No. 21-1539

In The
Supreme Court of the United States

SPECTRUM NORTHEAST, LLC, et al.,

Petitioners,

v.

AARON M. FREY, ATTORNEY GENERAL OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Cable Communications Policy Act of 1984 (the "Cable Act") generally prohibits states from regulating "rates for the provision of cable service." 47 U.S.C. § 543(a)(2). It also explicitly preserves the right of states to adopt consumer protection laws that are not otherwise "specifically preempted" by the Cable Act. *Id.* § 552(d)(1).

Against this backdrop, Maine passed a law (Maine's "Pro-Rata Law") requiring that after a customer cancels their monthly cable service, the cable company provide a pro-rata rebate equal to the value of the remaining portion of that month. 30-A M.R.S. § 3010(1-A). The two questions identified as presented by this case in the Petition for Writ of Certiorari are:

1. Whether the Cable Act preempts Maine's Pro-Rata Law, which requires cable companies to provide customers a pro-rata rebate after service cancellation.

2. Whether the presumption against preemption applies when considering if an express preemption clause preempts state law—an issue explicitly not addressed by the court of appeals.

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INTRODUCTION

Maine's Pro-Rata Law is a sensible consumer protection measure designed to ensure that once a customer cancels their cable service, they are no longer required to pay for that service. The law does not dictate the rates that cable companies may charge for service, but rather governs what must happen upon service cancellation, when those charges have ceased.

The First Circuit correctly rejected the claim made by Petitioners, collectively a major cable provider in Maine, that the Cable Act preempts Maine's law. The court determined, based on the plain meaning of the statute and its legislative and regulatory context, that the Cable Act's prohibition on regulation of "rates for the provision of cable service," 47 U.S.C. § 543(a)(2), does not prohibit a state from requiring cable companies to provide a rebate after service is terminated.

The petition should be denied for three reasons.

First, there is no meaningful split of authority on the first question presented, namely whether the Cable Act preempts pro-rata rebate laws. The First Circuit is the first federal court of appeals to address this question, and its decision is the sole extant federal precedent on the matter. Petitioners cite only a conflicting decision of a New Jersey intermediate state appellate court, one which is currently under review by that state's highest court.

Second, the applicability of the presumption against preemption to express preemption clauses—the second

question presented—is not implicated by this case. The First Circuit's decision rests on the plain meaning of the Cable Act, and the court made clear that it was not deciding whether or to what extent the presumption against preemption applies.

Third, the First Circuit's decision is well-supported. The applicable preemption provision refers to rates "for the provision of cable service," whereas Maine's Pro-Rata Law only applies after the provision of cable service has ceased. That interpretation is consistent with the legislative and regulatory history of the statute, which includes no suggestion that post-termination rebates are barred. In fact, both the history and Petitioners' own admissions demonstrate that Maine's Pro-Rata Law is a consumer protection law permitted by the Cable Act. *See* 47 U.S.C. § 552(d)(1). Further, Maine's Pro-Rata Law does not regulate *rates* at all, but rather only directs that cable companies, based on whatever rate they set, refund a portion of the cancellation month.

STATEMENT OF THE CASE

A. The Cable Act Delineates the Powers of States and the Federal Government to Regulate Cable Systems

Congress passed the Cable Act to "provide and delineate within Federal Legislation the authority of Federal, state and local governments to regulate cable systems." *Cable Television Ass'n of N.Y. v. Finneran*,

954 F.2d 91, 97 (2d Cir. 1992) (quoting H. Rep. No. 98-934, at 22 (1984)). It sets forth a comprehensive regulatory regime, which includes an identification of the powers of states and localities, and of the FCC. The Cable Act, for example, preserves the right of states to pass consumer protection laws, 47 U.S.C. § 552(d)(1), whereas it leaves to the FCC the power to adjudicate complaints against cable operators' failure or refusal to make channel capacity available, *id.* § 532(e)(1).

The Cable Act is also to some extent deregulatory, deferring to market forces to dictate prices. Central to this case, it provides that so long as a cable system is subject to "effective competition" as determined by the FCC,[1] then "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. . . . " 47 U.S.C. § 543(a)(2).

