No. 21-1791

In The
United States Court of Appeals for the Third Circuit

ALTICE USA, INC.,

Plaintiff-Appellee,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES, ET AL.

Defendant-Appellant,

On Appeal from the United States District Court
for the District of New Jersey
Civil Action No. 19-CV-21371

BRIEF OF PLAINTIFF-APPELLEE ALTICE USA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF JURISDICTION 4

STATEMENT OF ISSUES 4

STATEMENT OF RELATED CASES 6

STATEMENT OF THE CASE 6

I. FACTUAL BACKGROUND 7

A. The Federal Cable Act 7

B. The Board's regulations require proration of cable bills, but the Pro Rata Requirement does not apply under conditions of effective competition. 8

C. The FCC rules in 2002 that Cablevision is subject to effective competition and is therefore exempt from rate regulation. 9

D. The Board grants Cablevision's Rule Relief Order. 9

E. Altice acquires Cablevision in 2016. 10

F. Altice implements its whole-month billing policy in October 2016. 10

II. PROCEDURAL HISTORY 11

A. Agency Proceedings 11

B. District Court Proceedings 13

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. THIS IS NOT THE EXCEPTIONAL CASE WARRANTING *YOUNGER* ABSTENTION. 17

A. The Board forfeited *Younger* abstention by asking this Court to resolve the merits of the case in its preliminary injunction appeal. 19

B. The district court correctly held that abstention was inappropriate in this rate regulation dispute. 22

1. Abstention is improper under governing precedent. 22

2. The Board's arguments to the contrary are meritless. 28

II. THE BOARD'S PRO RATA REQUIREMENT IS PREEMPTED RATE REGULATION. 32

A. The text and structure of the Cable Act establish that a proration requirement is rate regulation. 32

B. New Jersey's Pro Rata Requirement regulates Altice's rates "for the provision of cable service." 38

C. Labeling the Pro Rata Requirement a "consumer protection" or "customer service" requirement cannot save it from preemption. 41

1. The Board cannot regulate cable rates under the guise of "consumer protection." 42

2. Mandatory proration is not a "customer service" requirement. 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127 (3d Cir. 2014) .....*passim*

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).....39

American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998).....33

Bonkowski v. Oberg Industries, Inc., 787 F.3d 190 (3d Cir. 2015).....33

Cable Television Ass'n of New York, Inc. v. Finneran, 954 F.2d 91 (2d Cir. 1992) 17, 39, 40

Cellco Partnership v. Hatch, 431 F.3d 1077 (8th Cir. 2005) 43, 44, 50

City of Dubuque v. Group W Cable, Inc., No. C 85–1046, 1987 WL 11826 (N.D. Iowa Feb. 25, 1987).....43

Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights, 443 N.W.2d 440 (Mich. Ct. App. 1989) 40

E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).....19

Gonzalez v. Waterfront Commission of New York Harbor, 755 F.3d 176 (3d Cir. 2014).....28

Geier v. American Honda Motor Co., 529 U.S. 861 (2000).....46

Guttman v. New Mexico, 325 F. App'x 687 (10th Cir. 2009) 20

King v. Burwell, 576 U.S. 473 (2015) 49

Mele v. Federal Reserve Bank of New York, 359 F.3d 251 (3d Cir. 2004) 4, 32

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989).....23, 24, 26, 29

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 19

Ohio Civil Rights Commission v. Dayton Christian School, Inc., 477 U.S. 619 (1986).....19

PDX North, Inc. v. Commissioner New Jersey Department of Labor & Workforce Development, 978 F.3d 871 (3d Cir. 2020), *petition for cert. filed*, 89 U.S.L.W. 3328 (U.S. Mar. 19, 2021) (No. 20-1327) 28, 29, 30, 31

In re Philadelphia Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010) 49

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002).....46

Samantar v. Yousuf, 560 U.S. 305 (2010) 50

Spectrum Northeast LLC v. Frey, 496 F.Supp.3d 507 (D. Me. 2020).....37, 43, 47

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 46

Sprint Communications, Inc. v. Jacobs, 571 U.S. 69 (2013).....*passim*

Standard Insurance Co. v. Morrison, 584 F.3d 837 (9th Cir. 2009).....46

Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151 (D.C. Cir. 1995) 36

Trainor v. Hernandez, 431 U.S. 434 (1977).....28

United States v. Jackson, 964 F.3d 197 (3d Cir. 2020) 32

United States v. Smith, 751 F.3d 107 (3d Cir. 2014).....19

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002).....31

Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) 20

Windstream Nebraska, Inc. v. Nebraska Public Service Commission, No. CI-10-2399, 2011 WL 13359491 (Neb. Dist. Ct. June 9, 2011) 37

Winston by Winston v. Children & Youth Services of Delaware County, 948 F.2d 1380 (3d Cir. 1991) 21

Wyeth v. Levine, 555 U.S. 555 (2009) 46

STATUTES

47 U.S.C. § 332(c)(3)(A) 36

47 U.S.C. §§ 521 *et seq.* 7

47 U.S.C. § 543(a)(1) 32, 43

47 U.S.C. § 543(a)(2) 8

47 U.S.C. § 543(d) 36

47 U.S.C. § 543(f) 45

47 U.S.C. § 544(a) 7

47 U.S.C. § 552(b) 48

47 U.S.C. § 552(b)(3) 48

47 U.S.C. § 552(d)(1) 42, 44, 46

47 U.S.C. § 552(d)(2) 48

47 U.S.C. § 556(c) 8

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1406 40

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 36

N.J. Stat. Ann. § 48:5A-51 27

N.J. Admin. Code § 14:18-3.8(c) 5, 7, 8

N.J. Admin. Code § 14:18-16.7 8

N.J. Admin. Code § 14:18-16.7(a)(1) 8, 34, 42

LEGISLATIVE MATERIALS

H.R. Rep. No. 98-934, pt. IV (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655 ..... 43, 49

ADMINISTRATIVE RULINGS

In re Amendment to the Commission's Rules Concerning Effective Competition, Report and Order, 30 FCC Rcd 6574 (2015).....9

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).....36, 37

In re Truth-in-Billing & Billing Format, Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 (2005), *vacated on other grounds, National Ass'n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) 37

OTHER AUTHORITIES

47 C.F.R. § 76.309(c).....48

In re Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1 et seq., Docket No. A-001269-19 (N.J. App. Div.).....6

Altice USA, Inc. v. New Jersey Board of Public Utilities, No. 20-1773 (3d Cir.).....6, 20

Brief for Respondents, *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (No. 88-348), 1989 WL 1127627.....24

A.E. Kahn, *The Economics of Regulation* (1993 ed.).....33

Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/rate (last visited Aug. 19, 2021) 33

N.J. Super. Ct. App. Div. R. 2:9-7.....12

Oxford English Dictionary Online, https://www.oed.com/view/Entry/158412 (last visited Aug. 19, 2021).....33

Oxford English Dictionary Online, https://www.oed.com/view/Entry/46319 (last visited Aug. 19, 2021).....47

INTRODUCTION

Congress made the judgment in the Federal Cable Act that where – as is undisputed here – a cable television provider faces effective competition in the marketplace, a state may not regulate the rates for cable service. The Cable Act also preempts any state law that is inconsistent with that Act. The district court correctly held that the New Jersey Board of Public Utilities' ("the Board's") Pro Rata Requirement regulates the rates for cable service and is therefore preempted by the Cable Act. Every other tribunal to have addressed a proration regulation has reached the same conclusion. The district court's judgment should be affirmed.

