No. _____

In the Supreme Court of the United States

SPECTRUM NORTHEAST, LLC; CHARTER COMMUNICATIONS, INC.,
Petitioners,

v.

AARON FREY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Cable Communications Policy Act of 1984 generally prohibits states from "regulat[ing] the rates for the provision of cable service" by cable companies, and it deems any state or local laws inconsistent with this prohibition to be "preempted and superseded." 47 U.S.C. §§ 543(a)(1)-(2), 556(c). Notwithstanding that ban on rate regulation, states and municipalities have increasingly enacted laws that directly govern the rates cable companies may charge subscribers for the final month of service when the subscriber cancels service in the middle of that month. Here, Maine enacted a statute forbidding cable companies from charging a fixed rate for the final month, and instead requiring such companies to charge a prorated rate. Me. Stat. tit. 30-A, § 3010(1-A) (2021). The questions presented are as follows:

1. Whether the Cable Act preempts state and local laws that prevent cable companies from selling their services at their chosen rate for the final month of service.

2. Whether courts should interpret express preemption clauses according to their plain language, or should instead apply a non-textual presumption against preemption.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners Spectrum Northeast, LLC and Charter Communications, Inc. (collectively, "Charter") respectfully submit the following corporate disclosure statement.

Spectrum Northeast, LLC (formerly known as Time Warner Cable Northeast LLC) is a Delaware limited liability company with a principal place of business in Missouri. The 100% sole member of Spectrum Northeast, LLC is Time Warner Cable Enterprises, LLC, a Delaware limited liability company with a principal place of business in Missouri. The 100% sole member of Time Warner Cable Enterprises, LLC is Time Warner Cable, LLC, a Delaware limited liability company with a principal place of business in Missouri. The 100% sole member of Time Warner Cable, LLC is Charter Communications Operating, LLC, a Delaware limited liability company with a principal place of business in Missouri. Spectrum Northeast, LLC; Time Warner Cable Enterprises LLC; Time Warner Cable, LLC; and Charter Communications Operating, LLC are indirect subsidiaries of and managed by Charter Communications, Inc.

Charter Communications, Inc. is a publicly traded Delaware corporation with a principal place of business in Connecticut. Liberty Broadband Corporation, a publicly traded company, owns more than 10% of Charter's stock. Charter has no parent company, and no other publicly traded company owns 10% or more of Charter's stock.

LIST OF RELATED PROCEEDINGS

The proceedings directly related to this case are:

Spectrum Northeast, LLC v. Frey, No. 20-2142, U.S. Court of Appeals for the First Circuit. Judgment entered January 4, 2022. Petition for rehearing denied February 4, 2022.

Spectrum Northeast LLC v. Frey, No. 1:20-cv-00168-JDL, U.S. District Court for the District of Maine. Judgment entered November 2, 2020. Notice of appeal filed December 1, 2020.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

LIST OF RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. The Cable Act's Prohibition On State And Local Regulation Of Cable Rates 5

B. Maine's Pro Rata Law Regulating Cable Rates In The Final Month Of Service 6

C. Factual And Procedural Background 7

REASONS FOR GRANTING THE PETITION 12

I. THIS COURT SHOULD CLARIFY THE SCOPE OF CABLE ACT PREEMPTION OF RATE REGULATION 12

A. Federal And State Courts Are Split On How To Apply The Preemption Clause To State-Law Proration Requirements 13

B. The First Circuit's Refusal To Find Preemption Is Plainly Wrong 15

TABLE OF CONTENTS—Continued

Page

C. The Preemption Issue Is Important And Will Recur Given The Proliferation Of State And Local Proration Requirements 22

II. THE COURT SHOULD ALSO RESOLVE WHETHER A PRESUMPTION AGAINST PREEMPTION APPLIES TO EXPRESS PREEMPTION PROVISIONS 24

A. There Is An Entrenched 6-6 Split On This Issue 25

B. The Presumption Against Preemption Does Not Apply When There Is An Express Preemption Provision 28

C. The Court Can And Should Resolve The Presumption-Against-Preemption Issue In This Case 30

CONCLUSION 33

APPENDIX

Opinion of the United States Court of Appeals for the First Circuit, *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287 (1st Cir. 2022) 1a

Opinion of the United States District Court for the District of Maine, *Spectrum Northeast, LLC v. Frey*, 496 F. Supp. 3d 507 (D. Me. 2020) 35a

TABLE OF CONTENTS—Continued

Page

Final Judgment of the United States District Court for the District of Maine, *Spectrum Northeast, LLC v. Frey*, No. 20-cv-00168 (D. Me. Nov. 2, 2020), ECF No. 34 ..... 54a

Order of the United States Court of Appeals for the First Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc, *Spectrum Northeast, LLC v. Frey*, No. 20-2142 (1st Cir. Feb. 4, 2022) 56a

47 U.S.C. § 521 ..... 58a

47 U.S.C. § 543(a)(1)-(2) 59a

47 U.S.C. § 544(a) 61a

47 U.S.C. § 552(a), (b), (d) 62a

47 U.S.C. § 556 ..... 64a

47 C.F.R. § 76.906 ..... 65a

Me. Stat. tit. 30-A, § 3010(1), (1-A), (2-A) (2021) 66a

TABLE OF AUTHORITIES

Page(s)

CASES

Ace Auto Body & Towing, Ltd. v. City of New York,
171 F.3d 765 (2d Cir. 1999) 27

Air Evac EMS, Inc. v. Cheatham,
910 F.3d 751 (4th Cir. 2018)..... 26

In re the Alleged Failure of Altice USA, Inc., to Comply with Certain Provisions of the New Jersey Cable Television Act,
No. A-1269-19, 2021 WL 4808399 (N.J. Super. Ct. App. Div. Oct. 15, 2021), *petition for cert. filed*, No. 086408 (N.J. Nov. 23, 2021) 3, 11, 13, 14

Altice USA, Inc. v. Fiordaliso,
No. 3:19-cv-21371, 2021 WL 1138152 (D.N.J. Mar. 23, 2021) 11, 14

Altice USA, Inc. v. New Jersey Board of Public Utilities,
26 F.4th 571 (3d Cir. 2022)..... 14

Altria Group, Inc. v. Good,
555 U.S. 70 (2008)..... 25

Atay v. County of Maui,
842 F.3d 688 (9th Cir. 2016)..... 30

Atlantic Sounding Co. v. Townsend,
496 F.3d 1282 (11th Cir. 2007), *aff'd*,
557 U.S. 404 (2009)..... 28

TABLE OF AUTHORITIES—Continued

Page(s)

Bardsley v. Nonni's Foods LLC,
No. 20 Civ. 2979, 2022 WL 814034
(S.D.N.Y. Mar. 16, 2022) 28

Barr v. United States,
324 U.S. 83 (1945)..... 20

Cable Television Association of New York, Inc. v. Finneran,
954 F.2d 91 (2d Cir. 1992) 12, 19

Cellco Partnership v. Hatch,
431 F.3d 1077 (8th Cir. 2005)..... 20, 21

Chamber of Commerce of the United States v. Whiting,
563 U.S. 582 (2011)..... 9, 26, 29

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992)..... 29

Comcast of Maine/New Hampshire, Inc. v. Mills,
435 F. Supp. 3d 228 (D. Me. 2019), *aff'd*,
988 F.3d 607 (1st Cir. 2021) 27

Conklin v. Medtronic, Inc.,
431 P.3d 571 (Az. 2018) 26

Connell v. Lima Corporate,
988 F.3d 1089 (9th Cir. 2021)..... 30

CTS Corp. v. Waldburger,
573 U.S. 1 (2014)..... 25

TABLE OF AUTHORITIES—Continued

Page(s)

Daniel v. Navient Solutions, LLC,
328 F. Supp. 3d 1319 (M.D. Fla. 2018) 28

Dellums v. United States Nuclear Regulatory Commission,
863 F.2d 968 (D.C. Cir. 1988)..... 28

Dialysis Newco, Inc. v. Community Health System Group Health Plan,
938 F.3d 246 (5th Cir. 2019)..... 26

EagleMed LLC v. Cox,
868 F.3d 893 (10th Cir. 2017)..... 26

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018)..... 20

English v. General Electric Co.,
496 U.S. 72 (1990)..... 29

Florida East Coast Railway Co. v. City of West Palm Beach,
266 F.3d 1324 (11th Cir. 2001)..... 27

FMS Nephrology Partners North Central Indiana Dialysis Centers, LLC v. Meritain Health, Inc.,
144 N.E.3d 692 (Ind. 2020), *reh'g denied* (Aug. 12, 2020) 27

TABLE OF AUTHORITIES—Continued

Page(s)

In re Ford Motor Co. F-150 & Ranger Truck Fuel Economy Marketing & Sales Practices Litigation,
No. 19-mc-02901, 2022 WL 551221 (E.D. Mich. Feb. 23, 2022)..... 28

Gade v. National Solid Wastes Management Association,
505 U.S. 88 (1992)..... 29

Gelman v. Ashcroft,
372 F.3d 495 (2d Cir. 2004) 28

Gordon v. New England Central Railroad, Inc.,
No. 17-cv-00154, 2019 WL 5084160 (D. Vt. Oct. 10, 2019) 27

Griffioen v. Cedar Rapids & Iowa City Railway Co.,
914 N.W.2d 273 (Iowa 2018), *cert. denied*, 139 S. Ct. 1320 (2019)..... 26

International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration,
986 F.3d 841 (9th Cir.), *cert. denied*, 142 S. Ct. 93 (2021)..... 30

Lupian v. Joseph Cory Holdings LLC,
905 F.3d 127 (3d Cir. 2018) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Massachusetts v. United States Department of Transportation,
93 F.3d 890 (D.C. Cir. 1996) 27

Massachusetts Department of Telecommunications & Cable v. Federal Communications Commission,
983 F.3d 28 (1st Cir. 2020) 6

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 25

NCTA - Internet & Television Association v. Frey,
451 F. Supp. 3d 123 (D. Me. 2020), *aff'd*,
7 F.4th 1 (1st Cir. 2021) 27

New York ex rel. James v. Pennsylvania Higher Education Assistance Agency,
No. 19 Civ. 9155, 2020 WL 2097640
(S.D.N.Y. May 1, 2020) 27

Pharmaceutical Care Management Association v. Wehbi,
18 F.4th 956 (8th Cir. 2021) 26, 30

Philip Morris Inc. v. Harshbarger,
122 F.3d 58 (1st Cir. 1997) 27, 31

Puerto Rico v. Franklin California Tax-Free Trust,
579 U.S. 115 (2016) 4, 9, 22, 24, 25, 26, 29

TABLE OF AUTHORITIES—Continued

Page(s)

R.J. Reynolds Tobacco Co. v. County of Los Angeles,
29 F.4th 542 (9th Cir. 2022) 26, 30

Rutherford v. Columbia Gas,
575 F.3d 616 (6th Cir. 2009)..... 28

Shuker v. Smith & Nephew, PLC,
885 F.3d 760 (3d Cir. 2018) 27, 29, 30

Student Loan Servicing Alliance v. District of Columbia,
351 F. Supp. 3d 26 (D.D.C. 2018)..... 28

Thornton v. Tyson Foods, Inc., 28 F.4th 1016 (10th Cir. 2022)..... 30

Tyrrell v. Norfolk Southern Railway Co.,
248 F.3d 517 (6th Cir. 2001)..... 27

United States v. Lewis,
963 F.3d 16 (1st Cir. 2020), *cert. denied*,
141 S. Ct. 2826 (2021)..... 28

Watson v. Air Methods Corp.,
870 F.3d 812 (8th Cir. 2017)..... 30

Webb v. Trader Joe's Co.,
999 F.3d 1196 (9th Cir. 2021)..... 30

Younger v. Harris,
401 U.S. 37 (1971)..... 14

TABLE OF AUTHORITIES—Continued

Page(s)

In re Zantac (Ranitidine) Products Liability Litigation,
546 F. Supp. 3d 1284 (S.D. Fla. 2021) 28

FEDERAL CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. art. VI, cl. 2 29

28 U.S.C. § 1254(1)..... 1

47 U.S.C. § 521(1)..... 4, 12, 24

47 U.S.C. § 521(3)..... 24

47 U.S.C. § 521(6)..... 5, 12, 19

47 U.S.C. § 543(a)..... 5

47 U.S.C. § 543(a)(1) 15, 17

47 U.S.C. § 543(a)(2) 2, 5, 10, 15, 17

47 U.S.C. § 544(a)..... 5

47 U.S.C. § 552(d)(1) 5, 14, 21

47 U.S.C. § 556(c) 5, 15

47 C.F.R. § 76.906 6

STATE AND LOCAL LAWS

Anderson Cnty., S.C. Code of Ordinances
§ 14-8(c)(7)(b) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Aurora, Ill. Code of Ordinances § 19-116(h) 23

Beloit, Wis. Mun. Code § 28.14(4)(b) 23

Bensalem, Pa. Code of Ordinances § 69-24(b) 23

Big Bear Lake, Cal. Mun. Code § 5.20.1175 23

Elk Rapids, Mich. Code of Ordinances § 54-73(b) 23

Fraser, Mich. Code of Ordinances § 6.5-6(e) 23

Green Oak Charter Twp., Mich. Code of Ordinances § 30-37(11) 23

Haw. Code R. § 16-131-23 ..... 7, 22

Hillsborough Cnty., Fla. Code of Ordinances § 48-53(r) 23

Int'l Falls, Minn. Code of Ordinance § 13-3(*l*) 23

Manassas Park, Va. Code of Ordinances § 7.5-9(f)(8) 23

207 Mass. Code Regs. § 10.06(2) 7, 22

Me. Stat. tit. 30-A, § 3010(1-A) (2021) 2, 6, 16, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Mobile, Ala. Code of Ordinances § 11.5-9(j)(2) 7, 23

N.J. Admin. Code § 14:18-3.8(c) 7, 13

New London, Tex. Code of Ordinances App'x A(B)(I)(1)(5)(6)(b) 23

Pittsburgh, Pa. Code of Ordinances § 425.11(i)(15) 7, 23

Rochester, Minn. Code of Ordinances, ch. 91C(b)(c) 7, 23

Tuscaloosa, Ala. Code of Ordinances § 7.5-9(10)(b) 23

W. Va. Code § 24D-1-14(d) 7, 22

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019) 17

Merriam–Webster Online Dictionary, https://www.merriam-webster.com/ (last visited May 31, 2022) 16, 17

N.Y. Assembly Bill No. A5438-A (introduced Feb. 16, 2021) 7, 23

N.Y. Sen. Bill No. S7457-A (introduced Oct. 20, 2021) 7, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Oxford English Dictionary Online,
https://www.oed.com/ (last visited
May 31, 2022)..... 16

S. Rep. No. 98-67 (1983)..... 5

In re Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments,
Memorandum Opinion and Order,
14 FCC Rcd. 19898 (1999) 17

W. Va. H.B. 4773 (passed Mar. 2, 2022),
http://www.wvlegislature.gov/Bill_
Status/Bills_history.cfm?input=4773&
year=2022&sessiontype=RS&btype=bill 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners Spectrum Northeast, LLC and Charter Communications, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-34a) is reported at 22 F.4th 287. The opinion of the district court (App. 35a-53a) is reported at 496 F. Supp. 3d 507.

JURISDICTION

The court of appeals entered its judgment on January 4, 2022 (App. 1a) and denied rehearing on February 4, 2022 (App. 56a-57a). On April 19, 2022, Justice Breyer extended the time to file a petition for a writ of certiorari through June 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 521 *et seq.*, and Maine Public Law 2020, chapter 657 (the "Pro Rata Law"), are reproduced at App. 58a-67a.

INTRODUCTION

The Cable Communications Policy Act of 1984 ("Cable Act") establishes a national framework for the regulation of cable services and expressly prohibits state and local rate regulation of cable systems that are subject to effective competition. But in the years since its passage, state and local governments have increasingly enacted legislation requiring cable companies to provide pro rata rebates for the month in which a subscriber cancels service. These mandatory proration laws squarely conflict with the Cable Act's prohibition on state and local rate regulation. Federal and state courts are divided over whether such laws are preempted by the Act. This Court should grant certiorari to resolve the split and provide clarity to lower courts, as well as to state and local legislatures now actively considering such legislation. In doing so, the Court should also resolve a related (and even deeper) circuit split over whether a presumption against preemption applies to statutes—like the Cable Act—that *expressly* preempt state and local legislation.

