the predominant way in which subscribers determine what is available to watch. *Id.*, Add.31 (emphasis added) (citing Decl. of Anthony Vigue ¶¶ 11–16 (J.A.68-70); Decl. of William Giroux ¶ 5 (J.A.87); Decl. of Steve Eldridge ¶ 6 (J.A.103)).

Thus, the modest requirements of the Maine Act fall well within what can be considered “satisfactory” or “sufficient” service. *See In re Implementation of Section 621(a)(1) of the Cable Commc’ns Policy Act of 1984*, 22 FCC Rcd. 5101 ¶ 112 (2007) (interpreting “adequate” as “satisfactory or sufficient”) (footnote and internal quotations omitted), *aff’d sub nom. All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

NCTA cannot rationally explain how giving PEG channels systematically inferior treatment to other channels is nevertheless “adequate.” The Court should reject NCTA’s argument that it is “adequate” for a cable operator to treat PEG channels in a manner inferior to virtually all other channels on its system.

***C. The Maine Act’s PEG-related provisions are consumer protection laws not specifically preempted by the Cable Act.***

The Cable Act provides that “[n]othing in this subchapter [i.e., the Cable Act] 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.” 47 U.S.C. § 552(d)(1). The term “consumer protection” (which is not defined under the Cable Act) covers a wide range of activities.<sup>11</sup> Its specific use in the Cable Act further confirms that Congress intended to give States wide latitude in enacting consumer protection laws. States may enact “*any* consumer protection law” so long as it is not “*specifically preempted*” by the Cable Act. 47 U.S.C. § 552(d)(1) (emphasis added); *see also id.* § 556(a) (“Nothing in this subchapter shall be construed to affect any authority of any State . . . regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.”).

As the district court explained, each of the PEG-related provisions of the Maine Act falls well within the scope of consumer protection. *See* District Court Order, Add.22-33. The electronic programming guide provision ensures that viewers are as informed about PEG channels as they are about local broadcast channels, and that they are able to find and access critical local PEG programming in the same manner as they do for other channels. The requirement thus prevents cable operators from artificially steering consumers away from PEG programming.

---

<sup>11</sup> *See* District Court Order, Add.22 n.15 (“Consumer protection is ‘the protection of buyers of goods and services against low quality or dangerous products and advertisements that deceive people.’”) (quoting *Consumer Protection*, Cambridge Dictionary (last accessed Aug. 25, 2020), <https://dictionary.cambridge.org/dictionary/english/consumer-protection>).

The same is true of the Maine Act’s provisions regarding the numerical location of PEG channels. As the district court explained, this provision developed in response “to consumer complaints that they could not locate PEG channels after cable operators removed them from the low number stations that they had long occupied and relocated them to digital Siberia.” District Court Order, Add.23 (citing Decl. of Anthony Vigue ¶¶ 4-5, 9 (J.A.65-66, 68)). As a response to consumer complaints, the Maine Act qualifies as a consumer protection law.

Finally, the HD provision protects consumers by preventing cable operators from down-converting HD PEG programming to SD—in other words, from singling out PEG channels for substandard treatment vis-à-vis other programming that the operator carries in an HD format. Protecting consumers from a provider’s degrading of a product or service—particularly in light of “evidence that cable operators are down-converting PEG channels’ programming,” *id.*, Add.25 (citing Decl. of Anthony Vigue ¶ 21 (J.A.71))—clearly falls within Maine’s authority to enact consumer protection laws.

As consumer protection laws, these provisions of the Maine Act are permitted under the Cable Act unless they are “specifically preempted” by the federal statute. 47 U.S.C. § 552(d)(1). None of these provisions is specifically preempted:

**Channel Placement.** NCTA identifies one provision of the Cable Act that it claims specifically preempts the Maine Act’s channel placement provisions: 47 U.S.C. § 543(b)(7). NCTA Br. at 42-44. But that provision does not address the numerical location of channels at all. Rather, it pertains to “service tier[s],” which the Act defines as “categor[ies] 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(17). NCTA does not—and cannot—claim that Section 543(b)(7) has any relevance to the Maine Act’s requirements regarding the initial designation of PEG channel numbers and its prohibition on cable operators’ relocating PEG channels without consent of the relevant local government authority. Nothing in the Cable Act specifically preempts Maine from imposing these requirements.