B. Maine Legislates to Protect Consumers from Being Unfairly Charged for Service Following Termination

In March 2010, Maine adopted a law to "reform unfair cable company billing practices" and "protect cable customers" by ensuring that "cable providers . . . pro-rate charges when a customer disconnects service." App. 2a (quoting "Testimony of Rep. Seth Berry, Before J. Standing Comm. on Energy, Utils. & Tech., Presenting

[1] The parties do not dispute, for purposes of this case, that cable operators in Maine are subject to effective competition. *See* App. 3a n.1.

LD 2031, An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber" (Jan. 28, 2020)). This "Pro-Rata Law" took effect on June 16, 2020. *See* Me. Const. art. IV, pt. 3, § 16.

Maine's Pro-Rata Law amended 30-A M.R.S. § 3010, entitled "Consumer rights and protection relating to cable television service," to require that "[a] franchisee . . . 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." 30-A M.R.S. § 3010(1-A). Therefore, rather than altering the rates that cable companies charge while cable is flowing to their customers' homes, including for what turns out to be the final month of service,[2] Maine's Pro-Rata Law only regulates what cable companies must pay back to customers *after* they disconnect service.

Some other states and jurisdictions require, or are considering requiring, cable companies to prorate cable service in some fashion, but many such laws are structurally different than Maine's Pro-Rata Law. For example, Hawaii's law requires that service charges for less than a month always be prorated, regardless of whether service is terminated. Haw. Code. R. § 16-131-23. New Jersey's law similarly requires proration not only at the termination

[2] Petitioners have never contended that they prospectively charge for partial months of service.

of service, but also at its onset. N.J. Admin. Code § 14:18-3.8(c).

C. Proceedings Below

Petitioners are collectively a cable provider that sells cable service in advance in whole-month increments in Maine except in "limited circumstances." Compl. ¶¶ 2, 27, Dkt. No. 1 (May 11, 2020).[3] While Petitioners claim that selling in monthly blocks is "integral" to their "pricing model," *id.* ¶ 28, they alleged that as recently as June 2019—just a year before Maine's Pro-Rata Law took effect—they provided a pro-rata credit to any customer who requested it after disconnection, *id.* ¶¶ 30-31.

On May 11, 2020, Petitioners filed a Complaint and Motion for a Preliminary Injunction in the United States District Court for the District of Maine. Compl.; Mot. for Prelim. Injunction, Dkt. No. 4 (May 11, 2020). The Maine Attorney General moved to dismiss. Def.'s Mot. to Dismiss, Dkt. No. 12 (June 2, 2020). On October 7, 2020, after staying preliminary injunction briefing, the district court denied the motion to dismiss, concluding that Maine's Pro-Rata Law is preempted by the Cable Act. *See* App. 52a; Order, Dkt. No. 16 (June 5, 2020). The district court thereafter granted the parties' Joint Motion for the court to enter a Final Judgment, which the parties intended to enable an appeal. *See* Joint Mot. for Summ. J., Dkt. 33 (Oct. 29, 2020).

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

After entry of that judgment, Final Order and Judgment, Dkt. No. 34 (Nov. 2, 2020), the Maine Attorney General filed his appeal, Notice of Appeal, Dkt. No. 35 (Dec. 1, 2020).[4]

The First Circuit reversed. Based on the "plain language" of the Cable Act, App. 10a, read together with the statute's "structure and legislative history," App. 23a, the court concluded that Maine's Pro-Rata Law "does not regulate 'rates for the provision of cable service,'" App. 2a. The court reasoned that rates for "the provision of cable service" do not "naturally . . . encompass a termination rebate," because termination ends cable service, App. 10a; *see also* App. 30a-31a (citing *Finneran*, 954 F.2d at 100, for its conclusion that downgrade fees are not preempted because "a reduction in service is not a provision of service").

In support of its interpretation, the First Circuit recounted significant legislative and regulatory history. That history reflects a focus on preempting rates charged for cable service, but lacks any reference at all to termination fees or rebates. App. 23a-25a. The court likewise concluded that termination rebates, if anything, promote competition, consistent with the Cable Act's "preference for competition through market forces." App. 25a-26a.