This case involves a Maine law mandating that cable companies provide a pro rata rebate for the month in which a subscriber cancels service. Me. Stat. tit. 30-A, § 3010(1-A) (2021) (the "Pro Rata Law"). Maine's Pro Rata Law forbids cable companies from charging consumers the full monthly rate for the final month of service. The law undeniably regulates "the rates for the provision of cable service," 47 U.S.C. § 543(a)(2), and it is therefore squarely preempted by the Cable Act.

The First Circuit nonetheless concluded that Maine's law is not preempted by the Cable Act

because a rebate provided after cancellation of service purportedly does not constitute regulation of rates for the "provision of cable service." App. 10a-11a (quoting Section 543(a)(2)). To bolster its cursory textual analysis, the First Circuit explained that its no-preemption holding was "compel[led]" by the absence of any specific reference to "termination rebates" in the legislative history. *Id.* at 8a, 24a. And it further concluded that a "narrow reading" of the preemption provision was necessary to preserve a "significant role" for state consumer protection laws. *Id.* at 27a.

The First Circuit's decision is plainly wrong. By requiring that cable companies provide a "pro rata" rebate after cancellation, Maine's law necessarily mandates that cable companies charge only a prorated monthly rate for their "provision of cable service" for the days *preceding* cancellation. And the First Circuit's attempt to discern Congress's "purpose" from "congressional silence," *id.* at 23a-26a, rather than looking to the statute's plain text, contravenes basic principles of statutory interpretation.

Just as importantly, the ruling creates a split of appellate authority over the scope of Cable Act preemption. Whereas the First Circuit held that mandatory proration laws are not preempted, the New Jersey Appellate Division reached the opposite conclusion with respect to New Jersey's materially similar proration law. *In re the Alleged Failure of Altice USA, Inc., to Comply with Certain Provisions of the N.J. Cable Television Act*, No. A-1269-19, 2021 WL 4808399 (N.J. Super. Ct. App. Div. Oct. 15, 2021), *petition for cert. filed*, No. 086408 (N.J. Nov. 23, 2021). Cable companies operating nationwide are thus subject to different legal rules in different

jurisdictions. That uncertain and varied legal landscape poses serious practical difficulties for cable companies and undermines the Cable Act's express purpose of "establish[ing] a *national* policy concerning cable communications." 47 U.S.C. § 521(1) (emphasis added). The problem is especially acute given the many states and localities that have adopted proration laws like the Maine statute at issue here.

The First Circuit's decision also deepens a broader split over the interpretation of express preemption clauses more generally. There is an acknowledged conflict over whether a presumption against preemption applies to such clauses, or instead is limited to cases involving implied preemption. Four circuit courts and two state supreme courts have relied on *Puerto Rico v. Franklin California Tax-Free Trust,* 579 U.S. 115 (2016), to hold that no presumption against preemption applies when the relevant federal statute expressly mandates preemption. On the other side, six federal circuits apply the presumption even when Congress has plainly mandated preemption. Although the First Circuit purported not to address the issue, it insisted on a "narrow reading" of the Cable Act's express preemption provision that amounts to the same thing. App. 27a. Resolution of this issue is essential, because it implicates the proper interpretation of express preemption clauses across a vast range of congressional statutes, and is likely to generate future conflicts among the circuits if left unresolved.

This Court's intervention is warranted to resolve the splits and clarify that lower courts should enforce express preemption provisions—including the Cable Act provision here—according to their terms. This Court should restore the Cable Act's uniform national

policy of deregulation and eliminate uncertainty for courts and legislatures across the country. The petition should be granted.

STATEMENT OF THE CASE

A. The Cable Act's Prohibition On State And Local Regulation Of Cable Rates

The Cable Act establishes a national framework for the regulation of cable services and cable systems. The Act seeks to implement a "uniform national policy" of deregulation intended to "eliminate and prevent conflicting and counterproductive regulations" and encourage competition. S. Rep. No. 98-67, at 17 (1983); *see also* 47 U.S.C. § 521(6) (explaining that one of the purposes of the Cable Act is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems").

To that end, the Cable Act limits state and local regulatory authority over cable services. *See, e.g.*, 47 U.S.C. §§ 543(a), 544(a), 556(c). With respect to rate regulation in particular, the Act establishes a "[p]reference for competition," providing: "If the [Federal Communications] Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority." *Id.* § 543(a)(2). The Act further declares that state and local laws "inconsistent with this chapter shall be deemed to be preempted and superseded." *Id.* § 556(c). It preserves states' ability to enact and enforce consumer protection laws, but only "to the extent not specifically preempted by this subchapter." *Id.* § 552(d)(1).

The Federal Communications Commission ("FCC") has promulgated a regulation stating that, "[i]n the absence of a demonstration to the contrary[,] cable systems are presumed . . . [t]o be subject to effective competition" for purposes of the provisions cited above. 47 C.F.R. § 76.906. Pursuant to that regulation, nearly all cable systems throughout the United States are currently deemed to be subject to effective competition. *See Massachusetts Dep't of Telecomms. & Cable v. Fed. Commc'ns Comm'n*, 983 F.3d 28, 30, 32 n.1 (1st Cir. 2020) (explaining that only Kauai, Hawaii and 32 franchise areas in Massachusetts rebutted the FCC's presumption). Accordingly, state and local regulation of cable rates is prohibited throughout the vast majority of the United States, including all of Maine. *See* App. 3a n.1.

B. Maine's Pro Rata Law Regulating Cable Rates In The Final Month Of Service

Maine adopted the Pro Rata Law in 2020. As relevant here, that law provides that a "franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period." Me. Stat. tit. 30-A, § 3010(1-A) (2021). In other words, when a subscriber cancels cable service mid-month, the cable company is allowed to charge the subscriber for only a portion of the month of service originally purchased, and that charge must equate to a prorated amount of the cable company's monthly rate.

Maine's law thus prohibits cable companies from selling cable service only in full-month increments (i.e., without proration). It likewise prohibits cable

companies from freely choosing the prices they wish to charge subscribers for partial service in the final month.

In adopting such a proration rule, Maine joined a number of other jurisdictions that impose similar proration requirements. *See, e.g.*, 207 Mass. Code Regs. § 10.06(2); Haw. Code R. § 16-131-23; N.J. Admin. Code § 14:18-3.8(c); Pittsburgh, Pa. Code of Ordinances § 425.11(i)(15); Rochester, Minn. Code of Ordinances, ch. 91C(b)(c); Mobile, Ala. Code of Ordinances § 11.5-9(j)(2); *infra* at 23 n.7 (citing over a dozen additional examples). Just three months ago, West Virginia enacted its own proration law. *See* W. Va. Code § 24D-1-14(d) (enacted by W. Va. H.B. 4773 (passed Mar. 2, 2022), http://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=4773&year=2022&sessiontype=RS&btype=bill). And both houses of New York's state legislature are currently considering similar legislation. *See* N.Y. Sen. Bill No. S7457-A (introduced Oct. 20, 2021) (requiring a "refund" on "a pro rata basis" for customers "that have paid in advance for the billing period when the disconnection" occurs); N.Y. Assembly Bill No. A5438-A (introduced Feb. 16, 2021) (same).

C. Factual And Procedural Background

1. Petitioners Spectrum Northeast, LLC and Charter Communications, Inc. (collectively, "Charter") are cable providers operating throughout the United States, including in Maine. Like many such providers, Charter sells cable services on a monthly basis and charges for those services in

advance. Compl. ¶¶ 2, 29, Dkt. No. 1.[1] Charter's bills clearly state the beginning and end dates of the billing period, so that subscribers know in advance when their next billing period begins and can discontinue service for the subsequent month if they wish. *Id.* ¶ 33. Charter's whole-month billing practice is in line with the practices of many of its competitors, including satellite providers like DIRECTV and DISH, and online video streaming services like Netflix and Amazon Prime. *Id.* ¶ 35. Those providers are not subject to cable regulation and do not give terminating subscribers a pro rata rebate. *See id.*

Maine's Pro Rata Law forces Charter to deviate from its whole-month billing rate and essentially bill its subscribers by the day for the final month of service. For example, assume Charter's standard monthly rate is $50/month. If a subscriber chooses to cancel on April 15 for the April billing cycle that began on April 1, Maine's law requires Charter to charge the subscriber $25—based on a prorated billing rate of $1.67/day for 15 days—even though the subscriber initially agreed to purchase a month's worth of service for $50 under Charter's whole-month billing rate.

2. In May 2020, Charter filed suit in the United States District Court for the District of Maine, challenging Maine's Pro Rata Law and seeking a declaratory judgment that the law is preempted by the Cable Act. Charter argued that Maine's law impermissibly regulates rates for the provision of cable service by requiring Charter to charge subscribers by the day, rather than the month, for the

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[1] "Dkt. No." refers to district court docket No. 1:20-cv-00168-JDL (D. Me.).

month in which a subscriber cancels service. *See* Compl. ¶¶ 6, 36, 41, 63. Charter also explained that its whole-month billing policy helps consumers by lowering administrative costs and ultimately reducing the upward pressure on rates for Charter's continuing subscribers. *Id.* ¶ 3.

Maine moved to dismiss the complaint, arguing that the Pro Rata Law is a consumer protection provision that does not regulate "rates for the provision of cable service," and urging the court to apply a presumption against preemption. Def.'s Mot. to Dismiss (June 2, 2020), Dkt. No. 12. In response, Charter argued that no presumption against preemption applies to express preemption provisions, relying on *Franklin*, which stated that when a statute "'contains an express pre-emption clause,'" courts should not "invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause.'" 579 U.S. at 125 (quoting *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). Charter further explained that, under the plain language of the Cable Act, Maine's law impermissibly regulates rates for the provision of cable service by mandating the daily rate that cable providers must charge for the month in which a subscriber cancels service. Opp'n to Def.'s Mot. to Dismiss 5-6, 7-17 (June 23, 2020), Dkt. No. 19.

In October 2020, the district court denied Maine's motion to dismiss, agreeing with Charter that the Pro Rata Law impermissibly regulates "rates for the provision of cable service," in violation of Section 543(a)(2) of the Cable Act. App. 41a-52a. In doing so, it invoked the presumption against preemption, but it found no need to apply that presumption because the

statutory text was not "susceptible of more than one plausible reading." *Id.* at 41a-42a, 52a.

In light of the district court's ruling, the parties stipulated that there were no remaining issues of fact to resolve and asked the district court to enter judgment in favor of Charter, so that Maine could appeal the "single, dispositive legal issue" in the case—whether Maine's Pro Rata Law is preempted by the Cable Act. Joint Mot. for Summ. J. 4 (Oct. 29, 2020), Dkt. 33. The district court granted the motion and entered final judgment on November 2, 2020. Final Judgment, Dkt. 34.

3. A panel of the First Circuit reversed, holding that the Pro Rata Law is not rate regulation preempted by the Cable Act, but rather a "termination rebate" not subject to preemption. *See* App. 1a-53a.

With respect to the text of the statute, the court noted the parties' agreement that the "plain and ordinary meaning of the term 'rate,'" is "the amount charged for a particular product; [ ] as defined by a particular unit of measurement in relation to the product." App. 9a (alteration in original) (citation omitted). But the court focused its analysis on the statute's reference to rates "*for the provision of cable service*." 47 U.S.C. § 543(a)(2) (emphasis added). The court stated that "the language 'provision of cable service' . . . is not naturally read to encompass a termination rebate," because termination "ends cable service." App. 10a. "Thus," the court reasoned, "the plain language of § 543 excludes the time after provision of service—i.e., the only time when Maine's Pro Rata Act applies." *Id.* at 10a-11a; *see also id.* at 11a (explaining that Maine's law differs from a "monthly cap" on prices because it applies only "for

the month in which that customer has terminated—i.e., when the cable operator no longer provides—'cable service'").

The court then considered the Cable Act's legislative history. *Id.* at 11a-12a; *see generally id.* at 11a-29a. Although the court recognized that the Cable Act "established a federal preference for competition through market forces," *id.* at 25a, it nevertheless concluded that the legislative history weighed against preemption because it contains "no reference at all to termination rebates," and thus "does not suggest a concern with, or a purpose to preempt, state regulation of termination fees or termination rebates," *id.* at 23a-24a. Given this "congressional silence" with respect to termination rebates, the court concluded that the "focus" of the statute was instead "monthly rates for basic cable service." *Id.* at 23a-25a.

The court further noted that the Cable Act "preserved state authority to adopt consumer protection laws," *id.* at 18a-19a, *see id.* at 20a-21a, and concluded that Maine's Pro Rata Law qualified as such a law, *see id.* at 26a-28a. Although the court recognized that rate regulation is not permitted, even under the guise of consumer protection, it nevertheless found that the Cable Act's "purpose to preserve a significant role for state consumer protection laws . . . favor[ed] a narrow reading" of the preemption provision. *Id.* at 27a.

The court acknowledged that other courts had "followed the district court here" in finding similar proration laws preempted. *Id.* at 29a-30a & n.12 (citing *Altice USA, Inc. v. Fiordaliso*, No. 3:19-cv-21371, 2021 WL 1138152, at *5 (D.N.J. Mar. 23, 2021); *In re Altice*, 2021 WL 4808399). But rather

than follow those decisions, it looked to a Second Circuit case holding that extra charges for downgrading cable service were not preempted because "'a reduction in service is not a provision of service.'" *See id.* at 30a-31a (quoting *Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91, 100 (2d Cir. 1992)).

Finally, the court stated that it was not addressing whether the presumption against preemption applies to express preemption provisions, because its holding was "compel[led]" by "the structure and legislative history of the Cable Act." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THE SCOPE OF CABLE ACT PREEMPTION OF RATE REGULATION

The First Circuit's decision in this case adopts a misguided and unduly narrow interpretation of the Cable Act's prohibition on state and local rate regulation. That ruling conflicts with the New Jersey Appellate Division's decision regarding a substantially similar proration law and creates significant uncertainty over the validity of such laws more generally. That lack of uniformity contradicts the Cable Act's purpose of "establish[ing] a national policy concerning cable communications." 47 U.S.C. § 521(1). And the First Circuit's ruling undermines the Cable Act's prohibition on rate regulation and its express goal of "minimiz[ing] unnecessary regulation," *id.* § 521(6), by upholding Maine's direct regulation of cable companies' rates. This Court's review is needed to restore the uniform legal regime contemplated by the Cable Act and safeguard the deregulatory objectives embodied in its text.

A. Federal And State Courts Are Split On How To Apply The Preemption Clause To State-Law Proration Requirements

The First Circuit itself acknowledged that its decision creates a square split between federal and state courts with respect to the validity of proration laws under the Cable Act. App. 29a-30a & n.12. Specifically, in *In re Altice USA, Inc.*, the New Jersey Appellate Division considered—and invalidated—a New Jersey law that is materially identical to Maine's Pro Rata Law. No. A-1269-19, 2021 WL 4808399, at *4 (N.J. Super. Ct. App. Div. Oct. 15, 2021), *petition for cert. filed*, No. 086408 (N.J. Nov. 23, 2021).[2]

Like Maine's Pro Rata Law, the New Jersey law requires cable companies to prorate their bills upon a subscriber's termination of service. *See* N.J. Admin. Code § 14:18-3.8(c). Unlike the First Circuit here, however, the New Jersey Appellate Division found the law preempted by the Cable Act, reversing the New Jersey Board of Public Utilities' decision upholding the law. Specifically, the Appellate Division concluded that New Jersey's statute qualified as prohibited rate regulation under the Cable Act, because it altered cable companies' "whole-month billing practice[s] to a per diem billing methodology," and had "'the effect of prescribing a

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[2] New Jersey has filed a petition for certification seeking further review of the Appellate Division's ruling in the New Jersey Supreme Court. *See* Petition for Certification, No. 086408 (N.J. Nov. 23, 2021). If the New Jersey Supreme Court denies review, the Appellate Division's decision will be the final word on the preemption issue, solidifying the split. If the New Jersey Supreme Court *grants* review, this Court should nevertheless grant certiorari to resolve the important issues presented here as a matter of federal law.

daily rate for the service that was provided before the cancellation.'" *In re Altice*, 2021 WL 4808399, at *4 (citation omitted). The court further concluded that the statute could not be justified as a consumer protection law, because such laws are permissible only "to the extent not specifically preempted by" the Cable Act. *Id.* (quoting 47 U.S.C. § 552(d)(1)). In reaching those conclusions, the Appellate Division found persuasive the "cogent reasoning" of a New Jersey federal district court that had also held that the Cable Act preempts New Jersey's law. *See id.* (explaining that although it was not bound by the decision, it was "persuaded" by the federal district court's decision in *Altice USA, Inc. v. Fiordaliso*, No. 19-cv-21371-BRM-ZNQ, 2021 WL 1138152, at *4 (D.N.J. Mar. 23, 2021)).[3] Accordingly, like the federal district court, the Appellate Division held that New Jersey's statute was preempted by the Cable Act.