Altice structures its rates for cable service in a familiar way: it sells its service by the month (the "whole-month" billing policy). Subscribers in New Jersey agree to pay for a month's worth of cable service at the start of their billing cycle. Once the month begins, subscribers are entitled to receive service for that entire month, but under the terms of service they do not receive a partial refund if they cancel their service mid-month. Altice's rates are like that of many other products and services. Just as with, say, a ticket to a Springsteen concert, the price of the ticket entitles the customer to see the entire concert, but fans do not get a prorated refund if they choose to leave at intermission.

Altice chooses to sell its service on a monthly basis for numerous reasons. Doing so help keeps Altice on equal footing with its many non-cable competitors

(Dish, Netflix, Amazon Prime, etc.) who also sell their service by the month. It limits losses from scenarios where a customer subscribes to the service to watch a particular program, like the *Friends* reunion show, and then seeks to cancel the service after only a few days. And a monthly rate generally keeps downward pressure on Altice's rates for all customers.

The Board's Pro Rata Requirement fundamentally alters Altice's rates for cable service. Under the Board's rule, cable providers must allow a subscriber to cancel service mid-month and pay only for the number of days the customer wishes to use the service. As the district court explained, the Pro Rata Requirement is rate regulation because it bars Altice from selling its service by the month, and it instead forces Altice to sell its service for the particular number of days that the subscriber chooses. Moreover, the Board's rule dictates that Altice must offer that daily rate as a pro rata fraction of its monthly rate, and not some higher amount to account for the shorter subscription period. In short, the Pro Rata Requirement requires Altice to charge a daily rate rather than its preferred monthly rate, and it requires Altice to peg its daily rate for cable service to that monthly, "bulk" rate. That is rate regulation.

The district court properly so held, and the Board has little to say in opposition to that preemption ruling. The Board largely argues that proration is not rate regulation because it prevents customers from paying for a service that they no longer receive, but that is not the case. Customers who cancel service mid-month

continue to receive service until the end of month. New Jersey's law reflects a policy preference for Altice and other cable operators to offer a prorated daily rate in addition to their chosen monthly rate, so that customers can cease receiving and paying for service mid-month if they wish. But Congress made the decision that where there is effective competition in the market, it is market forces that should determine the viability of a monthly rate, not state regulators. If New Jersey required a supermarket that sold six-packs of soda for $6 to sell individual cans for $1 each rather than $1.50, that would clearly be rate regulation. And that is exactly what the Board seeks to do here.

Rather than focus on the preemption issue, the Board's primary argument on appeal is that this Court should abstain from hearing this dispute at all. But the Board forfeited that argument: When the Board appealed earlier from the preliminary injunction entered below, it expressly did *not* argue abstention and instead asked this Court to rule on the merits question. Under well-settled precedent from the Supreme Court and this Court, the Board cannot now ask this Court to abstain from deciding the preemption question that it previously asked this Court to resolve.

In any case, as the district court correctly held, this is not the rare case that warrants abstention. Under the governing Supreme Court case law (which the Board almost completely ignores) and this Court's precedents, this case has all the hallmarks of a dispute that is properly heard in the federal courts. Were the Court

to find abstention warranted here, it would close the federal courthouse doors to a wide swath of preemption challenges that have traditionally been the stuff of federal cases. This Court should exercise its jurisdiction and hold that New Jersey's Pro Rata Requirement is preempted.

STATEMENT OF JURISDICTION

In the proceedings below, Plaintiff-Appellee Altice USA, Inc. filed claims alleging that the New Jersey Board of Public Utilities' Pro Rata Requirement is preempted by federal law. JA82, 105–06 (Amended Complaint). The district court therefore had federal question jurisdiction pursuant to 28 U.S.C. § 1331. Defendant-Appellants New Jersey Board of Public Utilities, et al. appeal from the district court's order granting Altice's motion for judgment on the pleadings, a final appealable order. *See Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir. 2004). The Court therefore has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Federal Cable Communications Policy Act of 1984 ("Cable Act") prohibits states from regulating a cable provider's "rates for the provision of cable service" if the Federal Communications Commission ("FCC") determines that the provider is subject to effective competition in the state. It is undisputed that cable

providers in New Jersey face effective competition and that New Jersey is therefore preempted from regulating rates for cable service.

Plaintiff-Appellee Altice USA, Inc. ("Altice") operates as a cable provider in New Jersey. Altice sells its cable service by the month, and Altice subscribers agree to pay for cable service in monthly installments. Altice does not offer a daily rate for cable service, and it does not provide prorated rebates for subscribers who cancel their cable service mid-month.

New Jersey Administrative Code § 14:18-3.8(c) requires cable providers' bills to be "prorated as of the date of the initial establishment and final termination of service." This Pro Rata Requirement effectively requires Altice to offer a daily rate for cable service to subscribers who cancel mid-month after agreeing to buy a month of cable service, and it requires Altice to calculate that daily rate as a prorated fraction of its monthly rate. In 2011, Altice's predecessor asked Defendant-Appellant New Jersey Board of Public Utilities (the "Board") to acknowledge that the Pro Rata Requirement no longer applied by operation of federal law. The Board granted the requested relief but later held that Altice's monthly billing practice violated N.J. Admin. Code § 14:18-3.8(c). The issues presented in this appeal are:

1. Whether abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is required when the plaintiff initiated the proceedings by seeking relief from the state agency based on the preemptive effect of federal law.

2. Whether a requirement to prorate charges for cable service constitutes a regulation of "rates for the provision of cable service" under the Cable Act.

STATEMENT OF RELATED CASES

The New Jersey Board of Public Utilities previously appealed from the district court's order preliminarily enjoining enforcement of the Board's Pro Rata Requirement. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, No. 20-1773 (3d Cir.). In this appeal, the Board asked this Court to reverse the judgment of the district court and hold that its Pro Rata Requirement is not preempted by federal law. *Id.*, ECF No. 19. The Board voluntarily dismissed this appeal after the district court granted judgment on the pleadings in Altice's favor.

Altice USA, Inc. filed a protective appeal from the Board's order to the New Jersey Appellate Division—a prerequisite to seeking a stay of the Board's order so that Altice could pursue its claims in federal court. The proceedings before the Appellate Division remain pending. *See In re the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1 et seq.*, Docket No. A-001269-19 (N.J. App. Div.).