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[4] The Maine Attorney General agreed not to enforce the Pro-Rata Law absent vacatur or reversal. App. 6a n.3; Joint Mot. for Summ. J.

The First Circuit also relied on the fact that the Cable Act and its amendments "contemplated that the states could continue to adopt and enforce 'consumer protection' laws." App. 26a. The court reasoned that this explicit preservation of state power "favor[ed] a narrow reading of the scope of the preemption provision." App. 27a. The court characterized Maine's Pro-Rata Law as one such consumer protection law, and it concluded—consistent with Petitioners' own concession that requiring pro-rata rebates for lengthy service outages is a "consumer protection law" not specifically preempted by the Cable Act—that Maine's law was not specifically preempted. App. 27a-29a.

In reaching its decision, the First Circuit explicitly did not address the question of whether Maine's Pro-Rata Law is a customer service requirement that is exempt from preemption, *see* 47 U.S.C. § 552(d)(2), App. 32a, or whether the presumption against preemption applies, App. 8a. The First Circuit likewise did not address the Maine Attorney General's argument that Maine's Pro-Rata Law does not regulate any "rate" at all.

REASONS FOR DENYING THE WRIT

Petitioners purport to identify two instances of conflicting authority that support granting a writ of certiorari in this case. Neither is sufficient. The first, between the First Circuit and a New Jersey intermediate appellate court, hinges on a case currently being

briefed before that state's highest court. The second, among several federal courts of appeals, concerns an issue that the First Circuit did not address at all.

Petitioners' additional, last-ditch contention that the First Circuit's decision is so important and fatally flawed that the writ must be granted likewise falls short. The court's opinion is well-reasoned and firmly grounded in the text of the statute, and it likewise finds strong support in the Act's legislative and regulatory history.

I. The First Circuit's Decision Does Not Conflict With That of Any State Court of Last Resort

The First Circuit is the first federal court of appeals to address the question of whether the Cable Act preempts pro-rata refund statutes, and it is the only federal court decision at any level on this issue that remains good law. While Petitioners cite exactly one other case in which a federal court has ruled on whether pro-rata refund laws are preempted—*Altice USA v. Fiordaliso*, No. 3:19-cv-21371-BRM-ZNQ, 2021 WL 1138152 (D.N.J. Mar. 23, 2021)—that decision was vacated by the Third Circuit on *Younger* abstention grounds, *Altice USA v. N.J. Bd. of Pub. Utilities*, 26 F.4th 571, 579 (3d Cir. 2022). Further, the district court in that case relied heavily on, and indeed block quoted several paragraphs from, the sole other district court to address the same question: the subsequently

reversed district court decision *in this case*. *See Altice USA*, 2021 WL 1138152 at *4-*7.

Petitioners have nonetheless attempted to manufacture a meaningful split in authority, citing a conflicting decision of the decision of the New Jersey Superior Court, Appellate Division. In that case, relying on the thereafter-vacated decision in *Altice*, the New Jersey court concluded that New Jersey's pro-rata refund law was preempted by the Cable Act. *See Matter of Altice USA*, Docket No. A-1269-19, 2021 WL 4808399, at *4 (N.J. App. Division Oct. 15, 2021) ("Having reviewed [the federal district judge's] decisions . . . , we are persuaded his thorough and detailed legal analysis applies to the matter pending before this court . . . [and] we adopt [his] reasoning."). What Petitioners relegate to a footnote, however, is that the Appellate Division is an *intermediate* appellate court in New Jersey, not a "court of last resort."[5] Pet. 13 n.2. As this Court's rules suggest, such a conflict is insufficient for review on a writ of certiorari. *See* Rules of Supreme Court 10(a).