The New Jersey Appellate Division's holding directly conflicts with the First Circuit's decision in this case. In particular, it recognizes that proration laws directly regulate rates "*for the service that was provided* before the cancellation," *id.* (emphasis added) (citation omitted), whereas the First Circuit concluded that proration laws do not regulate rates "for the provision of service" because they apply after service is terminated. *See* App. 10a-11a. And contrary to the First Circuit, the Appellate Division's decision likewise recognizes that rate regulation does

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[3] The Third Circuit subsequently vacated the district court's decision on the ground that the district court should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971), in light of the pending state court litigation. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, 26 F.4th 571 (3d Cir. 2022).

not become permissible simply because the measure can be deemed a "consumer protection" law. These courts thus squarely disagree with one another. Only this Court can resolve the split.

B. The First Circuit's Refusal To Find Preemption Is Plainly Wrong

The First Circuit erred in concluding that Maine's Pro Rata Law is not preempted by the Cable Act. The Pro Rata Law directly regulates "the rates for the provision of cable service" for the final month of service—precisely what Congress enacted 47 U.S.C. §§ 543(a)(2) and 556(c) to forbid. The First Circuit's conclusion that a "termination rebate" is not prohibited rate regulation has no basis in the statutory language or common sense, and would directly undermine the Cable Act's deregulatory purposes.

1. Maine's Pro Rata Law is preempted under the plain language of the Cable Act. Section 543(a)(1) of the Act provides that "[n]o Federal agency or State may regulate the rates for the provision of cable service" except in circumstances not present here. 47 U.S.C. § 543(a)(1). Section 543(a)(2) then reiterates that command, providing that where, as here, a cable system is subject to effective competition, "the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority." *Id.* § 543(a)(2).

Maine's Pro Rata Law clearly constitutes "regulation" of "rates." As the First Circuit acknowledged, the plain meaning of the term "rate" is "the amount charged for a particular product; [ ] as defined by a particular unit of measurement in relation to the product." App. 9a; *see*

also Rate, *Merriam–Webster Online Dictionary*, https://www.merriam-webster.com/ (last visited May 31, 2022) ("an amount of payment or charge based on another amount"); Rate, *Oxford English Dictionary Online*, https://www.oed.com/ (last visited May 31, 2022) ("[t]he amount of a charge or payment . . . as a proportion of some other amount or as a basis of calculation"). In other words, a rate "depends not only on the price charged, but also on the type and amount of service provided." App. 9a. The First Circuit properly defined the term "rate," but never directly addressed whether Maine's Pro Rata Law constitutes rate regulation.

It plainly does. Charter sells its service by the month, for a particular price per month. But the proration requirements established by Maine's Pro Rata Law mandate that for the final month of service, Charter must instead (1) sell its service by the day, and (2) do so for the prorated monthly price, rather than a higher daily rate. In other words, the law changes Charter's rate structure, and then requires Charter to sell its services at a bulk monthly price, while providing a daily service.

The example discussed earlier helps illustrate the point. Imagine again that Charter's standard monthly rate is $50/month. Under Maine's law, if a subscriber cancels on April 15 for a billing cycle that began on April 1, Charter must "grant" the subscriber "a pro rata credit or rebate" for the remaining 15 days of the billing cycle. Me. Stat. tit. 30-A, § 3010(1-A). That means the subscriber, who purchased the full month of April service in advance, will receive a rebate of $25, and Charter will, by operation of Maine's law, be limited to charging the subscriber a net total of $25. Charter is prohibited from charging

the subscriber more for the service Charter provided, because doing so would not be a "pro rata" rebate. *See, e.g.*, Pro Rata, *Black's Law Dictionary* (11th ed. 2019) ("Proportionately; according to an exact rate, measure, or interest"); Pro Rata, *Merriam-Webster Online* ("proportionately according to an exactly calculable factor"). Maine's law thus caps Charter's rates during the final month of service and precludes Charter from charging either (1) for the full month, or (2) a daily rate higher than its standard monthly rate. That is rate regulation, pure and simple.[4]

2. Contrary to the First Circuit's decision, the Pro Rata Law constitutes regulation of the rates "for the provision of cable service." 47 U.S.C. § 543(a)(1), (2). The First Circuit concluded that "the language 'provision of cable service' . . . is not naturally read to encompass a termination rebate," because termination "ends cable service." App. 10a. On its view, therefore, "the plain language of § 543 excludes the time after provision of service—i.e., the only time when Maine's Pro Rata Act applies." *Id.* at 10a-11a; *see also id.* at 11a (explaining that Maine's law differs

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[4] Consistent with this analysis, the FCC has concluded that state laws prohibiting cellular phone providers from billing in whole-minute increments (instead of by the second) are a form of preempted rate regulation under Section 332 of the Communications Act. *See In re Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd. 19898, 19906-07 ¶¶ 18-20 (1999). Maine's law presents a substantially easier question as to whether it is rate regulation, because it regulates *both* the "rate structure[]" *and* the "rate level[]" of cable companies' rates. *Id.* at 19907 ¶ 20.

from a "monthly cap" on prices because it applies only "for the month in which that customer has terminated—i.e., when the cable operator no longer provides—'cable service'").

The First Circuit's reading of the statute does not withstand scrutiny. The Pro Rata Law requires Charter to provide refunds to subscribers who cancel mid-month, and in doing so, it regulates the rate that Charter may charge for the days Charter *was* providing service. This is clear from the example above: Assuming a $50/month rate, Maine's law limits Charter to charging the subscriber who cancels in the middle of the month only $25 for Charter's "provision of cable service" in the final month. Maine's law thus regulates "rates for the provision of cable service."

To take another example, imagine that Maine had drafted the statute to state that a "franchisee shall charge a subscriber only a pro rata rate for the days of the monthly billing period prior to the cancellation of service." That hypothetical law would have precisely the *same* effect as Maine's current law mandating that a "franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service." Me. Stat. tit. 30-A, § 3010(1-A). But there is no question the hypothetical law would constitute regulation of "rates for the provision of cable service." The purely semantic—and entirely non-substantive—distinction between the hypothetical law and Maine's actual Pro Rata Law should make no legal difference whatsoever.

The First Circuit's artificial temporal distinction has no basis in the statute. Accepting it would undermine the Cable Act's prohibition on rate

regulation, because states could use post-cancellation refunds and rebates to circumvent the Act and indirectly regulate the rates charged by cable companies. Under the First Circuit's approach, for example, a state wishing to lower cable rates could simply mandate that, each January, cable providers must grant a 10% rebate for the prior year of service, simply because "the only time when" such a law would apply would be "after provision of service." App. 10a-11a. But that interpretation cannot be squared with the Cable Act's clear prohibition on rate regulation or its broader deregulatory purposes. *See* 47 U.S.C. § 521(6) (listing as one of the purposes of the Cable Act "promot[ing] competition in cable communications and minimiz[ing] unnecessary regulation").[5]

Nor does it matter that the Pro Rata Law regulates rates only for the month in which a subscriber cancels service. Nothing in the text of the Cable Act, which unequivocally prohibits "the regulation of rates for the provision of cable service," suggests it is limited to continuous regulation only. Just as a state could not pass a law mandating a rate of $5/month for every third month of service, Maine

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[5] The First Circuit also found support for its holding in the Second Circuit's observation in *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), that "a reduction in service" is not "a provision of service." *See* App. 29a-31a (quoting 954 F.2d at 100)). But *Finneran* is readily distinguishable. There, the Second Circuit rejected a preemption challenge to a state law that regulated the fees cable companies could charge customers for downgrading their service. Unlike the proration laws at issue here, those downgrade charges were separate and apart from the rates the cable company charged for the services themselves.

cannot mandate a monthly prorated rate for the month in which a subscriber cancels service. *Cf. Cellco P'ship v. Hatch*, 431 F.3d 1077, 1082 (8th Cir. 2005) (holding that a state law that required consumer consent prior to any rate increase was preempted rate regulation because it "effectively fr[oze] rates for 60 days").

3. The First Circuit's non-textual bases for its holding confirm its error. The court relied on "congressional silence" to avoid the clear import of the text, pointing to the absence of any reference to "termination rebates" in the legislative history. App. 23a-25a. But this Court has repeatedly made clear that "silence in the legislative history . . . cannot defeat the better reading of the text and statutory context." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). Nor can it "lend any clarity," even where the text is ambiguous. *Id.* Rather, "if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945); *see Encino*, 138 S. Ct. at 1143.

And the First Circuit's conclusion that the preemption provision focuses on regulation of "monthly rates," App. 23a-24a, rather than "termination rebates" is likewise flawed, because it sets up a false dichotomy. As explained above, the Pro Rata Law *does* regulate cable companies' monthly rates for the month in which a subscriber cancels service. *Supra* at 15-17. In that sense, it is exactly the type of regulation Congress contemplated in passing the Cable Act—*i.e.*, one that deprives cable companies of the ability to determine how much they

are going to charge their customers for their preferred billing period.

4. Finally, the First Circuit's conclusion that the Pro Rata Law is a "consumer protection measure" also cannot justify its holding. App. 26a-28a. Under the statute, consumer protection laws are permissible only "to the extent not specifically preempted by" the Cable Act. 47 U.S.C. § 552(d)(1). And, while "[a]ny measure that benefits consumers," including rate regulation, "can be said in some sense to serve as a 'consumer protection measure,'" "a benefit to consumers, standing alone is plainly not sufficient" to avoid preemption. *Cellco*, 431 F.3d at 1082-83 (considering prohibition on regulation of rates of mobile service providers). Because Maine's law is specifically preempted by the prohibition on rate regulation, it does not matter whether it qualifies as a consumer protection measure.

Although the First Circuit purported to acknowledge this principle, it nevertheless insisted on adopting "a narrow reading of the scope of the preemption provision" because in its view, the history of the statute reflected "a purpose to preserve a significant role for state consumer protection laws, such as Maine's." App. 27a. In doing so, the First Circuit effectively applied a presumption against preemption, rather than following the plain text of the statute. *See infra* at 24-32.[6] That approach conflicts

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[6] Tellingly, the First Circuit claimed it was unnecessary to resolve whether the presumption against preemption applied *not* because the text of the statute was plain, but because "the *structure and legislative history* of the Cable Act and its amendments compel[led] a finding of no preemption." App. 8a (emphasis added).

with this Court's command that analysis of a preemption provision should begin and end with the "language of the statute itself," which provides "the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (citations omitted). The First Circuit's atextual and unfounded interpretation of the Cable Act should not stand.

C. The Preemption Issue Is Important And Will Recur Given The Proliferation Of State And Local Proration Requirements

This Court's review is urgently needed to ensure that courts properly—and uniformly—interpret the scope of the Cable Act's prohibition on rate regulation. The First Circuit's decision undermines the Cable Act's deregulatory purposes, and the current split in authority produces an unwarranted disparity in the way in which substantially similar state statutes are treated. Furthermore, because many other jurisdictions have similar laws, this issue is likely to recur. Only this Court can resolve the confusion.

Currently, at least three other states—and many more municipalities—have enacted similar regulations and ordinances requiring cable companies to provide pro rata rebates to subscribers who cancel mid-month. *See, e.g.*, W. Va. Code § 24D-1-14(d) ("A cable operator shall prorate any charge for service(s) that is cancelled by a subscriber rather than charging for the full term."); 207 Mass. Code Regs. § 10.06(2) ("Any subscriber who has paid in advance for the next billing period and who requests disconnection from service shall receive from the cable operator a prorated refund of any amounts paid in advance."); Haw. Code R. § 16-131-23 ("Service charges for less

than a billing month shall be a proration of the regular monthly rate."); Pittsburgh, Pa. Code of Ordinances § 425.11(i)(15) ("If any Subscriber terminates, for any reason, any monthly Cable Service prior to the end of a prepaid period, a prorated portion of any prepaid Cable Service fee shall be refunded to the Subscriber."); Rochester, Minn. Code of Ordinances, ch. 91C(b)(c) (similar); Mobile, Ala. Code of Ordinances § 11.5-9(j)(2) (similar).[7] And New York's legislature is actively considering similar legislation. *See* N.Y. Sen. Bill No. S7457-A (introduced Oct. 20, 2021) (requiring a "refund" on "a pro rata basis" for customers "that have paid in advance for the billing period when the disconnection" occurs); N.Y. Assembly Bill No. A5438-A (introduced Feb. 16, 2021) (same). Other states and municipalities will surely follow suit in light of the First Circuit's decision upholding Maine's Pro Rata Law.

This patchwork of laws throughout the United States creates a decidedly non-uniform landscape for cable companies operating nationwide. And the split

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[7] *See also, e.g.*, Tuscaloosa, Ala. Code of Ordinances § 7.5-9(10)(b); Anderson Cnty., S.C. Code of Ordinances § 14-8(c)(7)(b); Aurora, Ill. Code of Ordinances § 19-116(h); Beloit, Wis. Mun. Code § 28.14(4)(b); Bensalem, Pa. Code of Ordinances § 69-24(b); Big Bear Lake, Cal. Mun. Code § 5.20.1175; Elk Rapids, Mich. Code of Ordinances § 54-73(b); Fraser, Mich. Code of Ordinances § 6.5-6(e); Green Oak Charter Twp., Mich. Code of Ordinances § 30-37(11); Hillsborough Cnty., Fla. Code of Ordinances § 48-53(r); Int'l Falls, Minn. Code of Ordinance § 13-3(*l*); Manassas Park, Va. Code of Ordinances § 7.5-9(f)(8); New London, Tex. Code of Ordinances App'x A(B)(I)(1)(5)(6)(b). In fact, a review of pertinent laws and franchise agreements conducted by Charter in 2018 revealed approximately 430 franchise areas with an express requirement to prorate upon a subscriber's termination.

caused by the First Circuit's decision below exacerbates the uncertainty cable companies face with respect to the validity of those laws and their whole-month billing policies. This lack of uniformity is inconsistent with the overarching goal of the Cable Act to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1); *see also id.* § 521(3) (identifying Cable Act purpose of "establish[ing] guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems"). The Court should grant review to clarify the scope of the Cable Act's prohibition and restore the uniformity the Act envisions.

II. THE COURT SHOULD ALSO RESOLVE WHETHER A PRESUMPTION AGAINST PREEMPTION APPLIES TO EXPRESS PREEMPTION PROVISIONS

If the Court grants certiorari, it will also have the opportunity to resolve a circuit split over whether a presumption against preemption applies in the context of express preemption provisions. There is an entrenched 6-6 split on the issue, with one side directly contradicting this Court's clear—and most recent—instruction that no presumption against preemption applies when the federal statute at issue contains an express preemption clause. *See Franklin*, 579 U.S. at 125. This conflict of authority is particularly troubling because it will produce disparate results in the way circuits interpret express preemption provisions across a host of federal statutes.

This Court's review is needed to reaffirm *Franklin* and ensure a consistent and uniform mode of analysis

for the many express preemption clauses throughout the U.S. Code. And this case presents an appropriate vehicle for resolving the issue, because Maine will undoubtedly invoke the presumption against preemption to defend its law—as it did in the district court and the First Circuit—if this Court grants review of the first question presented.

A. There Is An Entrenched 6-6 Split On This Issue

This Court's precedent has not been entirely consistent about the applicability of a presumption against preemption in the context of express preemption clauses. In several cases, the Court applied a presumption when analyzing an express preemption clause. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (finding that presumption against preemption "support[ed]" "'a narrow interpretation'" of an express preemption provision (citation omitted)); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" (citation omitted)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (similar).

More recently, however, in *Franklin*, the Court clarified that the presumption does *not* apply in the face of an express preemption clause. 579 U.S. at 125. *Franklin* addressed whether the Federal Bankruptcy Code's preemption provision barred Puerto Rico from enacting its own municipal bankruptcy scheme. *Id.* at 117. In analyzing that question, this Court made clear that where a "statute 'contains an express pre-emption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus

on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* at 125 (quoting *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011)).

In light of those "somewhat varying pronouncements," federal and state appellate courts have divided over whether and when the presumption against preemption applies in cases involving express preemption clauses. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) (noting that the circuits are not "in full accord").

On one side of the split, the Fifth, Eighth, Ninth, and Tenth Circuits, along with the Arizona and Iowa Supreme Courts, have followed a straightforward reading of *Franklin* and declined to apply any presumption in any express preemption case, regardless of the underlying claim or statutory scheme.[8] And the Fourth Circuit has likewise indicated that "the best course is simply to follow . . . the wording of the express preemption provision, without applying a presumption one way or the other," though it purported not to "enter the great preemption presumption wars" because the text of the provision immediately before it was clear. *Air Evac EMS, Inc.*, 910 F.3d at 762 n.1.

