No. 21-1539

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,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The First Circuit's decision eschews a plain reading of the Cable Act's preemption provisions in favor of a "narrow reading" supposedly compelled by "congressional silence" in the legislative history. App. 23a-27a. That decision conflicts not only with the conclusion of other courts that have evaluated similar laws, but also with the considered judgment of the Federal Communications Commission ("FCC") as to what constitutes prohibited rate regulation in analogous statutory contexts. The First Circuit's erroneous decision is especially troubling because, as Maine concedes, proration laws similar to Maine's Pro Rata Law have proliferated throughout the country.

This Court should grant certiorari to ensure a uniform interpretation of the Cable Act that effectuates its deregulatory purposes in accordance with its text. In doing so, the Court can also resolve the entrenched 6-6 circuit split over whether a presumption against preemption applies in the context of express preemption clauses. On both questions presented, review will confirm that courts must interpret express federal preemption provisions according to their plain language.

ARGUMENT

I. MAINE OFFERS NO PLAUSIBLE DEFENSE OF THE FIRST CIRCUIT'S RULING

As explained in the petition, the First Circuit's holding that Maine's Pro Rata Law is not preempted by the Cable Act does not withstand even minimal scrutiny. *See* Pet. 15-22. Maine's defense of that decision fares no better.

1. By requiring that Charter provide a pro rata rebate when a subscriber cancels service mid-month,

Maine's Pro Rata Law (1) prohibits Charter from selling its services in whole-month increments, and (2) mandates the daily rate for service provided prior to cancellation. *See* Me. Stat. tit. 30-A, § 3010(1-A); Pet. 15-20. For example, in the hypothetical discussed in the petition and response, the Pro Rata Law prohibits a cable company from charging consumers its chosen rate of $50 for the final month of service, and instead forces the company to charge only $25 for that final month (via a mandatory $25 rebate). *See* Pet. 18; Opp. 15. That impermissibly regulates the company's "rates for the provision of [its] cable service" under the plain text of the Cable Act. 47 U.S.C. § 543(a)(2). It is therefore preempted.

Maine's response to the hypothetical confirms why the Pro Rata Law is impermissible. In Maine's words:

> [The] law does not change what cable companies may *charge* for any given month of service. In [Charter's] 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.

Opp. 15; *see also id.* at 16-17, 19.

Maine's argument appears to be that a mandatory, after-the-fact rebate does not amount to rate regulation simply because a cable company remains free to set the pre-rebate price—even though the later rebate directly negates that price. As Maine acknowledges, that timing-based approach was embraced by the First Circuit, which held that "[a]

law requiring a rebate solely after a customer has terminated service . . . does not regulate rates 'for the provision of cable service.'" Opp. 14 (citing App. 10a-11a).

This argument cannot be right. In real life, mandating a refund of a portion of the agreed-upon purchase price necessarily *changes* the amount Charter charges for that month. The idea that a company's rates are not regulated so long as it gets to "charge" its chosen amount in the first instance, before returning a portion of that amount back to the consumer, makes no sense. Under Maine's approach, a law capping cable rates at $25 per month would be preempted, but a law allowing companies to set rates freely—yet requiring them to later refund any charge above $25—would be allowed. That authorizes precisely the sort of rate regulation that the Cable Act expressly prohibits.[1]

2. In places, Maine also seems to suggest that what matters is not the timing of the rebate, but the fact that, absent Maine's law, the customer would be forced to pay money for service that was not actually provided (due to early cancellation). Opp. 16-17 & n.9. That argument ignores the fact that Charter charges for cable service *by the month*. In the

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[1] Maine is wrong to assert (at 15) that *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1991), supports its timing-based rule. Rather, as Charter explained, *Finneran* held that regulation of downgrade fees was not preempted because those ancillary fees were not tied in any way to the monthly charge for service. *See* Pet. 19 n.5; *Finneran*, 954 F.2d at 93 (noting that downgrade charges were separate fees "for implementing a request for a change in service"). Proration laws, by contrast, directly regulate the rates cable companies charge for their service.

hypothetical above, the $50 charge covers unlimited service during the course of the month. A customer who watches TV for the first 15 days of the month before going on vacation is charged $50 for that service, regardless of whether or not he cancels the service (or unplugs the cable box) before leaving.