The problem with relying on the decision of an intermediate appellate court to establish a conflict in authority is illustrated by what has transpired in that case in the time since Petitioners filed their brief. In September, the New Jersey Supreme Court, the actual

[5] *See* "Appellate Division," New Jersey Courts, https://www.njcourts.gov/courts/appellate (last visited Oct. 31, 2022) ("Court appeals in New Jersey go through the Appellate Division of the Superior Court. This is an intermediate appellate court. The state Supreme Court is the highest appellate court.")

court of last resort in New Jersey, exercised its discretionary authority to review the Appellate Division's decision, and the case is currently being briefed. *See Matter of Altice USA*, 252 N.J. 60 (Sept. 13, 2022). Should the New Jersey Supreme Court ultimately agree with the First Circuit's analysis in this case, there will be no active split of authority for this Court to consider at all.[6]

Petitioners, in short, rest their case for certiorari on a prediction that there *could* be conflicting authority in the future on the question of whether states can require pro-rata rebates. Mere conjecture does not warrant this Court's exercise of its review authority.

II. The First Circuit Neither Addressed Nor Relied Upon the Presumption Against Preemption

Petitioners identify one additional conflict as a basis for certiorari. They note that a number of federal courts of appeals have diverged on the question of whether the presumption against preemption of state law applies to express preemption provisions. While the Maine Attorney General does not dispute that this is an existing circuit split, it was not addressed by the

[6] Anticipating this issue, Petitioners assert in a footnote that this Court should still grant certiorari "to resolve the important issues presented here as a matter of federal law." Pet. 13 n.2. As set forth below, this is not the rare case where the issues involved are so important as to warrant review on their own merits.

First Circuit below. Therefore, no matter how eager Petitioners are for a ruling on the issue, it does not justify granting the writ in this case.

Petitioners are correct that the Maine Attorney General argued below that the presumption against preemption applies. Of greater importance, however, is that the First Circuit explicitly chose *not* to reach the issue. Instead, the court wrote:

> 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.

App. 8a.

Petitioners urge this Court to ignore the First Circuit's own words. They claim that the court "effectively applied a presumption against preemption" by narrowly reading the Cable Act's preemption provision. Pet. 21. But that is not what the First Circuit did. The court did not narrowly read the Cable Act's preemption provision in deference to Maine's historic police powers. *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). Rather, the court engaged in a "natural[] read[ing]" of the "plain language" of the provision, one which was ultimately narrower than Petitioners urged. App. 10a-11a. The First Circuit explained that the "correctness" of that narrow reading, in turn, was supported by both the history of the Cable Act, App. 11a, and the statute's explicit preservation of a "significant role for state consumer

protection laws," App. 27a, consistent with what Petitioners themselves agreed was the appropriate interpretive approach, App. 9a ("The parties . . . agree that plain and ordinary meaning of terms, informed by the purpose and history of the Cable Act, should guide our analysis.").

On its face, far from "deepen[ing] a broader split," Pet. 4, the First Circuit neither entrenched existing precedent on the matter, nor contributed in any other way to the conflict between federal courts of appeals that Petitioners identify. Under both this Court's rules and pursuant to its general practice of not taking up issues left undecided below, the open question of the scope of the presumption against preemption does not warrant the Court's review in this case. *See* Rules of Supreme Court 10(a); *City of Austin, Tex. v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) ("This Court . . . is a court of final review and not first view, and it does not ordinarily decide in the first instance issues not decided below." (alternations omitted)); *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below.").[7]

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[7] Petitioners also contend that this issue is implicated by the case because the Maine Attorney General "will undoubtedly renew its argument" that the presumption against preemption applies. Pet. 32. But that argument puts the cart before the horse. This Court should not grant certiorari where the providence of review turns on both (1) the Court disagreeing with the First Circuit on the antecedent legal question of whether, under the Cable Act's plain meaning, Maine's Pro-Rata Law is preempted, and (2) Maine ultimately choosing to press an issue that was expressly not addressed by the court below.

III. The First Circuit Correctly Concluded that Maine's Pro-Rata Law Is Not a Regulation of "Rates for the Provision of Cable Service"

Petitioners also suggest that this Court's review is warranted simply because the First Circuit's decision addressed an important issue and is "plainly wrong." Pet. 3. Not so. The First Circuit's well-reasoned decision illustrates why under the plain language of the Cable Act, and consistent with its substantial legislative and regulatory history, Maine's Pro-Rata Law is not preempted.