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[8] *See R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 553 n.6 (9th Cir. 2022); *Pharm. Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956, 967 (8th Cir. 2021); *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258-59 (5th Cir. 2019); *EagleMed LLC v. Cox*, 868 F.3d 893, 899, 903 (10th Cir. 2017); *Conklin v. Medtronic, Inc.*, 431 P.3d 571, 574 (Az. 2018); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 281 (Iowa 2018), *cert. denied*, 139 S. Ct. 1320 (2019).

By contrast, the Third Circuit has expressly narrowed *Franklin* to its facts and "continue[d] to apply the presumption against preemption to claims . . . that invoke 'the historic police powers of the States.'" *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (citation omitted); *see also FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs., LLC v. Meritain Health, Inc.*, 144 N.E.3d 692, 702 (Ind. 2020), *reh'g denied* (Aug. 12, 2020) (declining to apply *Franklin*'s plain-language approach to express preemption in case involving ERISA preemption).

Five other circuits—the First, Second, Sixth, Eleventh, and D.C. Circuits—have likewise held that a presumption against preemption applies to express preemption clauses.[9] Although these courts have not expressly reconsidered whether those holdings survive *Franklin*, many district courts within those circuits have continued to apply the pre-*Franklin* (and anti-preemption) caselaw.[10] And all of those

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[9] *See, e.g.*, *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001) (invoking presumption against preemption in express preemption case); *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 522 (6th Cir. 2001) (same); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 774 (2d Cir. 1999) (same); *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 68 (1st Cir. 1997) (same); *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 896 (D.C. Cir. 1996) (same).

[10] *See, e.g.*, *Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F. Supp. 3d 228, 242 (D. Me. 2019), *aff'd*, 988 F.3d 607 (1st Cir. 2021); *NCTA - Internet & Television Ass'n v. Frey*, 451 F. Supp. 3d 123, 132 (D. Me. 2020), *aff'd*, 7 F.4th 1 (1st Cir. 2021); *Gordon v. New England Cent. R.R., Inc.*, No. 17-cv-00154, 2019 WL 5084160, at *7 (D. Vt. Oct. 10, 2019); *New York ex rel. James v. Pennsylvania Higher Educ. Assistance Agency*, No. 19 Civ. 9155, 2020 WL 2097640, at *13-14 (S.D.N.Y. May 1, 2020); *In re*

circuits treat prior panel precedent as binding unless a decision of this Court directly conflicts with or substantially undermines that precedent—a standard that, according to Maine, *Franklin* does not satisfy.[11]

In short, the split is entrenched and unlikely to be resolved on its own. This Court should grant review to clarify that an express preemption provision trumps any non-textual presumption against preemption.

B. The Presumption Against Preemption Does Not Apply When There Is An Express Preemption Provision

The majority of courts that have weighed in after *Franklin* have it right: No presumption against preemption applies to express preemption clauses. "Preemption fundamentally is a question of congressional intent." *English v. Gen. Elec. Co.*, 496

Zantac (Ranitidine) Prods. Liab. Litig., 546 F. Supp. 3d 1284, 1305 (S.D. Fla. 2021); *Daniel v. Navient Sols., LLC*, 328 F. Supp. 3d 1319, 1323-24 (M.D. Fla. 2018); *Student Loan Servicing All. v. Dist. of Columbia.*, 351 F. Supp. 3d 26, 53 (D.D.C. 2018). *But see Bardsley v. Nonni's Foods LLC*, No. 20 Civ. 2979, 2022 WL 814034, at *9 (S.D.N.Y. Mar. 16, 2022); *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, No. 2:19-mc-02901, 2022 WL 551221, at *8 (E.D. Mich. Feb. 23, 2022).

[11] *See United States v. Lewis*, 963 F.3d 16, 23 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2826 (2021); *Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004); *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009); *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007), *aff'd*, 557 U.S. 404 (2009); *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988); *see also* Resp. C.A. Br. 12-14 (invoking First Circuit's rule and arguing that *Franklin* did not overrule binding precedent).

U.S. 72, 78-79 (1990). And, as this Court explained in *Franklin*, when a law contains an express preemption clause, "the best evidence of Congress' pre-emptive intent" is "the plain wording of the clause." 579 U.S. at 125 (citation omitted); *see also Whiting,* 563 U.S. at 594 (same). Thus, any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). In such circumstances, courts must simply "apply to the text ordinary principles of statutory construction." *Id.*

That approach sensibly aligns the interpretation of express preemption clauses with ordinary principles of statutory interpretation. It also aligns with the mandate of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. As this Court has explained, "under the Supremacy Clause . . . 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (citation omitted). Accordingly, federalism concerns cannot justify the presumption against preemption—even where the claims at issue "invoke 'the historic police powers of the States.'" *Shuker*, 885 F.3d at 771 n.9 (citation omitted).

Rather, courts must "interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone,* 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part). That means enforcing express preemption provisions according to their

terms, without putting a thumb on the scale against preemption.

C. The Court Can And Should Resolve The Presumption-Against-Preemption Issue In This Case

This Court's review is needed to address this important issue. The split of authority implicates the proper interpretation of federal statutes governing a broad range of subject matters. In fact, the courts of appeals have considered *Franklin*'s import and the applicability of the presumption against preemption in the context of at least *eleven* different federal statutes.[12] This split is particularly troubling because, over time, the appellate courts' differing modes of analysis will produce differing results and additional splits of authority. This Court should act now to avoid future conflicts and ensure courts across the country analyze express preemption clauses based on their plain terms.

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[12] *See* App. 7a (Cable Act); *Thornton v. Tyson Foods*, Inc., 28 F.4th 1016, 1023 (10th Cir. 2022) (Federal Meat Inspection Act); *Connell v. Lima Corporate*, 988 F.3d 1089, 1097 (9th Cir. 2021) (Biomaterials Access Assurance Act); *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. 2021) (Poultry Products Inspection Act); *Int'l Brotherhood of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 845-46, 853 (9th Cir.) (Motor Carrier Safety Act of 1984), *cert. denied*, 142 S. Ct. 93 (2021); *Pharm. Care Mgmt. Ass'n*, 18 F.4th at 967 (ERISA); *Shuker*, 885 F.3d at 771 n.9 (Food, Drug, and Cosmetic Act); *Lupian v. Joseph Cory Holdings LLC,* 905 F.3d 127, 131 n.5 (3d Cir. 2018) (Federal Aviation Administration Authorization Act); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (Airline Deregulation Act); *R.J. Reynolds Tobacco Co.*, 29 F.4th at 553 n.6 (Tobacco Control Act); *Atay v. Cnty. of Maui*, 842 F.3d 688, 692, 699 (9th Cir. 2016) (Plant Protection Act).

This case is an appropriate vehicle to resolve the split. The parties vigorously litigated the presumption-against-preemption issue in both the district court and the First Circuit.[13] Indeed, Maine argued, among other things, that the First Circuit was bound by pre-*Franklin* case law applying the presumption to express preemption clauses. Resp. C.A. Br. 13 (arguing that "the presumption against preemption in express preemption claims remains binding First Circuit precedent" and citing *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997)). It further argued that the Cable Act's preemption provision "must be narrowly construed" in light of the presumption against preemption, also emphasizing that Maine's law regulates "consumer welfare," an area "of historic state regulation." *Id.* at 11-12.

The district court specifically invoked the presumption against preemption, although it found the statutory language sufficiently clear to overcome the presumption. App. 41a-52a. Although the First Circuit's ultimate decision purported not to "address" whether any presumption against preemption applied, *id.* at 8a, the court nonetheless effectively applied such a presumption anyway, per Maine's request. In particular, the court insisted on a "narrow reading of the scope of the preemption provision" in light of the "significant role" of "state consumer protection laws, such as Maine's." *Id.* at 27a; *see also id.* at 11a (finding a "narrow reading" of Section 543(a) "warranted").

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[13] *See* Def.'s Mot. to Dismiss 5-7, Dkt. No. 12; Opp'n to Def.'s Mot. to Dismiss 5-6, Dkt. No. 19; Resp. C.A. Br. 9-14; Pet'r C.A. Br. 15-16; Resp. C.A. Reply Br. 1-6.

If this Court grants review of Charter's first question presented, Maine will undoubtedly renew its argument that the presumption against preemption outweighs the Cable Act's express preemption provision here. The Court will thus have an opportunity to clarify how the presumption against preemption works, both generally and in the context of the Cable Act.

* * *

Both of Charter's questions presented spotlight the essential role of statutory text in conducting a preemption analysis. The first question highlights the need to enforce express preemption provisions according to their terms. The second question underscores that a textual preemption command necessarily trumps any judicial presumption of congressional intent. This Court's review is warranted to resolve the confusion over these foundational principles of preemption and statutory interpretation—and to confirm that in this corner of law, as in others, the text is paramount.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 6, 2022

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the First Circuit, *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287 (1st Cir. 2022) 1a

Opinion of the United States District Court for the District of Maine, *Spectrum Northeast, LLC v. Frey*, 496 F. Supp. 3d 507 (D. Me. 2020) 35a

Final Judgment of the United States District Court for the District of Maine, *Spectrum Northeast, LLC v. Frey*, No. 20-cv-00168 (D. Me. Nov. 2, 2020), ECF No. 34 .....54a

Order of the United States Court of Appeals for the First Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc, *Spectrum Northeast, LLC v. Frey*, No. 20-2142 (1st Cir. Feb. 4, 2022) 56a

47 U.S.C. § 521 .....58a

47 U.S.C. § 543(a)(1)-(2) 59a

47 U.S.C. § 544(a) 61a

47 U.S.C. § 552(a), (b), (d) 62a

47 U.S.C. § 556 .....64a

47 C.F.R. § 76.906 .....65a

Me. Stat. tit. 30-A, § 3010(1), (1-A), (2-A) (2021) 66a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SPECTRUM NORTHEAST, LLC; Charter Communications, Inc., Plaintiffs, Appellees,

v.

Aaron FREY, in his official capacity as Attorney General of the State of Maine, Defendant, Appellant.

No. 20-2142

January 4, 2022

22 F.4th 287

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. Jon D. Levy, U.S. District Judge]

Before THOMPSON, DYK,* and BARRON Circuit Judges.

DYK, Circuit Judge:

The Cable Communications Act of 1984 ("Cable Act") preempts state laws that regulate "rates for the provision of cable service" if the Federal Communications Commission ("FCC") has determined that cable operators in that state are "subject to effective competition." 47 U.S.C. §§ 543(a)(2), 556(c). Recently, Maine, a state that has effective competition, see 47 C.F.R. § 76.906 (2020), enacted a statute that requires cable operators to grant subscribers, if they cancel their cable service

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* Of the Federal Circuit, sitting by designation.

three or more days prior to the end of a billing period, pro rata credits or rebates for the days remaining in the billing period after the termination of cable service. We must decide whether this Maine statute is preempted by the Cable Act. We hold that it is not because it does not regulate "rates for the provision of cable service." We do not reach the question whether it is also a "customer service requirement" exempt from preemption.

I.

On March 18, 2020, Maine adopted "An Act to Require a Cable System Operator to Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber" ("Pro Rata Act") into law. As relevant here, the legislation amended Me. Stat. tit. 30-A, § 3010, titled "Consumer rights and protection relating to cable television service," to add: "A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period." Me. Stat. tit. 30-A, § 3010(1-A) (2021). The Pro Rata Act also requires that cable providers notify consumers of their right to a pro rata credit in "nontechnical language, understandable by the general public." Id. § 3010(2-A). The Act was to become effective on June 16, 2020. According to the Pro Rata Act's sponsor in the Maine House of Representatives, the purpose of the statute was to "reform unfair cable company billing practices" by requiring Maine "cable providers . . . to pro-rate charges when a customer disconnects service." In the legislator's view, the Pro Rata Act would "protect

cable customers from paying for service they do not receive."

II.

The Cable Act expressly preempts state regulation of "rates for the provision of cable service." 47 U.S.C. § 543(a)(2). Specifically, "the rates for the provision of cable service . . . shall not be subject to regulation" by the FCC, states, or local authorities when "a cable system is subject to effective competition." Id. If there is not effective competition,[1] local authorities may regulate "rates for the provision of basic cable service" pursuant to regulations promulgated by the FCC pursuant to § 543. § 543(a)–(b). Basic cable service constitutes the minimum tier of service and generally includes, for each locality, all over-the-air broadcast television channels, required public access channels, and additional channels added to the basic tier by the cable operator. See 47 C.F.R. § 76.901(a). Rates for cable programming services beyond basic cable service, i.e., nonbasic, higher-tier program packages or premium, pay-per-channel offerings, cannot be regulated even if there is not effective competition. § 543(a)(1)–(2), (b)(1), (c)(4). However, "customer service requirements" are exempt from preemption under 47 U.S.C. § 552(d)(2).

On May 11, 2020, Spectrum Northeast, LLC and Charter Communications, Inc. ("Spectrum") filed suit in the United States District Court for the District of Maine, challenging the new law, requesting a declaratory judgment that the law is preempted by

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[1] Under federal rules set by the FCC, "effective competition" is presumed in all markets unless rebutted. 47 C.F.R. § 76.906. There is no dispute here that cable operators in Maine are subject to effective competition.

the Cable Act, and moving to preliminarily enjoin enforcement of the law. Spectrum argued that the FCC has determined that cable providers in Maine are "subject to effective competition" and that the Pro Rata Act is preempted by the Cable Act because it is an attempt to regulate "rates for the provision of cable service." § 543(a)(2). The Attorney General moved to dismiss the complaint, contending that the Pro Rata Act was not preempted.

The district court stayed the preliminary-injunction briefing while it considered the Attorney General's motion to dismiss. On October 7, 2020, the district court denied the Attorney General's motion to dismiss, concluding that the Pro Rata Act "regulates 'rates for the provision of cable service,' which is prohibited by § 543(a)(2) of the Cable Act." In reaching this conclusion, the district court found "Maine's Pro Rata Law does not regulate a one-time cancellation or deinstallation fee but operates directly on the rate that Charter may charge for providing a certain quantity of cable service before a customer cancels service." Spectrum Ne. LLC v. Frey, 496 F. Supp. 3d 507, 514 (D. Me. 2020). The court accepted Spectrum's argument that "it provides cable service at a monthly, not daily, rate" and that the "whole-month billing policy effectively charges a higher daily rate to subscribers who cancel their service mid-month than to subscribers who do not cancel, because Charter sells cable service in monthly increments." Id. at 513. Despite acknowledging that "the Pro Rata Law applies only to the month in which a subscriber cancels her cable service," the district court nonetheless found the law's "prohibition on charges for service that was not provided [has] the effect of

prescribing a daily rate for the service that was provided before the cancellation." Id. at 514.

The court also rejected Maine's argument that the law is a "customer service requirement" exempted from preemption in § 552(d)(2) of the Cable Act.[2] The court noted the same section of the Cable Act requires the FCC to set minimum "customer service requirements" governing "(1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds)." Spectrum, 496 F. Supp. 3d at 515 (citing 47 U.S.C. § 552(b)). The court held that Maine's "Pro Rata Law

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[2] Section 552(b) states in pertinent part:

> The Commission shall . . . establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing—
>
> (1) cable system office hours and telephone availability;
>
> (2) installations, outages, and service calls; and
>
> (3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

Section 552(d)(2) states:

> (2) Customer service requirement agreements
>
> Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). 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 that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

cannot be characterized as a 'law concerning customer service' " (exempted from preemption). Id., at 515–16. The court acknowledged that "customer service requirements" are not limited to the minimum federal standards and confirmed both that "some laws requiring cable operators to grant credits, rebates, or refunds might meet" a dictionary definition of customer service and that the legislative history, discussed in detail infra, "may" support reading customer service to encompass rebates and credits. Id. at 516. But the court nonetheless concluded that the Pro Rata Act "goes well beyond" customer service and "directly regulates the rates" that Spectrum charges. Id.