STATEMENT OF THE CASE

Altice provides cable television service in New Jersey. JA82 (Amended Complaint). Altice is the successor in interest to Cablevision Systems Corporation

("Cablevision"). *See* JA83 (Amended Complaint), 223 (Board Cease & Desist Order). The Board is the state agency charged with administering the New Jersey Cable Television Act and regulating cable operators. JA85 (Amended Complaint). Among other things, the Board's regulations purport to regulate the increment of time for which cable operators may offer cable service. Under Section 14:18-3.8(c) of the Board's rules, cable operators may bill customers on a monthly basis, but "initial and final bills shall be prorated as of the date of the initial establishment and final termination of service." N.J. Admin. Code § 14:18-3.8(c). This case began in 2011 when Cablevision petitioned the Board to recognize that the Pro Rata Requirement is preempted by federal law. JA235.

I. FACTUAL BACKGROUND

A. The Federal Cable Act

The Federal Cable Communications Policy Act of 1984 and its subsequent amendments ("the Federal Cable Act" or "Cable Act") establish a national framework for the regulation of cable operators, cable services, and cable systems. *See* 47 U.S.C. §§ 521 *et seq.* The Cable Act limits local and state regulatory authority over cable operators, systems, and services: "Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the Cable Act. *Id.* § 544(a). Of particular relevance to this case, "[i]f the [FCC] 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 . . . a State." *Id.* § 543(a)(2). State laws "inconsistent with this chapter shall be deemed to be preempted and superseded." *Id.* § 556(c).

B. The Board's regulations require proration of cable bills, but the Pro Rata Requirement does not apply under conditions of effective competition.

Section 14:18-3.8(c) of the Board's rules permits cable television companies to charge for service in prescribed intervals—monthly, quarterly, semi-annually or annually. The rule permits advanced billing, but it requires companies to prorate service in the event a subscriber terminates service. "Unless otherwise provided for in the applicable filed schedule of prices, rates, terms and conditions, initial and final bills shall be prorated as of the date of the initial establishment and final termination of service." N.J. Admin. Code § 14:18-3.8(c).

The Board's regulations expressly acknowledge that, under the Cable Act, many of its rules do not apply to cable operators that are subject to effective competition. N.J. Admin. Code § 14:18-16.7 includes a list of rules that "may no longer apply to [a cable] system" once the FCC finds that it is exempt from rate regulation. Effectively recognizing that proration is a form of rate regulation, the Board's Pro Rata Requirement is the very first regulation on that list. *See id.* § 14:18-16.7(a)(1) (citing N.J. Admin. Code § 14:18-3.8).

C. The FCC rules in 2002 that Cablevision is subject to effective competition and is therefore exempt from rate regulation.

In a series of orders beginning in 2002, the FCC determined that Cablevision is subject to effective competition in 162 community units, comprising 161 of its franchised municipalities in New Jersey. *See* JA119 (Cablevision Petition for Relief).

In 2015, the FCC adopted a nationwide presumption that cable providers are subject to effective competition, and the Board has never sought to rebut that proposition in New Jersey by making the requisite filing with the Commission. *In re Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574 (2015) (codified at 47 C.F.R. § 76.906). The Board is therefore prohibited from regulating Altice's rates for the provision of cable service.

D. The Board grants Cablevision's Rule Relief Order.

In May 2011, Cablevision – Altice's predecessor – sought relief from the Board's cable regulations pursuant to N.J. Admin. Code § 14:18-16.7. JA235. Cablevision requested that "the Board find, pursuant to Section 14:18-16.7 of the Board's regulations, that the FCC has found the Systems subject to effective competition and that the Systems are therefore no longer subject to the identified regulatory obligations." JA248. Among those regulatory obligations, Cablevision expressly sought relief from N.J. Admin. Code § 14:18-3.8 and its requirement to prorate cable bills. JA239.

In September 2011, the Board granted Cablevision's request for relief from N.J. Admin. Code § 14:18-3.8 without reservation. JA117. Under the express terms of the Board's "Rule Relief Order," the Board broadly "[found] that Cablevision has satisfied the requirements of this rule relief provision and [granted] relief of N.J.A.C. 14:18-3.8," JA124, which effectively exempted Cablevision from the Pro Rata Requirement.

E. Altice acquires Cablevision in 2016.

In 2015, Cablevision and Altice sought the Board's approval for Altice to acquire control of Cablevision. The Board approved the merger in May 2016 with a Stipulation of Settlement, which in part required Altice to abide by "applicable" Board requirements. JA144.

F. Altice implements its whole-month billing policy in October 2016.

Altice sells and bills subscribers for cable service in advance and by the month. In October 2016, Altice implemented this whole-month billing policy across its twenty-one-state footprint, including New Jersey. JA170 (Declaration of Altice Vice President). Altice subscribers agree to pay in advance for a month's worth of service. When customers notify Altice that they intend to terminate service in the middle of a monthly billing cycle, terminating customers receive service through the balance of their monthly, prepaid cycle, but they do not receive prorated refunds

(with limited exceptions for extraordinary circumstances). *Id*. Altice then terminates service at the end of the then-current billing period. *Id.*

The whole-month billing policy puts Altice on equal footing with its competitors – who do not offer prorated refunds and are not subject to the Board's Pro Rata Requirement – including satellite competitors such as DIRECTV and DISH, as well as streaming video services like Amazon Prime, Hulu + LiveTV, Netflix, and SlingTV. JA170–71 (Declaration of Altice Vice President). Billing in monthly increments decreases Altice's costs and gives it more predictable revenue. JA170.

II. PROCEDURAL HISTORY

A. Agency Proceedings

As noted above, Altice's predecessor-in-interest Cablevision successfully obtained the Rule Relief Order from the Board in 2011, which included relief from the Pro Rata Requirement, and accordingly implemented its whole-month billing policy in 2016. Nonetheless, on December 18, 2018, the Board issued an order to show cause alleging that Altice's whole-month billing policy violated the Rule Relief Order and the Merger Order. JA178. The Board issued this order despite the fact that it had granted Cablevision relief from the Pro Rata Requirement years earlier. Altice filed an answer and the New Jersey Division of Rate Counsel submitted comments. JA184, 201.

On November 13, 2019 – more than three years after Altice implemented the whole-month billing policy, and following substantial engagement between the Board and Altice—the Board issued a cease and desist order concluding that Altice violated the Rule Relief Order, the Merger Order, and N.J. Admin. Code § 14:18-3.8 by not prorating subscribers' final cable bills. JA223. The Board ordered that Altice, *inter alia*, (1) begin prorating consumer monthly bills; (2) make a $10,000 contribution to the Altice Advantage Internet program – a program Altice initiated pursuant to the Board's Merger Order; (3) conduct an "audit of its customer billing records" and report to the Board the names and account numbers of New Jersey consumers billed pursuant to the whole-month billing policy; and (4) "issue refunds to each customer" affected by the policy since the policy came into effect in 2016. JA230–31.

On November 26, 2019, Altice responded by filing a protective appeal with the New Jersey Appellate Division. Under New Jersey law, filing such an appeal is required for a party to seek a stay of the Board's order. *See* N.J. Super. Ct. App. Div. R. 2:9-7 (stating that a motion for a stay is to be filed "on or after" the filing of a notice of appeal). On the very same day, Altice filed a motion to stay the Board's order with the Board, which the Board denied. JA264.