Maine's argument reflects that the Pro Rata Law effectively prohibits cable companies from charging by the month for the last month of service before cancellation. By requiring a rebate for a portion of that final month, Maine requires the company to charge by the day for that month. That mandatory rate structure is plainly a form of rate regulation.

Maine denies this by stating that cable companies "would still be permitted to charge whatever monthly rate they see fit." Opp. 16 n.8. But in the very next breath, Maine acknowledges that the Pro Rata Law requires that "[f]or the final month of service, that rate *would simply apply only to the portion of the month [preceding cancellation]*." *Id.* (emphasis added). This is simply another way of saying that companies *cannot* charge by the month for the final month of service.

Beyond mandating a rate structure, Maine's law also regulates the daily *price* for cable service in the final month by requiring companies to charge a prorated share of the monthly charge. Although Maine insists the law cannot be rate regulation because it "does not modify the monthly rate charged by cable companies," Maine admits the law uses a cable company's monthly rate to "dictate the amount of the pro-rata rebate." *Id.* at 18. That, in turn, mandates the daily rate a cable company must charge for the service it provides in the final month.

Take another example—a cable company that wants to charge subscribers $30 per month for service, while allowing subscribers who cancel service before the end of the month to pay $2 for each day prior to cancellation in that final month. That $2 price would violate the Pro Rata Law, which prohibits the company from charging anything more than $1 per day, the prorated monthly rate, in the final month. The fact that the daily rate is based on the cable company's chosen *monthly* rate does not resolve the problem, because the law takes that monthly rate and applies it to a different unit of service, precluding Charter from charging a higher rate. That too is rate regulation.[2]

3. Maine's laundry list (at 17-18) of additional reasons to support the First Circuit's analysis also fails.

First, Maine repeats the First Circuit's point that "termination rebates are unmentioned in the legislative history." Opp. 17. But it has no response to Charter's precedent establishing that silence in the legislative history "cannot defeat the better reading of the text." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018); Pet. 20. Here, moreover, the silence is explained by the fact that the sort of

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[2] The D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*, is instructive. 56 F.3d 151 (D.C. Cir. 1995). There, the court held that requiring cable companies to use geographically uniform rates throughout a franchise area was "clearly a form of rate regulation" prohibited by Section 543(a)(2), even though companies could *choose* what that rate would be. *Id.* at 191. Similarly, allowing Charter to select a monthly rate but then requiring it to apply that rate in a different way is rate regulation preempted under Section 543(a)(2).

mandatory pro rata rebate at issue would plainly qualify as impermissible rate regulation, for the reasons noted above. The statute is clear on its face.

Second, Maine invokes an unrelated subsection of the Cable Act that regulates cable systems that do not face effective competition. Opp. 17 (citing App. 25a; 47 U.S.C. § 543(b)). That provision has no bearing on Section 543(a)'s preemption provisions, which by their terms exempt cable systems that *are* subject to effective competition from all rate regulation.

Third, Maine reiterates the First Circuit's view that the Pro Rata Law is pro-competitive. Opp. 17. But Congress imposed a blanket prohibition on rate regulation for cable systems subject to effective competition. That prohibition applies even if a state—or a court—believes certain forms of rate regulation would be beneficial.

Finally, Maine contends the Pro Rata Law is a valid consumer protection measure. Opp. 17-18. But the statute allows for consumer protection laws only if they are "not specifically preempted," 47 U.S.C. § 552(d)(1), and Maine's Pro Rata Law *is* specifically preempted. *See* Pet. 21-22; *supra* at 1-5.