In light of the district court's conclusion that the Pro Rata Act was "preempted by the [Cable Act] as a matter of law," the parties stipulated that "there [were] no remaining genuine issues of fact for the [district court] to resolve and that [Spectrum] [was] entitled to judgment as a matter of law." Joint Mot. to Grant Summ. J. to Pls. & Enter Final J. 1, 4, No. 20-cv-168, ECF No. 33 (internal citations omitted). The district court entered judgment for Spectrum, granting declaratory relief that the Pro Rata Act is preempted by the Cable Act.[3]

The Attorney General now appeals. We have jurisdiction under 28 U.S.C. § 1291.[4]

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[3] The court's judgment did not grant the preliminary injunction, but the Attorney General agreed that "he will not seek to enforce, directly or indirectly, the Pro Rata [Act] absent vacatur or reversal." Final J., No. 20-cv-168, ECF No. 34.

[4] On June 22, 2021, this court invited the FCC to file an amicus brief in this appeal addressing the following questions:

III.

The sole issue in this case is whether Maine's Pro Rata Act is preempted by federal law. The parties agree that this question is purely one of law. We review a district court's legal conclusions de novo. Lawless v. Steward Health Care Sys., LLC, 894 F.3d 9, 21 (1st Cir. 2018).

A.

"In any preemption analysis, '[t]he purpose of Congress is the ultimate touchstone.' " Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 67 (1st Cir. 1997) (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)); see also Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 324, 136 S.Ct. 936, 194 L.Ed.2d 20 (2016) ("[P]re-emption claims turn on Congress's intent.").

The parties agree that the question here is one of express preemption as the Cable Act contains a specific preemption provision. There is no issue as to congressional authority to preempt state law regulating the provision of cable service. Our task is

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1. Whether the Maine statute, Me. Stat. tit. 30-A, § 3010(1-A), constitutes the regulation of "rates for the provision of cable service" preempted by 47 U.S.C. § 543(a)(2).

2. At the time of the enactment of the Cable Communications Policy Act of 1984, in what respects were states regulating "rates for the provision of cable service"?

3. Any other relevant analysis or information that the Commission believes would be helpful to this court.

Order (June 22, 2021), No. 20-2142, ECF No. 00117755456. On August 23, 2021, the FCC declined this Court's invitation to file an amicus brief, stating, "After due consideration, we have determined that we do not have anything material to add to the party submissions." Letter (Aug. 23, 2021), No 20-2142, ECF No. 00117778108.

to determine the scope of the federal statute and "to identify which state laws are preempted." Brown v. United Airlines, Inc., 720 F.3d 60, 63 (1st Cir. 2013). That inquiry "start[s] with the text and context of the provision itself," and "[o]ur analysis is informed by the statutory structure, purpose, and history." Tobin v. Fed. Express Corp., 775 F.3d 448, 452 (1st Cir. 2014).

B.

The parties disagree as to whether the general presumption against preemption applies in this case. Because we conclude that the structure and legislative history of the Cable Act and its amendments compel a finding of no preemption of the Pro Rata Act, we need not address whether the presumption against preemption applies here.

C.

The Cable Act includes both general and specific preemption provisions. The general preemption provision states, "any provision of law of any State . . . or franchising authority . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). This Court recently had occasion to review this provision in the context of public, educational, and government (PEG) access requirements and rural service availability requirements. NCTA -- The Internet & Television Ass'n v. Frey, 7 F.4th 1, 3–4 (1st Cir. 2021) (rejecting preemption challenge and upholding Maine law addressing PEG channels and rural service availability). We now consider the question in the context of rate regulation subject to a specific preemption provision relevant here. This provision states, "the rates for the provision of cable service . . .

shall not be subject to regulation by the [Federal Communications] Commission or by a State or franchising authority under this section." § 543(a)(2). The parties dispute whether Maine's Pro Rata Act is a regulation of "rates for the provision of cable service" within the meaning of § 543(a)(2).

The parties agree that the Cable Act here neither defines "rates" nor "rates for the provision of cable service." Given this statutory silence, they agree that plain and ordinary meaning of terms, informed by the purpose and history of the Cable Act, should guide our analysis. They even do not dispute the plain and ordinary meaning of the term "rate"--that a "rate" is "the amount charged for a particular product; [ ] as defined by a particular unit of measurement in relation to the product." Appellant's Br. 15. As the FCC has explained, in a different context (addressed infra),

> [A] "rate" has no significance without the element of service for which it applies. . . . the term "rate" is defined in the dictionary as an "amount of payment or charge based on some other amount." In this regard also, the Supreme Court has recently stated: "Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached."

Sw. Bell Mobile Sys., Inc., 14 F.C.C. Rcd. 19,898, 19,906 (1999) (internal citations omitted) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993); AT&T Co. v. Cent. Off. Tel., Inc., 524 U.S. 214, 223, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998)). Thus, as the FCC acknowledged, a "rate" depends not only on the price charged, but also on the type and amount of service provided.

But that is where the agreement ends. The parties propose two different interpretations of the statutory language "rates for the provision of cable service" in § 543(a)(2). Spectrum argues that Maine's Pro Rata Act is a form of rate regulation because, in Spectrum's view, it "must measure the quantity of service it provides in daily increments [during the last month of service], rather than monthly increments" in order to provide the pro rata credits required by the law. Appellees' Br. 19. The Attorney General argues that Maine's Pro Rata Act does not force a cable provider "to sell its product by 'daily' rates rather than a 'monthly' rate," but instead, the law "merely requires [Spectrum] to refund customers for the portion of their final monthly billing cycle, at the rate charged by [Spectrum], in which they did not receive cable service." Appellant's Br. 17– 18. Further, the Attorney General argues, Maine's Pro Rata Act only applies to a period after termination. "[A]lthough the Cable Act prohibits states from setting rates for the provision of cable service, the statute does not prohibit states from protecting citizens from being charged for cable services that are never provided." Appellant's Br. 21–22.

We think that the language "provision of cable service" most naturally refers to the amount a subscriber is charged for receiving cable service, i.e., the price per month or per channel, or for equipment required to receive the subscribed-to programming of the cable service. In our view, the rate for "the provision of cable service" is not naturally read to encompass a termination rebate. A termination event ends cable service, and a rebate on termination falls outside the "provision of cable service." Thus, the plain language of § 543 excludes the time after

provision of service--i.e., the only time when Maine's Pro Rata Act applies. Significantly, Spectrum conceded at oral argument that a state law requiring pro rata rebates for periods of service outage would not be rate regulation (but would instead be consumer protection).

To see why this narrow reading of the scope of § 543(a)(1)'s expressly preemptive ban may be warranted, it helps to focus on the difference between a hypothetical state law that would cap the amount that a cable operator could charge a customer on an ongoing monthly basis for cable service and the Maine law that is at issue here.

There is no question that § 543(a)(1)'s preemption of a state regulation of "the rates for the provision of cable service," § 543(a)(1), would encompass the hypothetical state law that sets a $50 cap. In fact, we do not understand Maine to suggest otherwise. But, Maine's termination-rebate law differs from that hypothetical monthly cap on what may be charged for cable service because it regulates only the charge that the cable operator may impose on a customer for the month in which that customer has terminated--i.e., when the cable operator no longer provides--"cable service." It is difficult to conclude that Maine's termination rebate law regulates "the rates <u>for the provision of cable service</u>," § 543(a)(1) (emphasis added), even though there can be no question that the posited measure that imposes the $50 monthly cap would. The history of the Cable Act confirms the correctness of this interpretation.

IV.

On its inception in 1948 and in the two decades thereafter, cable primarily served to retransmit over-

the-air broadcast signals, particularly in areas where such signals experienced interference. This was referred to as community antenna television (CATV): systems that connected households to a community antenna that brought broadcast reception by wire to households where a signal was otherwise unavailable. S. REP. NO. 98-67, at 5–6 (1983). These systems did not initially include additional, non-broadcast programming. H.R. REP. NO. 98-934, at 20–21 (1984). Early regulation focused on a franchising process between local governments and cable operators, which allowed the use of streets and rights of way and imposed various service requirements. S. REP. NO. 98-67, at 6–7.

During the period from the development of the first commercial cable system until the FCC's first comprehensive regulation of cable in 1972, some state and local governments prohibited cable operators from charging rates in excess of upper limits set in the franchise agreements with cable operators. MARTIN H. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY, 46 (1965); see S. REP. NO. 98-67, at 5, 7; Cable Television Ass'n v. Finneran, 954 F.2d 91, 95–96 (2d Cir. 1992). The precise nature of that rate regulation across franchising authorities and states is, however, unclear, though it appears that it focused on regulating monthly charges.[5]

At the federal level, the FCC "gradually asserted jurisdiction over" cable television beginning in 1960. United States v. Sw. Cable Co., 392 U.S. 157, 165, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). In 1968 in Southwestern Cable, the Supreme Court recognized

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[5] See note 7, infra.

that the FCC could regulate cable under its existing statutory authority, but such regulatory authority was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of [over-the-air] television broadcasting." Id. at 178. Southwestern Cable did not address the FCC's ability to regulate cable rates or to preempt state rate regulation.

Before the early 1970s, cable's primary function was still to improve access to broadcast television programming by distributing, or retransmitting, the broadcast signals via cable. See S. REP. NO. 98-67, at 6. In 1972, the FCC attempted to "define the boundaries of federal and state regulation" with its first comprehensive rulemaking for cable, and these regulations included rules regarding subscriber rate regulation. Finneran, 954 F.2d at 96; Cable Television Rep. and Ord., 36 F.C.C.2d 143, 207–10 (1972). The 1972 order adopted rules requiring local franchise authorities to have "specified or approved the initial rates which the franchisee charges subscribers for installation of equipment and regular subscriber services." 47 C.F.R. § 76.31(a)(4) (1972). The order explained that § 76.31(a)(4) applied to regulation of rates "for services regularly furnished to all subscribers" and that the proper standard was "the maintenance of rates that are fair to the system and to the subscribing public." Cable Television Ord., 36 F.C.C.2d at 209; see S. REP. NO. 98-67, at 9 (discussing FCC's 1972 Rulemaking). Although premium, or nonbasic cable programming was developing, the FCC's instruction to regulate rates in 1972 focused on the basic cable tier and excluded higher tiers with specialized programming. Cable Television Ord., 36 F.C.C.2d at 209; Clarification of

the Cable Television Rules, 46 F.C.C.2d 175, 199–200 (1974).

In 1974, the FCC determined it would preempt state regulation of rates for premium service. The FCC viewed this nascent category as any "specialized programming for which a per-program or per-channel charge is made" that was separate from "regular subscriber service" including "all broadcast signal carriage and all [the FCC's] required access channels." Clarification, 46 F.C.C.2d at 199. The FCC determined that "there should be no regulation of rates for such [specialized] services at all by any governmental level" and clarified that "for now we are pre-empting the field and have decided not to impose restrictive regulations." Id. at 199–200; see Cap. Cities Cable, Inc. v. Crisp, 467 U.S. 691, 702–703, 703 n. 9, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (explaining the FCC's preemption and exclusion from regulation of nonbasic cable service).

In 1976, the FCC changed course and determined that "deletion of Section 76.31(a)(4) [requiring local rate regulation for basic service] would be advisable." Rep. and Ord., 60 F.C.C.2d 672, 682 (1976). The FCC deleted the rule primarily due to problems for local authorities that did "not hav[e] the jurisdiction to . . . regulate rates" or that "found subscriber rate regulation to be either onerous or unnecessary." Id. at 673. The FCC explained that deletion "will enable local authorities to decide whether subscriber rates should be regulated, and will best facilitate experimentation in the types of rate controls exercised." Id. at 682.

The result was "that local authorities should be permitted to decide for themselves whether they will undertake such regulation." Id. at 683. The "regular

subscriber services" required to be regulated prior to deletion of the rule were "charges for installation, disconnection and reconnection as well as charges for broadcast signal carriage and all required access channels, including origination programming." Id. at 673 n.1.[6] Significantly, the 1976 order did not preempt state regulation of regular subscriber services. Id. at 684–85.

Following the 1976 FCC rulemaking, states continued to engage in rate regulation directed largely to monthly charges for basic service.[7]

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[6] The FCC's 1976 order deleting its 1972 regulation of rates for "services regularly furnished to all subscribers" stated in a footnote that such regulation included "disconnection" charges, Rep. and Ord., 60 F.C.C.2d at 673 n.1, which reads as follows:

> The subscriber rates whose regulation is at issue in this proceeding are rates charged for services regularly provided to all cable subscribers: that is, charges for installation, disconnection and reconnection as well as charges for broadcast signal carriage and all required access channels, including origination programming. It does not include subscriber rates for specialized programming for which a per-program or per-channel charge is made. The Commission has preempted jurisdiction of subscriber rates for such specialized programming and has determined that rates for these services should not be regulated by any governmental entity.

[7] See Cox Cable New Orleans, Inc. v. New Orleans, 594 F. Supp. 1452, 1455 (E.D. La. 1984) (addressing a franchise agreement authorizing "a Basic Service package of 31 stations" offered "for $7.95 per month"); Helicon Corp. v. Brownsville, 68 Pa.Cmwlth. 375, 449 A.2d 118, 118–120 (Pa. Commw. Ct. 1982) (addressing a local ordinance prohibiting a cable operator from charging a "monthly cable television fee in excess of the maximum rate"); Munhall v. Dynamic Cablevision, Inc., 31 Pa.Cmwlth. 575, 377 A.2d 853, 853–54 (Pa. Commw. Ct. 1977)

In the late 1970s to early 1980s, cable television continued to mature into modern cable with national programming and premium movie channels like Home Box Office ("HBO"). H.R. Rep. NO. 98-934, at 20–21. As the industry matured, the FCC's position on cable began to shift "from viewing cable as merely a threat to established broadcasters to viewing cable as a significant communications media of its own." Finneran, 954 F.2d at 96. The FCC preemption of state regulation continued to be limited to nonbasic cable services. In 1983 in In Re: Community Cable TV, 95 F.C.C.2d 1204, 1204, 1218 (1983), the FCC considered and expanded its preemption of regulation to "specialized or auxiliary cable services—primarily satellite-delivered programming—of the kind commonly provided in tiers of services offered to subscribers at a single package rate distinct from the rate charged for regular subscriber services." The FCC noted it had "preempted state regulation of non-basic program offerings, both non-broadcast programs and broadcast programs," and it concluded "we see no reason . . . to limit the scope of our

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(addressing a local ordinance permitting cable company to "charge subscribers for its services the sum of $4.95 per month"); Cablevision, Inc. v. Sedalia, 518 S.W.2d 48, 49–50 (Mo. 1974) (addressing an agreement between the cable operator and the city council that the "monthly service rate be $4.50 with no installation charge").

Massachusetts in 1971 enacted legislation requiring the state commission to "fix and establish" a "fair and reasonable rate of return from subscription rates charged to subscribers" for cable. M.G.L.A. 166A § 15 (1976) (originally enacted Nov. 16, 1971). The Massachusetts legislation initially limited the "monthly charge to subscribers" to "seven dollars" until the cable commission could determine rates and charges under the state statute. St. 1971, c. 1103, § 2 (Nov. 16, 1971).

preemption of state and local rate regulation of services not regularly provided to all subscribers." 95 F.C.C.2d at 1215, 1218; see Finneran, 954 F.2d at 97; Cap. Cities, 467 U.S. at 703; H.R. Rep. NO. 98-934, at 24. The FCC continued not to preempt state regulation of rates for basic cable service.

The Supreme Court, in 1984, upheld the FCC's jurisdiction and authority to preempt state regulation, including the regulation at issue in that case, which required cable operators "to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they retransmit by cable." Cap. Cities, 467 U.S. at 694. Capital Cities expanded the FCC's jurisdiction beyond the "reasonably ancillary" requirement in Southwestern Cable and "placed within the FCC's discretion the power to pre-empt virtually any state regulation of the cable industry." Finneran, 954 F.2d at 97.

V.

Against this backdrop, in 1984, Congress passed the statute at issue here--the Cable Communications Policy Act of 1984 ("Cable Act"), which created the first federal legislative scheme for the regulation of cable television. Cable Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984). The Cable Act implemented a "uniform national policy" of deregulation intended to "eliminate and prevent conflicting and counterproductive regulations" and encourage competition. S. REP. NO. 98-67, at 17. Preemption was no longer limited to rates for nonbasic service. It applied as well to rate regulation for the "provision of basic cable service." § 623(b)(1), 98 Stat. at 2788. The Act included the general and specific preemption provisions codified in 47 U.S.C. §§ 556(c) and 543(a).

They provide now, as they essentially did then, that "any provision of law of any State . . . or franchising authority . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded" and "[n]o Federal agency or State may regulate the rates for the provision of cable service" subject to the exception in the absence of "effective competition." §§ 556(c), 543(a)(1)–(2). "Effective competition" was so broadly defined that "97 percent of all cable systems" were exempt from rate regulation within a few years of enactment. S. REP. NO. 102-92, at 3 (1991).