B. District Court Proceedings

On December 13, 2019, Altice filed suit in the district court for the District of New Jersey seeking injunctive and declaratory relief against the Board and its Commissioners. JA47, 81. Altice also filed a motion for preliminary injunctive relief and a temporary restraining order to prevent the Board from enforcing its cease-and-desist-order against Altice. In opposition, the Board argued that the district court should abstain from hearing the case and that the Board's Pro Rata Requirement was not preempted.

On January 29, 2019, the district court granted Altice's motion for a preliminary injunction to prevent the Board's Commissioners from enforcing the cease-and-desist order during the pendency of litigation. JA283. In reaching its conclusion, the district court determined that Altice was likely to prevail on the merits of its preemption argument. JA16. The district court held that "the Cable Act prohibits states from regulating 'the rates for the provision of cable service,' if the FCC finds that 'the cable system is subject to effective competition.'" JA16. The district court further held that "[a] requirement that service providers prorate bills is a type of rate regulation" that is preempted by the Cable Act because it requires Altice to bill subscribers "based on the exact dates of service." JA16–17.

The Board filed a motion for reconsideration, which was denied on March 10, 2020. The Board then appealed from the district court's preliminary injunction.

JA286. In its appeal, the Board abandoned its abstention argument and argued solely that the Federal Cable Act does not preempt its Pro Rata Requirement. *Id*.

Altice subsequently moved for judgment on the pleadings, which the district court granted, JA25–36, reasoning that the Board's Pro Rata Requirement "constitutes an impermissible regulation of Altice's rates for the provision of cable service" because it had "'the effect of prescribing a daily rate for the service that was provided before the cancellation,'" JA32. After the district court entered judgment in Altice's favor, the Board filed a notice of appeal from the district court's final judgment. JA286. This Court then consolidated the Board's appeal from the preliminary injunction order with its appeal from the final judgment below. The Board subsequently moved to dismiss its appeal from the preliminary injunction order.

SUMMARY OF ARGUMENT

The district court correctly held that Altice's preemption claims do not present the kind of extraordinary dispute that warrants abstention. It further correctly held on the merits that New Jersey's Pro Rata Requirement regulates "rates for the provision of cable service" and is therefore "unambiguously preempted." JA32. That conclusion follows from the text and the structure of the Cable Act.

I. The Board's *Younger* argument is forfeited and, in any case, meritless. The Board abandoned its *Younger* argument when it appealed the district court's

preliminary injunction solely on the merits. Under long-standing precedent from the Supreme Court and this Court, the Board cannot ask this Court to abstain from deciding the very preemption question that it previously asked this Court to decide.

Regardless, this matter has all the hallmarks of a preemption dispute over rate regulation that is properly heard in federal court. It is occasioned by the Board's disagreement with Altice's contention that New Jersey's Pro Rata Requirement is inconsistent with the Federal Cable Act's prohibition on rate regulation. While the Board has manifested its disagreement by issuing a belated cease and desist order, this dispute is not akin to a criminal action initiated by the State. To the contrary, the Supreme Court has held that rate regulation cases like this one are not appropriate for abstention. And, as the Board does not dispute, Altice could not be criminally charged for the conduct at issue here; nor did the Board impose any sort of criminal penalty on Altice. The Court should therefore reject the Board's demand that the federal courts be closed to the rate regulation and preemption questions this case presents, and that have traditionally been a staple of federal litigation.

II.A. As the district court held, New Jersey's Pro Rata Requirement has "'the effect of prescribing a daily rate for the service.'" JA32 (quoting *Spectrum Ne. LLC v. Frey*, 496 F.Supp.3d 507, 514 (D. Me. 2020)). The Cable Act does not define "rate," but the ordinary and undisputed meaning of "rate" is a given price for a given quantity. The Pro Rata Requirement regulates Altice's rates by prohibiting Altice

from offering its service by the month and requiring Altice to instead offer subscribers a daily rate for cable service at a prorated price specified by New Jersey. That is rate regulation. Moreover, the Cable Act expressly treats regulation of "rate structure" as a kind of rate regulation, and the Pro Rata Requirement regulates Altice's rate structure.

New Jersey argues that its regulation does not regulate rates because it does not alter the ratio between price and quantity (*i.e.*, the number of dollars charged per day) applicable to the monthly service charge. But that admission in fact demonstrates why the Pro Rata Requirement is a form of rate regulation and therefore preempted. Requiring Altice to charge the equivalent of its monthly rate for daily service *is* regulating Altice's rates: Altice might well choose to charge a different rate for daily service if it decided to offer service on a daily basis. Further confirmation that the district court is correct comes from the fact that every tribunal to have considered the issue has held that proration is a form of rate regulation. New Jersey offers no persuasive rebuttal to this uniform line of persuasive authority.

B. The Pro Rata Requirement also regulates Altice's rates "for the provision of cable service." Altice's subscribers agree to purchase cable service in monthly—not daily—installments at a set monthly rate. The same goes for a subscriber's final month of service, and the Pro Rata Requirement directly regulates Altice's standard monthly charge for that final month of service. New Jersey's

reliance on *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992)—a case about extra fees for downgrading service, not cable rates—is misplaced and in fact only shows why the district court was correct.

C. New Jersey's final argument is that the Pro Rata Requirement cannot be rate regulation because the Cable Act elsewhere permits states to adopt "consumer protection" and "customer service" requirements. This argument is deeply misguided and would make a virtual dead letter out of Cable Act's express provisions preempting rate regulation by states. The text, structure, and purposes of the Cable Act show that states may not regulate rates under the guise of "consumer protection" or "customer service." And the district court recognized, interpreting N.J. Admin. Code § 14:18-3.8(c) as a customer service law would undermine the purposes of the Cable Act. JA34–36.

For all these reasons, this Court should affirm the judgment of the district court.

ARGUMENT

I. THIS IS NOT THE EXCEPTIONAL CASE WARRANTING *YOUNGER* ABSTENTION.

***Standard of Review*:** The Court exercises plenary review when reviewing a district court's decision on *Younger* abstention. *See, e.g.*, *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 132 (3d Cir. 2014).

"In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court

proceeding involves the same subject matter." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989) ("*NOPSI*")). In fact, the Supreme Court and this Court have long held that federal courts have a "virtually unflagging" obligation to hear cases within their jurisdiction. *Id.* at 77; *ACRA Turf Club*, 748 F.3d at 138.

Younger abstention is a narrow exception to this rule, and it applies only to three types of proceedings: (1) on-going state criminal prosecutions; (2) civil enforcement proceedings that are akin to a criminal prosecution in important respects; and (3) civil proceedings involving orders uniquely in furtherance of a state court's ability to perform its judicial functions. *See Sprint*, 571 U.S. at 78; *ACRA Turf Club*, 748 F.3d at 136–37. The BPU argues only that the second category is at issue here. BPU Br. 12, 17–18.