Maine emphasizes Charter's statement at oral argument that a state law requiring a pro rata rebate for periods of service outage would not be preempted. *See* Opp. 15, 17-18; App. 11a, 28a. But a rebate for a service outage is not the same as a pro rata rebate after a customer's cancellation. A service-outage rebate simply mandates a remedy in circumstances where a customer does not receive the service he contracted and paid for. Unlike Maine's Pro Rata Law, it does not alter a company's ability to select either the "amount charged" or the "particular unit of

measurement" when offering its services to the public. App. 9a (citation omitted); *see supra* at 1-5.

II. THIS CASE WARRANTS REVIEW

The First Circuit's flawed and atextual decision conflicts with the decisions of the other courts to have considered whether proration laws are preempted under the Cable Act, as well as with the FCC's view of rate regulation under related statutory schemes. This Court's review is needed to resolve the confusion on this question and to ensure the Cable Act—and other express preemption provisions—are interpreted according to their plain terms.

1. Maine does not deny that the first question presented here squarely implicates countless laws passed by states and municipalities throughout the country. As the petition explains, mandatory proration laws similar to Maine's Pro Rata Law have proliferated in recent years and will continue to spread in light of the First Circuit's decision. *See* Pet. 22-23 & n.7 (collecting examples); *see also* D.C. Mun. Reg. tit. 15, § 15-3113.3. These laws create a patchwork of regulation for cable companies operating nationwide and undermine the Cable Act's purpose of implementing a "uniform national policy" of deregulation and eliminating "conflicting" regulations. S. Rep. No. 98-67, at 17 (1983); *see also* 47 U.S.C. § 521(1). This Court should intervene to restore uniformity across the country.

Review is especially warranted given the substantial judicial confusion over how the Cable Act's preemption provisions apply to such proration laws. As the First Circuit acknowledged, its decision directly conflicts with the New Jersey Appellate Division's decision in *In re Alleged Failure of Altice*

USA, Inc., No. A-1269-19, 2021 WL 4808399 (N.J. Super. Ct. App. Div. Oct. 15, 2021), and the New Jersey federal district court's decision in *Altice USA, Inc. v. Fiordaliso*, No. 19-cv-21371, 2021 WL 1138152 (D.N.J. Mar. 23, 2021). *See* App. 29a-30a & n.12.

Maine notes that the federal district court decision was vacated on other grounds, and the New Jersey Appellate Division's decision is currently under review by the New Jersey Supreme Court. Opp. 8-10. But those proceedings do not obviate the need for certiorari. The New Jersey Supreme Court will likely agree with the textual reading set forth above and in the New Jersey Appellate Division's decision, solidifying the split with the First Circuit. Either way, though, it will not resolve the substantial confusion that courts have experienced—and likely will continue to experience—when interpreting the Cable Act's preemption provisions. That confusion will persist given the many state and local statutes impermissibly regulating rates in the same way as Maine's law. This Court's guidance is needed to clarify the proper scope of preemption under the Act.

2. Review is also warranted because the First Circuit's interpretation of the Cable Act conflicts with the FCC's view of rate regulation in analogous statutory provisions. Pet. 17 n.4. Like Sections 543(a)(1)-(2) of the Cable Act, Section 332(c)(3) of the Communications Act provides that "no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A). And, like the Cable Act provisions, Section 332(c)(3)'s prohibition on rate regulation is

designed to effectuate the statute's deregulatory purpose.[3]

Interpreting Section 332(c)(3), the FCC has held that state laws prohibiting cellular service providers from billing in whole-minute increments are a form of preempted rate regulation under the statute. *In re Southwestern Bell*, 14 FCC Rcd. at 19906-08 ¶¶ 18-20, 23. The FCC explained that Section 332's prohibition on rate regulation encompasses not just "rate levels," but also "rate structures," because "rates" are only meaningful as measured against "the services to which they are attached." *Id.* at 19906-07 ¶¶ 18-20 (citation omitted). The First Circuit's decision directly conflicts with that understanding of rate regulation by upholding Maine's law prohibiting cable companies from billing in whole-month increments, without proration.