The FCC was required, where there was no effective competition, to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service" and to "establish standards for such rate regulation." § 623(b)(1)–(2), 98 Stat. at 2788. For the purpose of rate regulation under this section, the FCC defined "basic cable service" in 1985 to mean "the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals . . . and the public, educational and governmental channels, if required by a franchising authority." Implementation of the Provisions of the Cable Communc'ns Pol'y Act of 1984, 50 Fed. Reg. 18,648, 18,653 (May 2, 1985). The regulation of a nonbasic service tier continued to be preempted whether or not there was effective competition. See id. at 18,649.

While the Cable Act largely deregulated basic cable service, and also preempted rate regulation for the provision of basic cable service (when cable operators faced "effective competition"), the new statute preserved state authority to adopt consumer

protection laws. See 47 U.S.C. § 552(d). Section 552 as enacted left to the states the ability to "enact[ ] or enforc[e]" consumer protection laws "to the extent not inconsistent with this title." Significantly, state "customer service requirements" were not preempted. § 632(a)–(c), 98 Stat. at 2796. According to House Report 934, these customer service requirements reserved to the states include "requirements related to interruption of service; disconnection; rebates and credits to customers; deadlines to respond to consumer requests or complaints; the location of the operator's consumer services offices; and the provision to customers (or potential customers) of information on billing or services." H.R. REP. NO. 98-934, at 79. The House report is particularly authoritative because the Senate specifically adopted the explanation in House Report 934 when it concurred in the House amendments. 130 CONG. REC. 31,871 (1984).

Pursuant to the mandate in the 1984 Act, the FCC conducted a rulemaking to address the definition of effective competition and to determine what "procedures and methodologies" state or local authorities "must follow in regulating basic cable service rates" in the absence of effective competition. Implementation of the Provisions of the Cable Communc'ns Pol'y Act of 1984, 50 Fed. Reg. at 18,654. The FCC decided to leave the specific structure and rules of rate regulation to local franchising authorities. Id. at 18,651–55. Thus, although the FCC required notice, opportunity to respond, and a formal statement for the process of rate regulation by local franchising authorities, it did not otherwise establish rules regulating rates. Id.

In the years following the Cable Act, cable rates increased substantially, leading to an amendment to the 1984 Cable Act--the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Amendments"). S. REP. NO. 102-92, at 3–8, 18–20; see Cable Television Consumer Prot. and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The 1992 Amendments maintained many of the provisions of the 1984 Cable Act but made several significant adjustments. The 1992 Amendments adopted an updated and more limited definition for "effective competition" such that many cable operators were no longer exempt from rate regulation. § 3, 106 Stat. at 1470. They extended the rate regulation allowed (in the absence of effective competition) to include a heavily subscribed tier above the most basic cable service tier if the most basic tier was not heavily subscribed. S. REP. NO. 102-92, at 63. The 1992 Amendments also required the FCC to set more detailed rules "identifying, in individual cases, rates for cable programming services that are unreasonable" and "the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable." § 3, 106 Stat. at 1468.

The 1992 Amendments also clarified the exclusion from preemption for consumer protection laws and customer service requirements. The earlier Cable Act in 1984 included a carve-out from preemption for consumer protection laws "not inconsistent with this title." § 632, 98 Stat. at 2796. The 1992 Amendments changed the language of the preemption carve-out in § 552(d)(1)[8] to preserve a state's ability to "enact[ ] or

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8 Section 552(d) was enacted as § 552(c).

enforc[e]" consumer protection laws "not specifically preempted by this title." § 8, 106 Stat. at 1484. Congress included the clarification in § 552(d)(1) to indicate "that state and local authorities retain all authority to enact and enforce consumer protection laws that they have under current law." H.R. REP. NO. 102-628, at 105–106 (1992).

The 1992 Amendments also restructured and clarified a distinct carve-out for "customer service requirements" by preserving "the establishment or enforcement of ... any State law, concerning customer service that imposes customer service requirements that exceed . . ., or that addresses matters not addressed by" the minimum standards set by the FCC. § 552(d)(2). The distinct carve-out in § 552(d)(2) was added to clarify that the "legislation allows local authorities . . . to establish and enforce laws that impose more stringent customer service requirements." H.R. REP. NO. 102-628, at 35–37. In other words, § 552(d)(2) now specifically excepted state customer service requirements from the preemption provision. With this amendment, Congress again confirmed that "customer service requirements . . . relate to interruption of service; disconnection; rebates and credits to consumers;" etc. Id. at 34.

The 1992 Amendments for the first time required the FCC to set federal minimum customer service requirements for three categories. These were "(1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds)." 47 U.S.C. § 552(b).

Pursuant to the 1992 Amendments, the FCC conducted a rulemaking to redefine "effective competition" and adopt more specific rate regulation requirements. Cable Television Act and Cable Television Sys., 58 Fed. Reg. 29,736 (May 21, 1993). The FCC's rulemaking replaced the previous light-touch rate regulations in 47 C.F.R. § 76.33 (1985), promulgated under the 1984 Cable Act, with an entire sub-chapter for "Cable Rate Regulation." Id. at 29,753. The sub-chapter specifically regulated rates in a new section, 47 C.F.R. § 76.922, which set the "maximum monthly charge per subscriber for a tier of regulated programming services offered by a cable system" in terms of the "permitted per channel charge multiplied by the number of channels on the tier, plus a charge for franchise fees." Id. at 29,756. The regulations did not regulate termination fees or termination rebates.

Four years later, Congress enacted the Telecommunications Act of 1996 ("1996 Amendments"), modifying the 1992 Amendments. Telecomms. Act of 1996, Pub. L. No. 104-104, § 301, 110 Stat. 56, 115 (1996). Relevant portions of the 1996 Amendments confined rate regulation (in the absence of effective competition) to the basic tier of cable service. § 301(b)-(c), 110 Stat. at 115–16. In 2015, the FCC promulgated a rule presuming "effective competition" in all markets unless rebutted by the local franchising authority--effectively ending rate regulation in all but two markets. 47 C.F.R. § 76.906; see Mass. Dep't of Telecomms. & Cable v. FCC, 983 F.3d 28, 32 n.1 (1st Cir. 2020).

VI.

Four aspects of the structure and legislative history support our conclusion that the preemption of "rates for the provision of cable service" does not extend to the regulation of termination rebates.

A.

First, the legislative history of the Cable Act and the FCC's regulations (evidencing the FCC's interpretation of the congressional mandate) focused on preempting monthly "rates" charged for the provision of basic cable service.[9] The legislative history of the 1984 Cable Act does not suggest a concern with, or a purpose to preempt, state regulation of termination fees or termination rebates. Nor does it suggest that the term "rates for the provision of cable service" includes termination fees or termination rebates. 47 C.F.R. § 76.922(a). The focus in the later amendments was similarly on

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[9] For example, the legislative history of the Cable Act as proposed in 1984 illustrates the definition of "basic cable service" in terms of monthly prices:

> [A]ny service tier which is separately offered and does not include the retransmission of local broadcast signals is not basic cable service, for purposes of Title VI. For instance, a single tier which includes the retransmission of local broadcast signals together with other cable services, and which is offered to subscribers for $7 per month, is basic cable service. By contrast, if a tier includes only those other cable services for $2 per month, and the subscriber must purchase a $5 tier in order to receive the retransmitted local broadcast signals, then the $2 tier is not basic cable service-even if the subscriber must "buy through" the $5 tier in order to be able to purchase the $2 tier.

H.R. Rep. NO. 98-934, at 40.

monthly rates for basic cable service and not on termination fees and termination rebates. For example, in passing the 1992 Amendments, Congress' first finding highlighted the increase in "monthly rates for the lowest priced basic cable service." § 2(a)(1), 106 Stat. at 1460.

The regulations promulgated by the FCC to ensure reasonable rates (in the absence of effective competition) similarly focused on monthly prices for basic cable service. The FCC's regulations set the "maximum monthly charge per subscriber for a tier of regulated programming services." 47 C.F.R. § 76.922(a). Copious details, factors, and requirements followed that are related to that maximum monthly charge per subscriber. See § 76.922. These FCC regulations similarly do not discuss or address termination rebates or termination fees.

Spectrum has not identified, and we have not found, any reference to preempting state regulation of termination rebates in the history of federal cable regulation. There is no reference at all to termination rebates, and the only reference to disconnection fees in the context of rate regulation was in a footnote (quoted earlier in Section IV) in the context of an FCC rule *requiring* local authorities to have "specified or approved the initial rates" charged to subscribers by a cable company "for installation of equipment and regular subscriber services" (a rule abandoned by the FCC in 1976).[10] 47 C.F.R. § 76.31(a)(4) (1972).

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[10] While the FCC did not propose to preempt termination fees, it did collect, pursuant to the congressional mandate in § 543(k), information about "(a) Rates charged for basic cable service, cable programming services, and other cable

B.

Second, the congressional silence concerning termination fees or rebates is particularly significant because Congress required regulation of rates for installation of equipment for basic cable service (in the absence of effective competition). In the 1984 Cable Act, Congress required the FCC to "regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service" (in the absence of effective competition). § 623(c)(3), 98 Stat. at 2789. As amended by the 1992 Amendments, § 543 now states, "The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for-(A) installation and lease of the equipment used by subscribers to receive the basic service tier . . . ." § 543(b)(3). Installation fees were viewed as rates "for the provision of cable service." Termination fees were not.

Relatedly, Congress did not address prices or rates for service termination even though Congress well knew service termination occurred and addressed the disposition of cable wiring "upon termination of service." 47 U.S.C. § 544(i).

C.

Third, The Cable Act established a federal preference for competition through market forces because such competition would "keep the rates for

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programming; (b) fees for converter boxes, remote control units, installation and disconnection; and (c) any other charges for equipment or service levied on subscribers." Cable Television Act and Cable Television Sys., 58 Fed. Reg. at 29,749.

basic cable services reasonable in that market without the need for regulation." H.R. REP. NO. 98-934, at 25; S. REP. NO. 98-67, at 5, 17, 22. Congress barred state regulation only where "marketplace forces would determine and control rates." S. REP. NO. 98-67, at 22. Congress acknowledged multiple potential sources of competition including "multipoint distribution services, subscription television stations, videodiscs and cassettes, master antenna television and satellite master antenna television systems, low power television stations, and direct satellite-to-home broadcast systems." Id., at 5.

Spectrum has not suggested how relatively small, pro rata termination credits would be controlled by effective competition. If anything, Maine's Pro Rata Act encourages competition by prohibiting cable companies from creating artificial barriers to switching between competitors by charging consumers beyond termination of service. See Finneran, 954 F.2d at 100 (noting how Congress' purpose "to allow market forces to control [ ] rates" was frustrated by excessive cable downgrade charges that "insulate cable companies from market forces").

D.

Fourth, Congress in the 1984 Cable Act and amendments contemplated that the states could continue to adopt and enforce "consumer protection" laws. Generally, Congress expressed a purpose to preserve state consumer protection laws, though at the same time making clear that regulation of "rates for the provision of cable service" was preempted:

> Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any

> consumer protection law, to the extent not specifically preempted by this subchapter.

§ 552(d)(1).[11] The House Committee Report in 1984 explained:

> Nothing in Title VI is intended to interfere with a state's or franchising authority's exercise of its authority to enact and enforce consumer protection laws, to the extent that the exercise of that authority is not inconsistent with Title VI. A state or franchising authority may not, for instance, regulate the rates for cable services in violation of section 623 of Title VI, and attempt to justify such regulation as a "consumer protection" measure.

H.R. REP. NO. 98-934, at 79. Maine's Pro Rata Act is a consumer protection law--it has the plain purpose of protecting consumers from paying for cable after termination of service.

Though a state's ability to adopt consumer protection laws does not extend to regulating the "rates for the provision of cable service," this provision and its history show a purpose to preserve a significant role for state consumer protection laws, such as Maine's, and favor a narrow reading of the scope of the preemption provision. It makes sense in light of the Cable Act's provision regarding "consumer protection laws" to read the scope of expressly

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[11] Section 552(d)(1) was enacted in the Cable Act as 47 U.S.C. § 552(c), which provided, with minor differences, the following:

> Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this title.

preemptive provisions in a manner that accounts for Congress' evident intent to protect state "consumer protection laws" from preemption absent their being "specifically preempted."

As noted earlier, Spectrum itself appears to concede that Maine's outage-rebate requirement, which requires cable operators to give subscribers a "pro rata credit or rebate" for service outages "for 6 or more consecutive hours in a 30-day period," Me. Rev. Stat. tit. 30-A, § 3010(1)(A), is a "consumer protection law" and so is not preempted. That concession (itself mandated by the language and legislative history of the Cable Act) is significant. If the outage-rebate measure is not preempted because it is a "consumer protection law," then it must be because such an outage-rebate requirement also is not "specifically preempted by" § 543(a). And, if that is so, then it must also follow that Maine's termination-rebate requirement in the Pro Rata Act, too, is both not "specifically preempted" by § 543(a) and is a "consumer protection law." For, while Spectrum does attempt to distinguish the two Maine rebate measures on the ground that the outage-rebate law merely guarantees that a "customer gets the month that he or she paid for," while the termination-rebate law does not, Maine's outage-rebate law applies even when the outage is not the cable operator's fault, as it applies by its plain terms whenever "service to any subscriber is interrupted." Me. Rev. Stat. tit. 30-A, § 3010(1)(A). Thus, both Maine laws mandate a rebate for non-service that is not owing to any failing on the cable operator's part. Accordingly, Spectrum's own logic for explaining why Maine's outage-rebate requirement is not preempted supports the conclusion that Maine's termination-

rebate requirement in the Pro Rata Act must also not be preempted, since Spectrum advances no argument that would permit us to find the termination-rebate law preempted if the outage-rebate law is not.

It is also not a stretch to think that Maine's limited termination-rebate law in the Pro Rata Act protects against the kind of deceptive business practices that consumer protection laws typically target. There are reasons to be concerned that consumers will not recognize that they are being required to pay as much for the days of non-service following termination as they pay for all the preceding days in which the service is provided, just as there are reasons to be concerned that consumers will not recognize that they are signing up to pay for non-service during outages in which the service is not being provided.

And the termination-rebate requirement in the Pro Rata Act is at no risk of being preempted under the general provision for state laws "inconsistent with this chapter," § 556(c), because § 552(d)(1) preserves any "consumer protection law" from preemption unless it is "specifically preempted." Because we find the Pro Rata Act is not specifically preempted under § 543(a)--and because Spectrum has advanced no other reason as to why it would otherwise be "inconsistent" with the Cable Act--we find the Pro Rata Act is not preempted under the general provision in § 556(c).

VII.

Although a few district court cases have followed the district court here,[12] the relevant cases at the

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[12] A New Jersey Board of Public Utilities (BPU) rule that is similar to, but not identical with, the Maine Pro Rata Act was found to be preempted by the Cable Act in Altice USA, Inc. v.

Circuit level either support our holding or do not contradict it. In Finneran, the Second Circuit considered whether New York could regulate rates charged "to customers wishing to downgrade to a less expensive level of cable service" by limiting such downgrade charges "to the company's actual cost." 954 F.2d at 92–93. The court determined that such downgrade fees for stepping from a higher tier of cable service to a lower tier did not constitute regulation of "rates for the provision of cable service" and were not preempted by § 543--the same statute governing rate regulation at issue in this case. Id. at 102.

In reaching that conclusion, the court noted that "Congress left regulation of complete disconnections to the states." Id. at 101. The court explained, "we think Congress meant to pre-empt only those state rules that regulate rates charged by cable companies for providing services to customers." Id. at 102. Thus, because "a reduction in service is not a provision of service, and since the FCC has not spoken clearly on the matter," the court concluded "that the Cable Act

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Fiordaliso. No. 3:19-CV-21371-BRM-ZNQ, 2021 WL 1138152, at *5 (D.N.J. Mar. 23, 2021) (unpublished); see Altice USA, Inc. v. New Jersey Bd. of Pub. Utils., No. 3:19-CV-21371-BRM-ZNQ, 2020 WL 359398, at *1 (D.N.J. Jan. 22, 2020)(explaining the factual background and granting a preliminary injunction). That case is also currently on appeal. No. 21-1791 (3d Cir. Apr 22, 2021). The district court in Altice relied heavily on the district court's decision below in this case in reaching the same result. 2021 WL 1138152, at *4–7. Similarly, a non-precedential state court decision holding that the same New Jersey BPU rule was preempted by the Cable Act indirectly relied on the decision on appeal here (through the D.N.J. decision). See In re Altice USA, Inc., No. A-1269-19, 2021 WL 4808399 (N.J. Super. Ct. App. Div. Oct. 15, 2021).

does not expressly pre-empt state regulation of downgrade charges." Id. at 100.