This Court should affirm the district court's decision not to abstain from hearing this case. Not only has the Board forfeited its abstention argument, but this rate regulation dispute is squarely outside the narrow band of civil cases for which the Supreme Court has said Younger abstention is appropriate. The Board's view of abstention would also dramatically narrow federal courts' review of federal preemption claims, including in challenges to state agency orders where the Supreme Court has expressly held that a federal cause of action is available. The Court should

therefore reject the Board's attempt to avoid clear federal jurisdiction over this preemption claim.

A. The Board forfeited *Younger* abstention by asking this Court to resolve the merits of the case in its preliminary injunction appeal.

The Board's abstention argument fails at step one because the Board forfeited the issue when it asked this Court to review the district court's preliminary injunction ruling solely on the merits. As this Court has held many times, "[a] party may not litigate on [a] . . . subsequent appeal issues that 'were not raised in [the] party's prior appeal.'" *United States v. Smith,* 751 F.3d 107, 122 (3d Cir. 2014) (quoting *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 203 (3d Cir. 2004)).

That general principle of forfeiture applies with special force in the context of abstention, where it is well-settled that once a state has asked a federal court to resolve an issue, it cannot later ask that federal court to abstain from resolving it. As the Supreme Court has explained, abstention is inappropriate after the "State [has] expressly urged [the] Court . . . to proceed to an adjudication of the merits." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986); *see also Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 480 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."); *E.B. v. Verniero*, 119 F.3d 1077, 1092 n.13 (3d Cir. 1997) (declining to resolve abstention question where state pressed only merits question on appeal). Accordingly, when a

state fails to raise *Younger* abstention in a prior appeal and chooses instead to pursue a disposition on the merits, it forfeits *Younger* abstention in any subsequent appeal in the same dispute. *See Walnut Props., Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988) ("If the City wished to challenge the district court's refusal to abstain, it should have done so at the time of the original appeals."); *Guttman v. New Mexico*, 325 F. App'x 687, 693 (10th Cir. 2009) (abstention argument waived when not raised in prior appeal).

That is precisely what the Board has done here. After the district court granted Altice's motion for preliminary injunction, the Board appealed solely on the merits: that its actions were not preempted by federal law. *See Altice USA, Inc. v. N.J. Bd. of Public Utils.*, No. 20-1773 (3d Cir.). The Board's merits brief could not have been clearer that it was not asking this Court to reverse on abstention grounds. The Board never argued abstention and it expressly asserted that "[t]he only question this case presents is whether federal law allows New Jersey" to require proration. *Id.*, ECF No. 19 at 1–2. The Board's reply brief on appeal likewise exclusively argued the merits of preemption and did not ask this Court to abstain from hearing the dispute. Indeed, when Altice sought a stay of the preliminary injunction appeal to allow the district court to resolve Altice's motion for judgment on the pleadings, the Board urged the Court to proceed to decide the preemption question without delay. *See id.*, ECF No. 27 at 7–8.

Having asked this Court to resolve the federal question presented by this case, it cannot now insist that the Court abstain from resolving it. For example, in *Winston ex rel. Winston v. Children & Youth Services of Delaware County*, this Court held that Pennsylvania "failed to preserve any claim for abstention" when it did not cross-appeal from the district court's decision on abstention and "did not even argue in their brief on appeal that the district court should have abstained." 948 F.2d 1380, 1385 (3d Cir. 1991). Notably, even though the Court asked for supplemental briefing on abstention, it held that Pennsylvania's "belated attempt to claim abstention . . . cannot excuse the defendants from the effect of their failure to preserve the issue." *Id.* The same reasoning should apply here.

Any other rule would invite states to use *Younger* abstention as a sword instead and not as a shield. It would open the door to allowing states to argue the merits of their disputes when contesting a preliminary injunction on appeal (in the hopes of a quick resolution of the case), while reserving *Younger* abstention arguments for subsequent appeals if they are unsuccessful. That is gamesmanship, not comity.

For all of these reasons, the Board has forfeited *Younger* abstention, and the Court should proceed to resolve this federal preemption case on the merits—just as the Board urged in its prior appeal.

B. The district court correctly held that abstention was inappropriate in this rate regulation dispute.

1. Abstention is improper under governing precedent.

Even if the Board had preserved its *Younger* abstention argument, abstention would be inappropriate here. "Only exceptional circumstances . . . justify a federal court's refusal to decide a case in deference to the States." *Sprint*, 571 U.S. at 70 (quoting *NOPSI*, 491 U.S. at 368). The Supreme Court has clearly instructed that any application of *Younger* abstention doctrine must comport with "our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id.* at 81–82 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)); *see also ACRA Turf Club*, 748 F.3d at 135, 138.

This is not one of those exceptional cases. On the contrary, this case has all the hallmarks of a dispute where abstention is improper. In *NOPSI* and *Sprint* – both cases in which state court proceedings were taking place in parallel with federal litigation – the Supreme Court held that *Younger* abstention is improper in a civil suit unless that suit is effectively "a criminal prosecution." *Sprint*, 571 U.S. at 79. This dispute lacks the characteristics the Supreme Court has associated with criminal disputes in both *Sprint* and *NOPSI*, including the fact that the dispute began with Altice's request for an exemption based on preemption, that the order in question

governs Altice's ratemaking, and that Altice could not have been charged with a crime based on the conduct alleged nor was it punished with criminal-like fine.

Not initiated by the State. *Sprint* observed that quasi-criminal civil cases for which abstention may be appropriate are typically "initiated by 'the State in its sovereign capacity.'" *Sprint*, 571 U.S. at 70. But this case began when Altice's predecessor, Cablevision, asked the Board for a determination that certain rate regulation requirements, including the Board's Pro Rata Requirement no longer applied given that Cablevision was subject to effective competition under federal law. JA235. Had the Board denied Cablevision's request and enforced the Pro Rata Requirement, Cablevision could have challenged that determination as preempted in federal court. *E.g.*, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) ("*NOPSI*") (it would make a "mockery" of federal jurisdiction if review were not available for state executive action). What happened instead is that the Board initially granted the requested Rate Relief Order relief unconditionally, but then years later decided that the Pro Rate Requirement was not part of that grant. The fact that the Board only later made clear that it would not exempt Altice from the Pro Rata Requirement, despite federal preemption of state cable rate regulation, does not change the *Younger* analysis nor deprive Altice of its right to seek redress in federal court.

Indeed, this case looks much like the party-initiated disputes in *NOPSI* and *Sprint*, where the Court held that abstention was inappropriate. *NOPSI* began when a utility company asked its regulator for an order allowing the utility to pass through certain costs to consumers and thereby increase its rates. *NOPSI*, 491 U.S. at 355. The utility contended that federal law required the regulator to permit the cost recovery. *Id.* After a hearing and investigation, the regulator concluded that the utility had imprudently managed its costs and issued an order barring the recovery. *Id.* at 356. The utility then sued in federal court, arguing that the regulator's rate determination was preempted by federal law. *Id.* at 357. The Supreme Court held that *Younger* abstention did not apply because the case was not akin to a typical judicial enforcement proceeding. In so holding, the Court rejected the state's argument that *Younger* abstention was appropriate because the state was a party to the case and had a strong interest in enforcing state requirements that utility customers not pay unwarranted costs. *Id.* at 365–67, 373; *see* Brief for Respondents at 29–30, *NOPSI*, 491 U.S. 350 (1989) (No. 88-348), 1989 WL 1127627.