The First Circuit attempted to distinguish *Southwestern Bell* because Section 332(c)(3) refers to "rates charged," rather than "rates for the provision of . . . service." App. 32a. But, as explained above, Maine's Pro Rata Law plainly affects the amount *charged* "for the provision of cable service" in the final month. That language thus fails to provide any

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[3] *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, 19902 ¶ 9 (1999) (emphasizing congressional policy that cellular industry "be governed by the competitive forces of the marketplace, rather than by government regulation"); 47 U.S.C. § 521(6) (identifying one of Cable Act's purposes as "promot[ing] competition" and "minimiz[ing] unnecessary regulation").

meaningful distinction between Sections 543(a)(1)-(2) and Section 332(c)(3) in this case. The First Circuit's decision improperly places Congress's deregulatory goals for the cable industry on a different footing than those for the cellular service industry. Certiorari is needed to resolve this disparity.

3. The second question presented—whether a presumption against preemption should be applied in the context of express preemption clauses—likewise warrants this Court's attention. Pet. 24-32. Maine does not contest that there is an entrenched 6-6 split among the courts of appeals on that issue; nor does Maine suggest that split is unimportant. *See* Opp. 10-11. Rightly so. Courts continue to diverge on the applicability of the presumption across a wide range of federal statutes. *See*, *e.g.*, *National R.R. Passenger Corp. v. Su*, 41 F.4th 1147, 1153 n.1 (9th Cir. 2022) (rejecting presumption in context of Railroad Unemployment Insurance Act); *Lavoie-Fern v. Hershey Co.*, No. 1:21-CV-1245, 2022 WL 2671856, at *2 (M.D. Pa. July 11, 2022) (applying presumption to find no preemption under Nutrition Labeling and Education Act); Pet. 25-28.

Rather than deny the split, Maine argues that the issue is not properly presented because the First Circuit disclaimed any need to rely on the presumption against preemption. Opp. 11 (citing App. 8a). But the First Circuit did so only after adopting a "narrow reading" of Section 543(a) to preserve a "significant role" for "state consumer protection laws, such as Maine's." App. 27a; *see id.* at 11a. That mode of analysis is materially indistinguishable from a presumption against preemption. *See*, *e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (explaining that courts have

applied a presumption "to support a narrow interpretation of" express preemption clauses in deference to "the historic primacy of state regulation" in certain areas); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 770-71 & n.9 (3d Cir. 2018) (holding that a presumption against preemption applies to claims invoking "historic police powers of the States").

The First Circuit's approach is also irreconcilable with this Court's instruction in *Puerto Rico v. Franklin California Tax-Free Trust* that when a statute "'contains an express pre-emption clause,'" courts should not "invoke any presumption against preemption but instead 'focus on the plain wording of the clause.'" 579 U.S. 115, 125 (2016) (citation omitted). After all, a "narrow reading," App. 27a, is not a plain reading. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (explaining that courts should "interpret Congress's decrees of pre-emption *neither narrowly nor broadly*, but in accordance with their apparent meaning" (emphasis added)). The First Circuit's decision thus directly implicates the second question presented.

In any event, if this Court grants review of the Cable Act question, Maine will surely argue that the presumption weighs against preemption in this case, just as it did in the district court and the First Circuit. This case thus provides a suitable vehicle for resolving not only the specific Cable Act issue presented here, but also an entrenched circuit split over the proper method of analyzing preemption provisions that appear across a vast range of federal statutes. *See* Pet. 30 & n.12. Both questions offer this Court the chance to resolve confusion and reaffirm the

crucial role of statutory text when interpreting federal preemption provisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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