At most, NCTA raises the question of whether 47 U.S.C. § 543 preempts the Maine Act’s requirement that cable operators carry PEG channels on the basic service tier. On its face, the Cable Act does not. The Cable Act establishes a federal requirement that all cable systems not subject to effective competition must include PEG channels on the basic tier. 47 U.S.C. § 543(b)(7). But as the district court correctly explained, this provision “says nothing about whether States *may* require cable operators subject to effective competition to carry PEG channels on the basic tier.” District Court Order, Add.24. This silence, particularly in the context of the statute’s overarching reliance on States and local governments to

ensure that cable systems meet local needs,<sup>12</sup> provides no basis for preempting the Maine Act's requirement regarding the basic service tier.

**High Definition.** The Maine Act's requirement that cable operators deliver PEG channels to subscribers in a quality and format equivalent to those of local broadcast channels is not contrary to the federal Cable Act. NCTA claims that this requirement is impermissible "[b]ecause the Cable Act authorizes only the FCC, and not states or franchising authorities, to set 'minimum technical standards related to . . . signal quality.'" NCTA Br. at 45 (quoting 47 U.S.C. § 544(e)). NCTA's argument mischaracterizes both the Cable Act and the Maine Act's HD provision.

First, the Cable Act does not give the FCC exclusive authority over signal quality issues or preempt all State regulation on this topic. Rather, the federal statute requires the FCC to establish "minimum technical standards" regarding signal quality. When Congress intended the Cable Act to preempt State and local regulation, it said so directly. Indeed, in this same subsection, Congress provided that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology,"

---

<sup>12</sup> H.R. Rep. No. 98-934, at 19 (1984) ("[The Cable Act] continues *reliance on the local franchising process as the primary means of cable television regulation*, while defining and limiting the authority that a franchising authority may exercise through the franchise process.") (emphasis added).

but it did *not* list signal quality among the list of things a State cannot “prohibit, condition, or restrict.” 47 U.S.C. § 544(e). Based on the evidence before it, the district court properly “conclude[d] that HD/SD is not a ‘transmission technology’ as that term is used in § 544(e).” District Court Order, Add.29. NCTA does not argue in its Brief that HD is a “transmission technology.”

Second, and perhaps more to the point, the Maine Act does not establish any “*technical standards* relating to . . . signal quality,” let alone “minimum” standards. 47 U.S.C. § 544(e) (emphasis added). In fact, it does not even require a cable operator to use HD technology at all. Nothing in the Maine Act dictates particular technical standards. It merely provides that if an operator chooses to carry other programming on its system in HD, it cannot refuse to likewise pass through in HD PEG programming that is delivered to it in HD. Thus, the Maine Act provides that if PEG programmers are capable of providing PEG programming in a manner that supports HD, cable operators cannot “diminish, down convert or otherwise tamper with the signal quality or format provided by the originator” so that consumers can only view PEG programming in inferior quality. Me. Rev. Stat. tit. 30-A § 3010(5-B). This nondiscrimination requirement is a consumer protection law, not a technical standard.