Likewise, *Sprint* began when Sprint filed a complaint with the Iowa Utilities Board ("IUB"), asking the IUB to enjoin another carrier from charging intercarrier access fees. 571 U.S. at 73–74. After the parties resolved their dispute, Sprint withdrew its complaint. *Id.* at 74. But the IUB chose to keep the proceedings open and ultimately held that Sprint was required to pay the fees in question. *Id.* Sprint

then filed suit in federal court and sought a declaratory ruling that the Federal Telecommunications Act preempted the IUB's decision. *Id*. at 74. In arguing for abstention, the IUB argued that once Sprint withdrew its complaint, "Sprint was no longer a willing participant, and the proceedings became, essentially, a civil enforcement action." *Id.* at 80. The Supreme Court rejected the argument and explained that an agency action beginning with a private party requesting relief is very much unlike a criminal proceeding. *Id.* at 80–81 (concluding that the case was not "more akin to a criminal prosecution than are most civil cases").

Adopting the Board's view that this is a quasi-criminal proceeding simply because the state is a party would vastly expand *Younger* abstention to all state regulatory proceedings, regardless of the state's role in the case. The Board argues *Younger* applies because the Board issued an order enforcing the Pro Rata Regulation, but that elevates form over substance. As explained above, both *NOPSI* and *Sprint* permitted federal review of orders enforcing state law after the regulated entity sought a ruling preempting that law. This Court should not withhold its jurisdiction simply because the Board rejected Altice's preemption argument in delayed fashion rather than immediately.

Rate regulation. Abstention is also improper because Altice seeks review of an order regulating Altice's rates. In *NOPSI*, the Supreme Court held that agency orders governing rates are not akin to criminal proceedings because unlike a

"proceeding against . . . to enforce the rate," they are "an essentially legislative act," in that they involve "making of a rule for the future," – *i.e.*, regulating the rates the utility can charge going forward. 491 U.S. at 371 (citations omitted). As noted above, the state regulator in *NOPSI* issued an order forbidding the utility from passing through certain costs in rates. So too here. Like the utility in *NOPSI*, Altice contends that federal law preempts the Board's regulation of its rates for service. And just like in *NOPSI*, the Board's order holds the regulation is not preempted and constrains Altice's rates going forward – *i.e.*, it requires Altice to offer its service at a daily prorated rate rather than monthly rate Altice prefers. Forward-looking rate regulation is not the kind of state action that is akin to a criminal prosecution or even a civil enforcement action.

Notably, the Supreme Court rejected the state's argument in *NOPSI* that the rate order was akin to a civil enforcement action because the regulator based its order on findings, after investigation and a hearing, that the utility had acted negligently and imprudently. The Supreme Court explained that "[m]ost legislation is preceded by hearings and investigations." *NOPSI*, 490 U.S. at 371 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226–27 (1908)). What mattered for abstention purposes is that the regulator's ultimate order determined the utility's rates going forward. That same inquiry requires the same result here.

Not punishment. Finally, the proceedings at issue meet none of the other *Sprint* factors. First, the Board did not sanction any wrongful conduct. "Sanctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act.'" *ACRA Turf Club*, 748 F.3d at 140. Here, the Board ordered Altice to refund certain payments and to contribute to its own discount broadband program. The Board did not require Altice to pay a fine to the government or otherwise impose "retributive" sanctions. JA230–31. Again, the case is like *Sprint:* The Board ordered Altice to refund supposedly owed service charges to its customers just as the IUB ordered Sprint to pay the access fees it had withheld. *Sprint*, 571 U.S. at 74 & n.2. The refunds issued by Altice and the funding of its own broadband program were no more sanctions than the fees paid by Sprint. Indeed, the required funding was effectively an extension of a condition in the Board's merger order the Board had previously approved—again, a context that bears no resemblance to a criminal punishment.

Second, there is no criminal analog to this action. The criminal provisions of the New Jersey Cable Act require proof of a "knowing" violation of law. N.J. Stat. Ann. § 48:5A-51. The Board has never alleged that Altice's conduct could be criminally charged, nor could it, given that Altice was relying on its interpretation of the waiver granted by the Board. Indeed, on appeal the Board pointedly does not contend that it could have criminally charged Altice for the conduct at issue here.

Instead, it observes generically that "some" violations of the New Jersey Cable Television Act are criminal misdemeanor offenses and that it is not "relevant whether the precise conduct that Altice engaged in could be the subject of a criminal charge."[1] BPU Br. at 22–23. This does not meet the inquiry required by this Court in *ACRA Turf Club*, where it asked "whether the State could have alternatively sought to enforce a parallel criminal statute." *ACRA Turf Club*, 748 F.3d at 138; *see also Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) ("[S]tate authorities also had the option of vindicating these policies through criminal prosecutions."); *Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014) ("New Jersey could have vindicated similar interests by enforcing its criminal perjury statute."). Neither the Board's briefing nor the regulatory scheme indicate that New Jersey could have sought to enforce the criminal provisions of the New Jersey Cable Act, which requires a *knowing* violation.

2. The Board's arguments to the contrary are meritless.

The Board's briefing largely ignores *Sprint* and *NOPSI*. Instead, the Board rests its appeal almost exclusively on this Court's decision in *PDX N., Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871 (3d Cir. 2020),

[1] Nor did the Board even argue that there was a criminal analog in the district court. The Board seeks to excuse that omission on the ground that the analog was "obvious," BPU Br. 13, but even now the Board does not contend that Altice's conduct actually could have given rise to criminal sanctions.

petition for cert. filed, 89 U.S.L.W. 3328 (U.S. Mar. 19, 2021) (No. 20-1327). *PDX* is straightforwardly distinguishable because it has none of characteristics that the Supreme Court has held make abstention improper.

First, unlike this case, *NOPSI*, and *Sprint*, *PDX* began as a classic civil enforcement action. 978 F.3d at 877–78. It was only *after* the state agency completed its audit that PDX initiated action and challenged the agency's determination. In contrast, as explained above, *this* case began when Cablevision sought and obtained a broad exemption from the state's rate regulation regime on federal preemption grounds, which the Board has subsequently sought to claw back. While the Board's chosen mechanism for doing so was a cease and desist order, that proceeding was effectively a belated rejection of the exemption Altice had sought regarding its rates. That is not a traditional civil enforcement action like *PDX*, but is instead akin to the orders in *NOPSI*, 491 U.S. at 365, 369–73 (denying the utility's request on preemption grounds to pass through costs), and *Sprint*, 571 U.S. at 80–81 (denying Sprint's petition on preemption grounds to avoid paying intercarrier fees). It is also far more akin to this Court's decision in *ACRA Turf Club*, where litigation began after race track owners filed an administrative challenge alleging that certain payment requirements were unconstitutional. The administrator denied the challenge and issued an order that "directed them to comply with" the payment requirements. *ACRA Turf Club*, 748 F.3d at 131 (quotation marks omitted). The

owners then challenged that order in federal court, and this Court ultimately held that abstention was improper, in part because the administrative proceedings were initiated by the race track owners.[2] *Id.* at 139–40. Like *ACRA Turf Club*, and unlike *PDX*, this case concerns a dispute initiated by the private entity about what state regulations are permitted by federal law followed by an order demanding compliance, rather than a dispute that began with "a state entity that commenced civil or administrative proceedings." *Id.*

Second, there was no rate-making component in *PDX*. The sole question there was whether PDX had violated the law by classifying its delivery drivers as independent contractors. That kind of audit-driven inquiry is different from the forward-looking question presented in *NOPSI* and this case about how a rate can be structured going forward.