As an initial matter, the alleged importance of this issue bears mention. Petitioners assert that the case risks an intolerable "patchwork" of pro-rata rebate laws nationally, and that such risk warrants granting certiorari. Pet. 23-24. This argument assumes the correctness of Petitioners' position on the merits, namely that termination rebates threaten "the uniformity the [Cable] Act envisions." Pet. 24. But as set forth above, the history of the Cable Act reveals no intent to achieve uniformity in termination rebates. To the contrary, the Act explicitly preserves the right of states to pass consumer protection laws like Maine's.

Further, pro-rata rebates are not complex or burdensome such that variance across the country is cause for concern. Providing a rebate requires adding scarcely more than some elementary math to what is already necessary when a customer cancels their service. Petitioners, in fact, provided pro-rata refunds to their customers upon request as recently as June 2019,

and they have in the years since operated under many of the pro-rata refund laws they list in their Petition, yet they have not claimed any meaningful impact on their business model or their bottom line. "Uncertainty" regarding the validity of these laws is therefore of minimal consequence. Pet. 24.

A. Maine's Pro-Rata Law does not regulate rates for the provision of cable service.

The Cable Act provides that where a cable system is subject to effective competition, "the rates for the provision of cable service . . . shall not be subject to regulation . . . by a State." 47 U.S.C. § 543(a)(2). The parties agreed before the First Circuit that the Cable Act defines neither "rates" nor "rates for the provision of cable service," such that the terms' plain meaning, "informed by the purpose and history of the Cable Act," should guide interpretation of the preemption provision. App. 9a.

The First Circuit's decision is firmly rooted in this plain-meaning-driven approach. The court reasoned that the term "provision of cable service" "most naturally refers to the amount a subscriber is charged for receiving cable service." App. 10a. A law requiring a rebate solely after a customer has terminated service—*i.e.*, once the cable provider is no longer providing that service—thus, in the court's view, does not regulate rates "for the provision of cable service" App. 10a-11a.

Lending credence to the First Circuit's approach, the Second Circuit similarly interpreted the phrase "for the provision of service" in the Cable Act in *Cable Television Association of New York v. Finneran*, 954 F.2d 91 (2d Cir. 1991). The court in that case concluded that the regulation of downgrade charges was not preempted because "a reduction in service is not a provision of service." *Id.* 100. Here, similarly, Maine's Pro-Rata Law governs not the provision of service, but rather what must happen upon the most complete of downgrades: the *cancellation* of service.

Petitioners press otherwise by way of example. They claim that if a cable company charges $50/month for cable service, and a customer cancels mid-month, Maine's Pro-Rata Law results in rate regulation because it mandates a charge of only $25 for the final month of cable service. Pet. 16-17. But Maine's law does not change what cable companies may *charge* for any given month of service. In Petitioners' example, the cable company still charges $50 for that month. All the law does require is that, once a customer has cancelled service, the cable company provide a refund for service they charged for but did not ultimately provide.

Petitioners' own admissions to the First Circuit confirm this understanding. At oral argument, Petitioners conceded "that a state law requiring pro rata rebates for periods of service outage would not be rate regulation," but rather would be a permissible consumer protection law. App. 11a; *see also* App. 28a.

Requiring pro-rata rebates after service is terminated is of the same ilk. In both circumstances, cable companies may charge what they wish for service, but they are required to provide a refund for service *not* provided. As the First Circuit put it, each "mandate[s] a rebate for non-service." App. 28a.