Spectrum attempts to distinguish Finneran as no longer good law since Congress acted to change the law. After Finneran, Congress amended the Cable Act to require that "charges for changing the service tier selected shall be based on the cost of such change," similar to the New York regulation in Finneran. § 543(b)(5)(C); 954 F.2d at 93. But Congress' action does nothing to undermine the reasoning of the court in Finneran--it simply demonstrates that Congress was persuaded to address the same problem the statute at issue in Finneran addressed, but at the federal level.

Spectrum also argues that Time Warner v. FCC, 56 F.3d 151 (D.C. Cir. 1995), supports its position. We do not find Time Warner pertinent. In Time Warner, the court addressed a provision of the Cable Act stating, "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." 47 U.S.C. § 543(d). In interpreting this provision, the FCC had determined "that the uniform rate structure provision applies not only to regulated systems, but also to systems subject to effective competition and otherwise exempt from rate regulation." Time Warner, 56 F.3d at 190. The court concluded that the exemption from rate regulation for systems facing "effective competition" exempts cable operators "from any rate regulation that the Commission or franchising authorities promulgate 'under this section [543],' " and thus set aside the FCC's decision. Id. at 191. We fail to see how that decision relates to the issues here.

Spectrum finally points to decisions addressing preemption of state regulation prohibiting charges for mobile service in whole-minute increments. The relevant federal law provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any" mobile telephone provider. 47 U.S.C. § 332(c)(3)(A). The FCC found it "clear from the language and purpose of Section 332(c)(3) of the Act that states do not have authority to prohibit [mobile telephone] providers from . . . charging in whole minute increments." Sw. Bell, 14 F.C.C. Rcd. at 19,907. But the situation here is quite different. First, whole-minute billing is directed at the continuing provision of service rather than the period after service is terminated. Second, the pertinent statutory text in § 332(c)(3) at issue there addresses "rates charged" generally, which is distinct from "rates for the provision of cable service" in § 543.[13]

VIII.

Because we decide that the Pro Rata Act is not preempted, we do not reach whether the Pro Rata Act is a "customer service requirement[ ]" exempt from preemption by virtue of § 552(d)(2). The 1984 legislative history explained that "customer service

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[13] Another case Spectrum relies on found a state law that imposed a waiting period on rate changes preempted. Cellco P'ship v. Hatch, 431 F.3d 1077, 1080 (8th Cir. 2005). But Cellco is inapplicable because it also addresses "rates charged" generally under § 332(c)(3), for cellular service providers, instead of "rates for the provision of cable service" under § 543. Id. at 1080. And the law at issue in Cellco directly regulated on-going monthly rates by forbidding changes in the terms of service, including rate changes, during a mandatory waiting period unless subscribers consented to the changes. Id. at 1079.

requirements" include both "disconnection" and "rebates and credits." H.R. REP. NO. 98-934, at 79.[14] When Congress restructured the carve-out with the 1992 Amendments, it repeated that "customer service requirements . . . relate to interruption of service; disconnection; rebates and credits to consumers;" etc. H.R. REP. NO. 102-628, at 34.[15] The Attorney General argues that the use of "requirements . . . related to disconnection" and "requirements . . . related to rebates and credits to consumers" in House Report 934 "indicates that Congress intended to permit states to enact precisely the type of legislation" that Maine has enacted. Appellant's Br. 29. In the light of our resolution of this case, we need not reach this issue.

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[14] H.R. REP. NO. 98-934, at 79 states:

> In general, customer service means the direct business relation between an cable operator and a subscriber. Customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services.

[15] H.R. REP. NO. 102-628, at 34 states:

> The 1984 Cable Act enables a franchising authority to require, as part of a franchise, provisions for the enforcement of customer service requirements. Such requirements relate to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator's consumer service offices; and the provision to customers, or potential customers, of information on billing or services.

IX.

For these reasons we conclude that the Maine law is not a law governing "rates for the provision of cable service" but rather governs a period after the provision of cable service and is a "consumer protection law" that is not preempted. The judgment accordingly is

Reversed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SPECTRUM NORTHEAST, LLC; et al., Plaintiffs,

v.

Aaron FREY, in his official Capacity as Attorney General of the State of Maine, Defendant.

1:20-cv-00168-JDL

Signed 10/07/2020

496 F. Supp. 3d 507

ORDER ON MOTION TO DISMISS

JON D. LEVY, CHIEF U.S. DISTRICT JUDGE

On March 18, 2020, the Maine Legislature enacted Public Law 2020, ch. 657, "An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber" (the "Pro Rata Law"). Spectrum Northeast, LLC, and Charter Communications, Inc. (collectively, "Charter"), assert in their complaint filed May 11, 2020 that the Pro Rata Law is preempted by federal law and seek a declaratory judgment and an injunction prohibiting Maine Attorney General Aaron Frey from enforcing the law against them (ECF No. 1). The Attorney General contends that the Pro Rata Law is not preempted and moves to dismiss Charter's complaint (ECF No. 12). A hearing on the motion to dismiss was held on July 21, 2020. For the reasons explained below, I deny the motion.

I. FACTUAL BACKGROUND

The complaint alleges the following facts, which I treat as true on a motion to dismiss. Spectrum Northeast, LLC, is a franchised cable operator that provides cable television, internet, and telephone services to customers in Maine. Charter Communications, Inc., is the parent company of Spectrum Northeast and provides certain billing and other services to Spectrum Northeast in support of its provision of cable service. Charter offers cable service to subscribers for a fixed dollar amount on a monthly basis and requires subscribers to pay in advance for the ensuing month's cable service. This is known as a "whole-month billing" policy. Consistent with this policy and with Charter's Terms of Service, a subscriber who chooses to cancel service in the middle of the billing period does not receive a rebate, but may continue to receive service for the balance of the month if he or she so elects.

On March 18, 2020, Maine's Pro Rata Law was enacted. *See* P.L. 2020, ch. 657. Section 1 of the Pro Rata Law provides that when a cable subscriber cancels her cable service more than three working days before the end of a monthly billing period, her cable provider must grant her "a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service." P.L. 2020, ch. 657, § 1 (to be codified at 30-A M.R.S.A. § 3010(1-A)). Section 2 of the Pro Rata Law requires that cable providers notify consumers of the right to proration as set forth in section 1. *Id.* § 2 (to be codified at 30-A M.R.S.A. § 3010(2-A)). Charter's whole-month billing policy

does not provide for pro rata credits or rebates and is therefore incompatible with the Pro Rata Law.[1]

II. LEGAL STANDARD

To survive a motion to dismiss, the complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 53 (1st Cir. 2013) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)). Courts apply a "two-pronged approach" to resolve a motion to dismiss. *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). First, the court must identify and disregard statements in the complaint that merely offer legal conclusions couched as factual allegations. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). Second, the court "must determine whether the remaining factual content allows a reasonable inference that the defendant is liable for the misconduct alleged." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quotation marks omitted). The court must accept all well-pleaded facts as true and draw all reasonable inferences in the plaintiff's favor. *Rodríguez-Reyes*, 711 F.3d at 52-53. Determining the plausibility of a claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 53 (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

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[1] The Attorney General agreed to postpone enforcement of the Pro Rata Law pending resolution of the motion to dismiss and Charter's motion for a preliminary injunction (ECF No. 4). ECF No. 16.

III. DISCUSSION

Charter's complaint asserts that Maine's Pro Rata Law is preempted by the Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521-573 (West 2020) (the "Cable Act"). The Attorney General contends that Charter's complaint does not state a plausible claim for relief because Maine's Pro Rata Law is not preempted by the Cable Act. Any preemption inquiry begins with the Supremacy Clause of the United States Constitution, which "mandates that federal law is the 'supreme Law of the Land.' " *Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452 (1st Cir. 2014) (quoting U.S. Const. art. VI, cl. 2). Under the Supremacy Clause, "[a]ny state law that contravenes a federal law is null and void." *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11, 6 L.Ed. 23 (1824), and *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013)). "Preemption may be express or implied." *Id.* (citing *Brown*, 720 F.3d at 63). "Express preemption occurs when congressional intent to preempt state law is made explicit in the language of a federal statute." *Id.* (citing *Grant's Dairy--Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 15 (1st Cir. 2000)).

The Cable Act contains two express preemption provisions relevant here. Title 47 U.S.C.A. § 556(c) states that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded." Additionally, 47 U.S.C.A. § 543(a)(2) provides that "rates for the provision of cable service . . . shall not be subject to regulation . . . by a State," so long as the Federal Communications Commission ("FCC") has found that the cable system providing the service is subject to effective competition. In 2015, the

FCC promulgated a regulation presuming that all cable systems are subject to effective competition. 47 C.F.R. § 76.906 (West 2020). It is undisputed that, pursuant to this regulation, the FCC has found that Charter is subject to effective competition in Maine. Thus, under § 543(a)(2) of the Cable Act, Maine may not regulate the rates that Charter charges for the provision of cable service. Accordingly, under § 556(c), any Maine statute that attempts to regulate rates for the provision of cable service is preempted by the Cable Act.

The parties dispute whether Maine's Pro Rata Law falls within the scope of the Cable Act's express preemption provisions. Specifically, they dispute whether the Pro Rata Law regulates "rates for the provision of cable service" within the meaning of § 543(a)(2) of the Cable Act. I begin by explaining the legal standards that guide my analysis of the parties' arguments.

A. Standards Governing the Analysis of Express Preemption Provisions

"Congressional intent is the touchstone of any effort to map the boundaries of an express preemption provision." *Tobin*, 775 F.3d at 452 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), and *Grant's Dairy--Me.*, 232 F.3d at 14). To determine Congress's intent, a court must begin "with the text and context of the provision itself." *Id.* at 452-53 (citing *Mass. Ass'n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 179-80 (1st Cir. 1999)). The inquiry into congressional intent is also "informed by the statutory structure, purpose, and history." *Id.* at 453 (citing *Brown*, 720 F.3d at 63, and *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st

Cir. 2011)). However, the text remains "the best evidence" of congressional intent. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, —— U.S. ——, 136 S. Ct. 1938, 1946, 195 L.Ed.2d 298 (2016) (quoting *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011)). Accordingly, where the text is sufficiently clear, the analysis begins and ends there. *See id.*

Additionally, when Congress has "legislated in a field traditionally occupied by the States," such as consumer protection, courts apply a presumption against preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)); *see also N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (collecting authorities). Accordingly, if an express preemption clause "is susceptible of more than one plausible reading" after an analysis of the statutory text, context, and purpose, "courts ordinarily 'accept the reading that disfavors pre-emption.' "[2] *Altria Grp.*, 555 U.S. at 77, 80, 129 S.Ct. 538 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005)); *see also Coventry Health Care of Mo., Inc. v. Nevils*, —— U.S. ——, 137 S. Ct. 1190, 1197-98 & n.3, 197 L.Ed.2d 572 (2017) (indicating that the presumption against preemption does not apply where Congress's intent is apparent from the

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[2] Because I conclude that the Pro Rata Law is unambiguously preempted by the Cable Act, I need not and, therefore, do not address Charter's arguments questioning the continuing vitality of the presumption against preemption.

statutory text, context, and purpose); *CSX Transp., Inc. v. Healey*, 861 F.3d 276, 286 (1st Cir. 2017) (same). The presumption against preemption applies not only when determining whether Congress generally intended to preempt state law but also when delineating the scope of an express preemption provision.[3] *See Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240; *accord Brown*, 720 F.3d at 63 (citing *Medtronic*, 518 U.S. at 484, 116 S.Ct. 2240, and *Ruthardt*, 194 F.3d at 179).

B. Maine's Pro Rata Law and the Cable Act's Express Preemption Provisions

As noted above, § 543(a)(2) of the Cable Act provides, in pertinent part, that "rates for the provision of cable service . . . shall not be subject to regulation . . . by a State," and § 556(c) provides that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to be preempted and suspended." The Attorney General contends that Maine's Pro Rata Law is not preempted for three reasons. First, he argues that the Pro Rata Law does not regulate any "rates" charged by Charter. Second, even if the Pro Rata Law regulates rates charged by Charter, he asserts that it does not regulate rates "for the provision of cable service." Finally, he contends that the Pro Rata Law does not fall within the scope of the Cable Act's preemption of state-imposed rate regulations because it is a consumer protection and customer service law

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[3] Consistent with this framework, § 552(d)(1) of the Cable Act specifically permits states to enact and enforce consumer protection laws, so long as they are not "specifically preempted" by the Cable Act's other provisions.

permitted by § 552(d). I address each argument in turn.

1. "Rate[ ] . . . Regulation"

The Cable Act does not explicitly define the word "rate" or the phrase "rate regulation." Accordingly, I assume that these words carry their plain and ordinary meaning. *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020). As relevant here, the Oxford English Dictionary defines "rate" as "[a] fixed charge or payment applicable to each individual instance of a set of similar cases" or "the amount paid or asked for a certain quantity of a particular commodity, service, etc." *Rate*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/158412?rskey=6N3pIG&result=2& isAdvanced=false#eid (last visited Oct. 6, 2020); *see also Me. Pooled Disability Tr. v. Hamilton*, 927 F.3d 52, 57 (1st Cir. 2019) (using dictionary definitions to illuminate the "ordinary meaning" of statutory language). Similarly, Merriam-Webster defines "rate" as "a charge, payment, or price fixed according to a ratio, scale, or standard," such as "a charge per unit of a public-service commodity." *Rate*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/rate (last visited Oct. 6, 2020). Consistent with these definitions, Black's Law Dictionary defines "rate" as a "[p]roportional or relative value; the proportion by which quantity or value is adjusted," or as "[a]n amount paid or charged for a good or service." *Rate*, Black's Law Dictionary (11th ed. 2019). All three dictionary definitions indicate that the word "rate" refers to the price charged for a particular quantity of a product or service.

Charter alleges that, under its whole-month billing policy, it charges subscribers a specific price per month for cable service. In other words, Charter asserts that it provides cable service at a monthly, not daily, rate. If a subscriber cancels her cable service in the middle of a monthly billing period, she does not receive a credit, rebate, or other form of refund for the rest of that billing period. Thus, Charter's alleged whole-month billing policy effectively charges a higher daily rate to subscribers who cancel their service mid-month than to subscribers who do not cancel, because Charter sells cable service in monthly increments. Maine's Pro Rata Law prohibits this outcome. Under the Pro Rata Law, if a subscriber cancels her cable service in the middle of a monthly billing period, her cable provider must grant her "a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service." P.L. 2020, ch. 657, § 1. The Pro Rata Law therefore alters the rates that Charter charges, at least for the subset of subscribers who cancel their service in the middle of any given month.

The Attorney General points out that the Pro Rata Law does not require Charter to adopt a fixed daily rate. However, the Pro Rata Law does require Charter to calculate rebates based on the number of days remaining in the monthly billing period after cancellation—or, as the Attorney General puts it, "on a daily basis." ECF No. 21 at 3 n.4. Thus, in order to comply with the Pro Rata Law, Charter must measure the quantity of service it provides in daily increments, rather than monthly increments. Further, under the Pro Rata Law, Charter must grant post-cancellation rebates or credits to ensure that subscribers who cancel their service in the middle of

a monthly billing period are charged the same daily rate as subscribers who do not cancel. In other words, the Pro Rata Law forces Charter to depart from its usual monthly rate in order to ensure that all subscribers are charged the same daily rate during any given billing cycle.[4] Thus, Charter's complaint sufficiently alleges that the Pro Rata Law regulates Charter's "rates," as that term is used in § 543(a)(2) of the Cable Act.[5] The only other court that has considered a similar law reached the same conclusion. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, No. 3:19-cv-21371-BRM-ZNQ, 2020 WL 359398, at *8 (D.N.J. Jan. 22, 2020) ("A requirement that service providers prorate bills is a type of rate regulation.").[6]

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[4] The Attorney General puts this point differently, arguing that the Pro Rata Law simply requires Charter to maintain the ratio between the amount charged and the quantity of service provided by requiring subscribers who cancel mid-month to pay only for the percentage of the month during which they received service. However, this percentage is calculated on a daily basis, as mentioned above; the Pro Rata Law prohibits Charter from calculating its "rates" by the monthly increment it has chosen. *See, e.g., Rate*, Oxford English Dictionary Online ("[a] fixed charge or payment applicable to each individual instance of a set of similar cases"). Thus, the Attorney General's argument only reinforces the conclusion that the Pro Rata Law is a rate regulation within the meaning of § 543(a)(2).