Third, unlike this case, *PDX* involved a fine: PDX was not required just to pay the unpaid taxes it owed (with interest) due to the misclassification, but "penalties" as well. *PDX*, 978 F.3d at 878. In this case, as noted, Altice was required only to refund the fees it supposedly owed its customers and to make a payment into its own discount broadband program. Neither component of that relief constitutes a fine or

[2] This Court noted that the absence of any formal investigation or hearing in *ACRA Turf Club* further confirmed that it was not a state-initiated action. *ACRA Turf Club*, 748 F.3d at 138–39. But as *NOPSI* explained, investigation and a hearing, particularly in the context of a rate dispute, does not mean that abstention is warranted. *See supra*.

penalty. *See ACRA Turf Club*, 748 F.3d at 140 ("Sanctions are retributive in nature and are typically imposed to punish the sanctioned party for some wrongful act."). Likewise, unlike *PDX*, where the plaintiffs admitted that they could face criminal sanctions for the alleged conduct, Altice could not be charged criminally here, and the Board does not contend otherwise. While the state need not *actually* criminally punish the conduct at issue to give rise to *Younger* abstention, the alleged conduct must at least be capable of being charged as such. *ACRA Turf Club*, 748 F.3d at 138; *PDX*, 978 F.3d at 883–84. Altice's conduct is uncontestably not punishable as a crime, and abstention is inappropriate for that reason as well.

As with the Board's quasi-criminal proceeding argument, expanding *Younger* abstention to proceedings initiated by a private party that result in no sanctions would transform abstention to the default, rather than the exception. It would also effectively preclude federal preemption challenges recognized by the Supreme Court. *See generally Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642, 645–46 (2002) (recounting over 100 years of federal jurisdiction over preemption challenges to state regulatory action); *see also Sprint*, 571 U.S. 76 (stating that the Court had confirmed federal court jurisdiction over "controversies of this kind"). As these cases make clear, litigants should have, and do have, the opportunity to invoke the jurisdiction of the federal courts to determine whether state rate regulation complies with the dictates of federal law. This Court should reject

the Board's argument that would deprive Altice of its opportunity to have this Court consider its preemption claim.

II. THE BOARD'S PRO RATA REQUIREMENT IS PREEMPTED RATE REGULATION.

***Standard of Review*:** The Court exercises plenary review when reviewing a district court's ruling on a motion for judgment on the pleadings. *See, e.g.*, *Mele*, 359 F.3d at 253.

On the merits, the district court's conclusion that the Pro Rata Requirement is preempted should be affirmed. Every tribunal to have addressed the question has held that proration requirements are a form of rate regulation. No other conclusion is possible because proration requires the cable company to offer its service at a prescribed daily rate rather than the monthly rate it prefers to charge. Congress's judgment was that where – as is uncontested here – market forces create effective competition, it is the market, and not state regulators, that should determine whether a cable operator's chosen rates should continue. The district court correctly held that the Pro Rata Requirement is a form of rate regulation, and is thus preempted by then Cable Act. That decision should be affirmed.

A. The text and structure of the Cable Act establish that a proration requirement is rate regulation.

Statutory interpretation begins with statutory text. *United States v. Jackson*, 964 F.3d 197, 201 (3d Cir. 2020). Section 543 provides that, in areas where cable providers are subject to effective competition, "[n]o . . . State may regulate the rates for the provision of cable service." 47 U.S.C. § 543(a)(1). Because the Cable Act

does not define "rate," Altice agrees that the term should be given its ordinary, plain English meaning. *Bonkowski v. Oberg Indus., Inc.* 787 F.3d 190, 199 (3d Cir. 2015); *see* BPU Br. 32.

As the Board concedes, a rate cannot be defined without reference to some underlying unit of the good or service at issue. BPU Br. 32–33. That is, a rate is "[t]he amount of a charge or payment . . . [having relation] of some other amount or as a basis of calculation." *Oxford English Dictionary Online*, https://www.oed.com/view/Entry/158412 (last visited Aug. 23, 2021); *see also Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/rate (last visited Aug. 23, 2021) (defining a rate as "a charge per unit of a public-service commodity"); A.E. Kahn, *The Economics of Regulation* at 21 (1993 ed.) ("[P]rice is a ratio, with money in the numerator and some physical unit of given or assumed quantity and quality in the denominator."); *accord Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 223 (1998) ("Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.").

It follows that requiring Altice to offer cable service on a daily basis is a form of rate regulation. Like its competitors, Altice offers its service in monthly installments; it does not offer its service on a daily basis. The Pro Rata Requirement nonetheless effectively requires Altice to offer cable service on a daily basis to subscribers who decided to cancel service in the middle of a monthly billing cycle,

even though they have already agreed to receive and pay for cable service for the full month. As the district court explained, this has the effect of requiring the provider to "change its rate from a monthly fixed rate to a daily rate." JA33 (quoting *Windstream Neb., Inc. v. Neb. Pub. Serv. Comm'n*, No. Cl 10-2399, 2011 WL 13359491, at *6 (Neb. Dist. Ct. June 9, 2011)). Indeed, New Jersey's own regulations recognize that proration is a form of rate regulation. *See* N.J. Admin. Code § 14:18-16.7(a)(1) (stating that certain provisions, including the Pro Rata Requirement, may no longer apply when the FCC has decertified rate regulation for that provider). The Pro Rata Requirement is akin to a law that requires supermarkets to sell soda in individual bottles rather than in six-packs. By requiring Altice to sell its cable service in specific units of time, the Pro Rata Requirement regulates a necessary component of Altice's rates. That is an essential element of rate regulation.

In addition to requiring Altice to offer cable service on a daily basis, the regulation prescribes the price that Altice must charge for this daily service to subscribers who cancel mid-month. The regulation requires Altice to calculate rebates by taking its monthly price and reducing it according to the number of days left in a given month. In short, the Pro Rata Requirement requires Altice to sell its service at a bulk price for a daily service. It does not allow Altice to charge customers who cancel mid-month a higher daily rate.