The difference between the Maine Act’s HD requirement and technical standards is highlighted by the technical standards addressed in *City of New York v.*

*FCC*, 486 U.S. 57 (1988). There, the FCC regulations established uniform technical standards so that cable operators would not need to gain approval for specific technologies from each individual franchising authority. *See id.* at 65-66; *see also* NCTA Br. at 45-46 (summarizing the FCC order regarding technical and operational requirements). The FCC-established technical standards “describe, in quantitative terms, various electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers, including such specific items as visual carrier frequency, aural center frequency, visual signal level, terminal isolation, and radiation and signal leakage.” *City of New York*, 486 U.S. at 59 n.1 (citing 47 CFR §§ 76.601, 76.605 (1987)). Here, however, the Maine Act does not prescribe how, as a technical matter, cable systems are operated. It merely requires that if a cable operator retransmits other channels in HD, and receives a PEG channel signal in an HD format, it cannot refuse to retransmit that PEG channel in HD.<sup>13</sup>

***Electronic Programming Guide.*** NCTA argues that the Maine Act violates the Cable Act’s prohibition on (1) State requirements regarding the “content of

---

<sup>13</sup> Moreover, NCTA’s arguments about non-uniform signal quality technical requirements are particularly misplaced here. *See* NCTA Br. at 45-46. The Maine Act requires PEG channels to be treated *similarly* to how cable operators treat other channels, which does not raise any concerns about operators complying with inconsistent regulations.



cable services” (47 U.S.C. § 544(f)(1)), and (2) franchising authority requirements for “information services” (*id.* § 544(b)(1)). Neither of these claims has merit.

First, courts have construed 47 U.S.C. § 544(f) narrowly to apply the regulation of the content of programming. *See* District Court Order, Add.10; Maine Br. 45-46. The Maine Act’s electronic programming guide provision does not regulate the content of programming; by requiring that PEG channels and programming information be displayed in the same manner as local broadcast channels, the provision merely requires that subscribers be able to more easily find that content.

Second, 47 U.S.C. § 544(b)(1) applies only to franchising authorities. It does not apply to States, and it certainly does not prohibit States from enacting consumer protection laws that the Cable Act expressly does *not* preempt. *See* 47 U.S.C. §§ 552(d)(1), 556(a). The Maine Act’s provision on electronic programming guides ensures viewers are able to find and access critical local PEG programming in the same manner as they do for other channels. Cable operators do not, as NCTA suggests (NCTA Br. at 14), list PEG channels in the electronic programming guide, at least not in any way comparable to the way they list other channels and their programming. Instead, NCTA’s members merely “identif[y] PEG channels only as ‘LOCAL’ and without a description of programming that is seen for other channels,” District Court Order, Add.6 (citing Decl. of Anthony

Vigue ¶¶ 14-19 (J.A.69-71)). Thus, unlike the case when they search for programming on other channels, consumers searching the electronic programming guide for PEG programming cannot find out what PEG programs are aired and at what time they will be aired.

NCTA’s “information service” argument likewise misses the mark. The Maine Act provides only that *if* cable operators use an electronic program guide with respect to local broadcast channels, they cannot refuse to do so with respect to PEG channels. The electronic programming guide requirement is therefore not a “requirements for . . . other information services” that 47 U.S.C. § 544(b)(1) precludes *franchising authorities* from establishing. It is a State consumer protection law that the Cable Act permits.

### **CONCLUSION**

The district court’s decision should be affirmed.

Respectfully submitted,

*/s/ James N. Horwood*

---

James N. Horwood

Tillman L. Lay

Jeffrey M. Bayne

Attorneys for *Amici Curiae*

Community Television Association of

Maine, Alliance for Community

Media, and Alliance for

Communications Democracy

Law Offices of:

Spiegel & McDiarmid LLP

1875 Eye Street, NW

Suite 700

Washington, DC 20006

(202) 879-4000

September 22, 2020

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App.

P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App.

P. 32(f), this brief contains 6,168 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

This document complies with the typeface requirements of Fed. R. App.

P. 32(a)(5) because this document has been prepared in a proportional spaced typeface using 14-point Times New Roman typeface in Microsoft Word 2010.

*/s/ James N. Horwood*

---

James N. Horwood

DATE: September 22, 2020

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

*/s/ James N. Horwood*

---

James N. Horwood

Law Offices of:  
Spiegel & McDiarmid LLP  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 879-4000