[5] Because I conclude that the Pro Rata Law plainly regulates Charter's rates, I need not address Charter's related argument that the Pro Rata Law regulates its "rate structure."

[6] The Attorney General contends that *Altice* "should not be read as an endorsement of Charter's position" because the defendants in that case did not brief the merits of the preemption issue. ECF No. 12 at 11. This point is well taken, but it does not substantively undermine the court's logic in *Altice*. Accordingly,

2. "Rates for the Provision of Cable Service"

The Attorney General contends that even if Maine's Pro Rata Law regulates rates, it does not regulate rates "for the provision of cable service" under § 543(a)(2) of the Cable Act because the Pro Rata Law only regulates Charter's rates after service is terminated—that is, the rates for service that is never provided. To support this argument, the Attorney General relies on *Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992). In that case, the court considered a state law prohibiting certain "downgrade fees" imposed upon subscribers who wished to move from a more expensive tier of channels to a lower, cheaper tier of cable service. *Id.* at 93. The court held that the state's prohibition on downgrade fees did not regulate rates "for the provision of services" under § 543(a)(2) because it is "linguistically unlikely . . . that the customer is 'provided' with cable service when services . . . are removed." *Id.* at 99. Further, the court found that prohibiting downgrade fees was consistent with the Cable Act's purpose of "allow[ing] market forces to control the rates charged by cable companies" because downgrade fees "insulate cable companies from market forces." *Id.* at 100. Thus, the court concluded that the Cable Act did not preempt the state's prohibition on downgrade fees. *See id.*

However, as Charter asserts, *Finneran* is distinguishable. The downgrade fees at issue in *Finneran* were akin to deinstallation fees, charged in addition to the cable provider's monthly rates for the

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I treat the court's decision in *Altice* as supportive authority and rely on it only for the limited proposition for which it is cited.

provision of cable service. *See id.* at 93. Because the downgrade fees and the rates for the ongoing provision of cable service were independent, the state's prohibition on downgrade fees did not directly regulate the rates charged by the cable provider at any time, whether before or after the downgrade request was made. *See id.* at 98-100. Unlike the state law at issue in *Finneran*, Maine's Pro Rata Law does not regulate a one-time cancellation or deinstallation fee but operates directly on the rate that Charter may charge for providing a certain quantity of cable service before a customer cancels service, as discussed above. Although the Pro Rata Law applies only to the month in which a subscriber cancels her cable service, its prohibition on charges for service that was not provided have the effect of prescribing a daily rate for the service that was provided before the cancellation. Thus, the complaint states a claim that the Pro Rata Law regulates the rates that Charter charges "for the provision of cable service" under § 543(a)(2).

3. "Consumer Protection" and "Customer Service"

The Attorney General contends that the scope of § 543(a)(2)'s prohibition on rate regulation is narrower than its plain language suggests when it is read in the context of the Cable Act as a whole. Because paragraphs 552(d)(1) and (2) of the Cable Act expressly permit states to enact "consumer protection" and "customer service" laws, the Attorney General argues, § 543(a)(2) was not intended to preempt state laws relating to consumer protection or customer service. I address his arguments under each statutory provision in turn.

a. "Consumer Protection"

First, the Attorney General contends that Maine's Pro Rata Law is a consumer protection law and that, as such, it does not fall within the intended scope of § 543(a)(2)'s prohibition on rate regulation. The Attorney General points out that § 552(d)(1) of the Cable Act expressly permits states to enact and enforce certain "consumer protection law[s]." However, the entire text of § 552(d)(1) provides that states may enact and enforce "any consumer protection law, *to the extent not specifically preempted*" by other provisions of the Cable Act. *Id.* (emphasis added). Thus, describing the Pro Rata Law as a consumer protection law does not aid in determining whether the Pro Rata Law is preempted by § 543(a)(2)—it simply begs the question. Because I find that Charter has sufficiently stated a claim that the Pro Rata Law regulates Charter's rates, and is therefore "specifically preempted" by § 543(a)(2), § 552(d)(1) does not change the result.

b. "Customer Service"

Second, the Attorney General argues that Maine's Pro Rata Law is a "law[ ] concerning customer service" within the meaning of § 552(d)(2) and that, as such, it is not preempted by § 543(a)(2). Section 552(d)(2) provides that "[n]othing in [the Cable Act] shall be construed to prevent the establishment or enforcement of . . . any State law[ ] concerning customer service," so long as the state law either "imposes customer service requirements that exceed the standards set by the [FCC]" pursuant to § 552(b) or "addresses matters not addressed" by those standards. Because § 552(d)(2) does not include the same preemption clause that appears in § 552(d)(1),

it is conceivable that a law could be valid under § 552(d)(2) even if it constitutes rate regulation for purposes of § 543(a)(2).[7]

The problem is that the Pro Rata Law cannot be characterized as a "law concerning customer service" for purposes of § 552(d)(2) because it does not "impose[ ] customer service requirements" on cable operators. Section 552(b) indicates that "customer service requirements . . . include, at a minimum, requirements governing (1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds)." The only one of these requirements that might plausibly allow a state to impose a proration requirement is paragraph 552(b)(3), which addresses "communications between the cable operator and the subscriber (including standards governing bills and refunds)." Although paragraph 552(b)(3) includes the phrase, "standards governing bills and refunds," it uses the phrase only as a parenthetical modifier of the primary term, "communications between the cable operator and the subscriber." *Id.* Thus, when read in context, § 552(b)(3) is limited to customer service requirements governing communications implicating bills and refunds, such as the time within which operators must issue refunds. *See* 47 C.F.R. 76.309(c)(3) (2020). It does not suggest that requirements governing the availability or structure

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[7] Because, as described below, I find that the Pro Rata Law is not a "law concerning customer service" under § 552(d)(2), I do not address the scope of any potential conflict between these two sections

of refunds qualify as "customer service requirements."[8]

Of course, as the Attorney General contends, the meaning of "customer service requirements" is not limited by the examples set forth in §§ 552(b)(1)-(3). Indeed, the phrase "at a minimum" in § 552(b) makes it plain that those examples are non-exhaustive. In the absence of further guidance from the statute, I assume that the phrase "customer service requirements" carries its plain and ordinary meaning. *City of Providence*, 954 F.3d at 31 (citing *In re Hill*, 562 F.3d 29, 32 (1st Cir. 2009)). The Oxford English Dictionary defines "customer service" as "assistance and advice provided by a company to those people who buy or use its products or services." *Customer service*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/46319?redirectedFrom=%22customer+service%22#eid1212284660 (last visited Oct. 6, 2020). Under this definition, a state law requiring cable operators to provide certain forms of assistance or advice to subscribers would "impose[ ] customer service requirements" and therefore would fall within the scope of § 552(d)(2). It is possible that

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[8] The regulations promulgated by the FCC pursuant to § 552(b)(3) support this view. In a subsection entitled "Communications between cable operators and cable subscribers," the FCC regulations prescribe the time within which cable operators must issue refund checks and credits for service. *See* 47 C.F.R. § 76.309(c)(3) (2020). Similarly, in a related context, the FCC has stated that customer service obligations under § 552 "are regulatory standards that govern how cable operators are available to and communicate with customers." Local Franchising Authorities' Regulation of Cable Operators and Cable Television Services, 84 Fed. Reg. 44725, 44737 (Aug. 27, 2019).

some laws requiring cable operators to grant credits, rebates, or refunds might meet this definition.

Further, as the Attorney General points out, the legislative history of the Cable Act supports the view that "customer service requirements" may encompass some requirements that cable operators provide rebates and credits to subscribers. Specifically, a House Report recommending the passage of the Cable Act defines "customer service requirements" as including "requirements related to . . . disconnection" of cable service as well as requirements related to "rebates and credits to consumers." H. Rep. 98-934, at 79 (1984). Because the Pro Rata Law imposes requirements related to rebates and credits upon disconnection, the Attorney General argues that it is a customer service law permitted by § 552(d)(2).

The Attorney General might prevail on this argument if the Pro Rata Law regulated cancellation fees charged in addition to Charter's ordinary rates, *see Finneran*, 954 F.2d at 101, or if it imposed mandatory rebates and credits in a manner that did not control the rates that Charter charges for cable service, such as when subscribers are accidentally overcharged or experience a lengthy service interruption. *Cf.* 30-A M.R.S.A. § 3010(1)(A) (West 2020) (requiring a cable operator to issue a pro rata credit or rebate for a service interruption of more than six hours). However, the Pro Rata Law goes well beyond these examples and directly regulates the rates that Charter may charge subscribers who cancel in the middle of a monthly billing period, as discussed above. Although the Pro Rata Law's method of regulation—a mandatory rebate—may be contemplated or authorized by § 552(d)(2), the substance that the Pro Rata Law regulates—the

increment by which a cable operator must bill for cable service—is unambiguously prohibited by § 543(a)(2), and nothing in the statutory text or legislative history of § 552(d)(2) suggests that it creates an exception to that prohibition. *See Finneran*, 954 F.2d at 101-02 (suggesting that state laws are only permitted by § 552 if they are not "rate regulations" within the meaning of § 543(a)(2)); H. Rep. 98-934 at 79.

Furthermore, the Attorney General's interpretation is at odds with the overarching purposes of the Cable Act, which was intended to "establish a national policy concerning cable communications" and to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C.A. § 521(1), (3). If the Pro Rata Law were interpreted as a "customer service" law that is permitted under § 552(d)(2) of the Cable Act, rather than a rate regulation that is prohibited by § 543(a)(2), those purposes would be undermined. States could regulate cable service rates under the guise of imposing customer service requirements, for instance, by requiring rebates and credits for different bundling and subscription selections, creating a risk of inconsistent local and regional policies and increasing the potential for confusion regarding the relationship between federal, state, and local authorities.

Accordingly, I conclude that the credit and rebate requirements imposed by the Pro Rata Law are "rate regulations" under § 543(a)(2) and not "customer service requirements" within the meaning of § 552(d)(2).

C. Summary

Maine's Pro Rata Law seeks to align cable operators' billing practices with reasonable public expectations regarding the way cable system operators should charge for cable service. *See An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber: Hearing on L.D. 2031 Before the J. Standing Comm. on Energy, Utils. & Tech.*, 129th Legis. (2020) (testimony of Rep. Seth Berry, House Chair, J. Standing Comm. on Energy, Utils. & Tech.). However, in enacting § 543(a)(2) of the Cable Act, Congress intended to ensure that "market forces," and not state governments, "control the rates charged by cable companies." *Finneran*, 954 F.2d at 100; *see also* 47 U.S.C.A. § 521(6). The Pro Rata Law runs afoul of this intent by dictating the units of time by which cable operators such as Charter may sell cable service. *See Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995) (describing Congress' intention to have market forces control rates as a "hallmark purpose" of the Cable Act). It therefore regulates "rates for the provision of cable service," which is prohibited by § 543(a)(2) of the Cable Act.

Having considered the relevant statutory text, context, and purposes, and treating the facts alleged by Charter as true as I must on a motion to dismiss, I conclude that Maine's Pro Rata Law is unambiguously preempted by §§ 543(a)(2) and 556(c) of the Cable Act. Because I do not find § 543(a)(2) to be susceptible of more than one plausible reading in the context of this case, I do not apply the presumption against preemption.

IV. CONCLUSION

For the foregoing reasons, the Attorney General's motion to dismiss (ECF No. 12) is **DENIED**.

SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SPECTRUM NORTHEAST, LLC, et al., Plaintiffs, v. AARON FREY, in his official capacity as Attorney General for the State of Maine, Defendant.	Case No. 1:20-cv-00168-JDL

FINAL JUDGMENT

This matter is before the Court on the parties' Joint Motion to Grant Summary Judgment to Plaintiffs and Enter Final Judgment ("Joint Motion"), ECF No. 33. For the reasons stated in the Joint Motion, as well as the Court's order denying Defendant's Motion to Dismiss, ECF No. 28, the Court hereby declares that Public Law 2020, ch. 657, "An Act To Require a Cable System Provider To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber," is preempted by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573. Accordingly, the parties' Joint Motion (ECF No. 33) is **GRANTED**, and it is **ORDERED** that judgment be entered in favor of Plaintiffs in this matter.

Defendant has preserved his right to appeal this judgment and associated orders, and this judgment is intended to be appealable. Defendant agrees that he will not seek to enforce, directly or indirectly, the Pro

Rata Law absent vacatur or reversal of this Court's judgment.

SO ORDERED.

Dated: November 2, 2020

/s/ Jon D. Levy
CHIEF U.S. DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 20-2142

SPECTRUM NORTHEAST, LLC; CHARTER COMMUNICATIONS, INC.,

Plaintiffs - Appellees,

v.

AARON FREY, in his official capacity as Attorney General of the State of Maine,

Defendant - Appellant.

Before
Howard, Chief Judge,
Lynch, Dyk,* Thompson, and Barron, and Gelpí
Circuit Judges.

ORDER OF COURT

Entered: February 4, 2022

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

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* Of the Federal Circuit, sitting by designation.

By the Court:

Maria R. Hamilton, Clerk

cc:

Joshua D. Dunlap, Howard J. Symons, Matthew S. Hellman, Jonathan Alexander Langlinais, Christopher C. Taub, Paul Suitter

47 U.S.C. § 521

§ 521. Purposes

The purposes of this subchapter are to—

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 543

§ 543. Regulation of rates

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition—

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the

regulations prescribed by the Commission under subsection (b); and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c).

* * *

47 U.S.C. § 544

§ 544. Regulation of services, facilities, and equipment

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

* * *

47 U.S.C. § 552

§ 552. Consumer protection and customer service

(a) Franchising authority enforcement

A franchising authority may establish and enforce—

(1) customer service requirements of the cable operator; and

(2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.

(b) Commission standards

The Commission shall, within 180 days of October 5, 1992, establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing—

(1) cable system office hours and telephone availability;

(2) installations, outages, and service calls; and;

(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

* * *

(d) Consumer protection laws and customer service agreements

(1) Consumer protection laws

Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection

law, to the extent not specifically preempted by this subchapter.

(2) Customer service requirement agreements

Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). 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 that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

47 U.S.C. § 556

§ 556. Coordination of Federal, State, and local authority

(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.

(b) State jurisdiction with regard to cable service

Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

(d) "State" defined

For purposes of this section, the term "State" has the meaning given such term in section 153 of this title.

47 C.F.R. § 76.906

§ 76.906 Presumption of effective competition

In the absence of a demonstration to the contrary cable systems are presumed: (a) To be subject to effective competition pursuant to section 76.905(b)(2); and (b) Not to be subject to effective competition pursuant to section 76.905(b)(1), (3) or (4).

Me. Stat. tit. 30-A, § 3010 (2021)

§ 3010. Consumer rights and protection relating to cable television service

This section applies to every franchisee. For purposes of this section, "franchisee" means a cable system operator that is granted a franchise by a municipality in accordance with section 3008. For purposes of this section, "cable system operator" and "cable television service" have the same meanings as in section 3008, except that "cable system operator" includes a multichannel video programming distributor as defined in 47 United States Code, Section 522(13). For purposes of this section, "originator" means a local unit of government or the entity to which a local unit of government has assigned responsibility for managing public, educational and governmental access channels.

1. Credits and refunds for interruption of service. Credits and refunds for interruption of cable television service of a franchisee must be as follows.

A. In the event service to any subscriber is interrupted for 6 or more consecutive hours in a 30-day period, the franchisee will, upon request, grant that subscriber a pro rata credit or rebate.

B. An office of the franchisee must be open during usual business hours, have a listed toll-free telephone and be capable of receiving complaints, requests for adjustments and service calls.

C. The franchisee shall provide subscribers with 30 days' advance written notice of an increase in

rates, changes in billing practices or the deletion of a channel.

1-A. Service cancellation. A franchisee must discontinue billing a subscriber for a service within 2 working days after the subscriber requests to cancel that service unless the subscriber unreasonably hinders access by the franchisee to equipment of the franchisee on the premises of the subscriber to which the franchisee must have access to complete the requested cancellation of service. A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.

* * *

2-A. Notice on subscriber bills; credits and refunds. Every franchisee shall include on each subscriber bill for service a notice regarding the subscriber's right to a pro rata credit or rebate for interruption of service upon request in accordance with subsection 1 or cancellation of service in accordance with subsection 1-A. The notice must include a toll-free telephone number and a telephone number accessible by a teletypewriter device or TTY for contacting the franchisee to request the pro rata credit or rebate for service interruption or service cancellation. The notice must be in nontechnical language, understandable by the general public and printed in a prominent location on the bill in boldface type.

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