Petitioners' second argument-by-example fares no better. They contend that if Maine had adopted a law requiring cable companies to only charge a "pro rata rate" for the month of cancellation, it would achieve the same end as Maine's Pro-Rata Law yet undoubtedly be rate regulation preempted by the Cable Act, and therefore Maine's Pro-Rata Law must also be impermissible rate regulation. Pet. 18. This hypothetical law makes little sense. Given Petitioners bill in advance, it is not clear how a cable company would know to charge a customer for only a portion of a month before the condition that determines that charge, namely cancellation, has been met. That said, regardless of whether the hypothetical law Petitioners describe would be preempted,[8] it is simply not what Maine's Pro-Rata Law does. Rather than prospectively governing rates while service is still being provided, the law directs

[8] To be clear, and as discussed below, the Maine Attorney General contends that such a law would not be preempted rate regulation because it does not regulate rates at all. Cable companies, under the hypothetical law, would still be permitted to charge whatever monthly rate they see fit. For the final month of service, that rate would simply apply only to the portion of the month during which cable service was still being provided.

that a rebate be provided only once cable service has been terminated.[9]

Even if Petitioners' linguistic gymnastics cast the First Circuit's sound textual reasoning in doubt, the court buttressed its reasoning with a thorough recounting of the "structure and legislative history" of the Cable Act, and how it supports its plain-meaning reading of the statute. App. 23a. The court specifically noted that: (1) termination rebates are unmentioned in the legislative history of the Cable Act and its amendments, and in associated FCC regulations, App. 23a-24a; (2) Congress explicitly requires the FCC to regulate rates for *installation* of cable equipment, but includes no similar regulation of termination-related charges, App. 25a (citing 47 U.S.C. § 543(b)(3)); (3) Petitioners failed to establish how pro-rata rebates are controlled by effective competition (as the Cable Act contemplates for cable service rates), particularly given rebates, if anything, remove "artificial barriers" to switching cable providers, App. 26(a); and (4) Congress explicitly preserved the right of states to enact consumer protection laws not specifically preempted, and—consistent with Petitioners' aforementioned concession regarding outage-rebate laws—Maine's Pro-Rata Law is one such consumer protection law that

[9] Petitioners' "10% rebate after a year of service" and "$5/month every third month" examples are likewise inapposite. Pet. 19-20. In each of these examples, cable service is still being provided, whereas Maine's Pro-Rata Law applies only after a customer terminates their service.

"protects against . . . deceptive business practices" and is not specifically preempted, App. 26a-29a.

B. Maine's Pro-Rata Law does not regulate any rates at all.

While the First Circuit did not directly address the question, its decision nonetheless underscores another reason why Maine's Pro-Rata Law is not preempted. As the court observed and the parties agreed, a "rate" refers to neither a price nor a unit in isolation. Rather, it consists of the relationship between both: the amount charged for a product as defined by a particular unit. App. 9a. *See also In re Southwestern Bell Mobile Sys.*, 14 F.C.C. Rcd. 19898, 19906 (1999) ("A 'rate' has no significance without the element of service for which it applies."). Maine's Pro-Rata Law does not regulate the rate charged by cable companies—and is therefore not preempted by the Cable Act—for two reasons.

First, Maine's Pro-Rata Law does not modify the monthly rate charged by cable companies. To calculate a pro-rata rebate, the rate charged must be multiplied by the proportion of the month remaining. Cancellation halfway through the month results in a 50% refund, cancellation 2/3rds through the month results in a 2/3rds refund, and so forth. In each instance, the rate—the charge for a month's worth of cable service set by the cable company—not only remains the same, but also dictates the amount of the pro-rata rebate itself.

Second, Maine's Pro-Rata Law does not govern what cable companies may *charge* at all. By operation of the law, if and only if a customer cancels, then at that time a partial *refund* is required. And even for that month, the cable companies will have already charged the rate they saw fit.[10]

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[10] Petitioners' passing reference to regulation of "rate structure" is thus beside the point. Pet. 16-17 & n.4. In a footnote, they cite the FCC's administrative ruling in *In re Southwestern Bell Mobile Systems*, wherein the FCC determined that under the Communications Act, a prohibition on charging by the minute, rather than by the second, is preempted rate regulation. *See In re Southwestern Bell Sys.*, 14 F.C.C. Rcd. at 19898-19907. But the Communications Act lacks the "provision of service" language in the Cable Act, and it regulates a different industry. Further, billing for whole or partial minutes necessarily dictates what customers pay for cell phone service each and every month. Here, Maine's Pro-Rata Law only regulates what customers must be refunded in the final month of cable service, after the cancellation of that service.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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