This is rate regulation, plain and simple. Businesses often charge more for smaller units of goods or services to account for the reduced predictability in their revenue and the costs associated with offering smaller units. Absent regulation, for example, a supermarket might charge $6 for a six-pack of soda, but charge $1.50 for individual bottles. A law barring supermarkets from selling soda in bulk might cause the supermarket to raise the price for individual bottles because the supermarket will likely sell fewer bottles with each transaction. The Proration Regulation is akin to a requirement that a supermarket take their $6 six-packs of soda, sell the bottles individually, and do so for $1 each (one-sixth of the price of a six-pack) rather than charge $1.50 per bottle. As a result, New Jersey's regulation "operates directly on the rate that [Altice] may charge for providing a certain quantity of cable service before a customer cancels service." JA33 (quotation marks omitted) (District Court Order).

Offering cable service in monthly installments give Altice a more predictable revenue stream and mitigates the costs of administering a system where customers can start and stop cable service on a daily basis. Absent rate regulation, Altice could in theory charge a higher price for daily service than for monthly service. But the Pro Rata Requirement forbids that result.

Indeed, the Cable Act itself includes the requirement that cable operators must employ a "*rate structure*[] . . . that is uniform throughout" the service area but states

expressly that this requirement "does not apply to a cable operator in any geographic area where the operator is subject to effective competition." 47 U.S.C. § 543(d) (emphasis added).[3] And the FCC has repeatedly concluded that "rate regulation" encompasses not just the level of a rate, but its structure. Like Section 543 of the Cable Act, Section 332 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." 47 U.S.C. § 332(c)(3)(A). The FCC has held that state laws prohibiting cellular phone providers from billing in whole-minute increments (instead of by the second) is a form of preempted rate regulation. In that decision, the FCC noted that "a 'rate' has no significance without the element of service for which it applies," and it concluded that states could not regulate the unit of time that cell phone providers use to charge for phone service. *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*,

[3] Even before the 1996 enactment of this express statutory language, *see* Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(2), 110 Stat. 56, 115, the federal appeals court considering the rate structure requirement determined that "[a]pplication of the uniform rate provision to competitive systems violates 47 U.S.C. § 543(a)(2), which prohibits the Commission and franchising authorities from utilizing their rate regulation authority under the . . . Cable Act to regulate the rates charged by cable systems facing effective competition." *Time Warner Ent. Co., L.P. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995) (internal quotation marks omitted).

Memorandum Opinion and Order, 14 FCC Rcd 19898, 19906 ¶ 19 (1999). The term "rates charged" in Section 332(c)(3)(A), it reasoned, included both the price (or "rate levels") and the unit of service offered (or "rate structures"). "[S]tates," the FCC concluded, "are precluded from regulating either of these."[4] *Id.* at 19906–07 ¶ 20.

Every tribunal to have considered a proration requirement has held that it is a form of rate regulation. This includes the district court below, as well as the District Court for the District of Maine, *Spectrum Northeast LLC v. Frey*, 496 F.Supp.3d 507 (D. Me. 2020). And although New Jersey argues that *Windstream Nebraska, Inc. v. Neb. Pub. Serv. Comm'n*, No. CI-10-2399, 2011 WL 13359491 (Neb. Dist. Ct. June 9, 2011), is different, BPU Br. 39–40, at its core this case addressed the same question presented here: is specifying the unit of service for which a change can be imposed a form of rate regulation? In *Windstream*, the court held that it was for the same reasons we explain here: proration requires "the rate period for service to be less than one month." 2011 WL 13359491, at *6. The same logic applies. Windstream charged customers for telephone service on a monthly basis and in advance. Altice does the same. The statute in *Windstream* mandated a credit for the

[4] The FCC has adhered to that same understanding of what constitutes rate regulation in subsequent decisions. *See In re Truth-in-Billing & Billing Format*, Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6463 ¶ 30 (2005) ("[T]he proscription of state rate regulation [in the cellular phone context] extends to regulation of 'rate levels' and 'rate structures.'"), *vacated on other grounds*, *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238 (11th Cir. 2006).

partial period when a customer terminated service. New Jersey's Pro Rata Requirement does the same. In either case, a proration requirement is rate regulation.

B. New Jersey's Pro Rata Requirement regulates Altice's rates "for the provision of cable service."

The Board then argues that even if the Pro Rata Requirement regulates rates, it does not regulate rates "for the provision of cable service" under Section 543(a)(2). BPU Br. 35. New Jersey contends that the prohibition on regulation of rates "for the provision of cable service" in 47 U.S.C. § 543(a)(2) refers only to rates "while cable signals are flowing to consumers' homes." BPU Br. 35. According to New Jersey, the Pro Rata Requirement does not fall within that provision because the Cable Act "plainly does not prevent States from regulating cable company charges after service is terminated." *Id.*

New Jersey is incorrect because the Pro Rata Requirement *does* regulate Altice's rates for the provision of cable service. Altice bills subscribers in advance for one month of cable service before providing that service to subscribers, which means that the "final bill" that New Jersey seeks to regulate "is for the provision of cable service that the customer has already agreed to purchase." JA32 (District Court Opinion). Contrary to New Jersey's claim that Altice's whole-month policy forces consumers to pay for a service they no longer receive, when a subscriber cancels their cable service mid-month Altice continues to provide service until the

end of the monthly billing cycle if the subscriber requests, consistent with its practice of charging subscribers upfront for the entire month of service.

Accordingly, the final monthly charge that the Pro Rata Requirement seeks to regulate is plainly "for the provision of cable service." As the district court below explained, the Pro Rata Requirement "operates directly on the rate that [Altice] may charge for providing a certain quantity of cable service before a customer cancels service" and it is "a rate regulation of cable service unambiguously and expressly preempted by the Cable Act." JA33.[5]

New Jersey's argument rests almost entirely on *Finneran*, 954 F.2d 91, but *Finneran* only proves why Altice is correct. There, the Second Circuit upheld a New York law regulating an extra fee charged to customers who downgraded their service tier (*i.e.*, chose to purchase a cable package with fewer channels). The law at issue required cable companies to charge no more than the actual cost of completing the

[5] In effect, New Jersey's position is that an agreed-upon monthly charge for cable service is no longer "for the provision of cable service" if the subscriber changes their mind—perhaps because the *Game of Thrones* season ends—and seeks to cancel service partway through the month despite having purchased a full month of service. If that were correct, the Cable Act's preemption on rate regulation would have little meaning because a state could then freely engage in rate regulation by labeling its regulation as a post-cancellation rebate. For example, New Jersey could require Altice to provide a "rebate" for the customer's last six months of service. The timing of the credit is not what matters; what matters is what the cable provider's charge is for. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004) ("[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance.'").

downgrade. The Second Circuit reasoned that the law did not regulate the rates for the provision of cable service because a customer is not "provided" with cable service when services are removed. But the Second Circuit rested that conclusion on the fact that the fee in *Finneran* pertained to *additional* fees charged to a customer to complete a downgrade, and not the rate for cable service itself. 954 F.2d at 100–01; *see also Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights*, 443 N.W.2d 440, 442–43 (Mich. Ct. App. 1989) (same).

Moreover, *Finneran* is not good law even when correctly read. After *Finneran*, Congress amended the Cable Act to expressly make downgrade charges a form of rate regulation that applies only to "the subscriber's selection of services or equipment *subject to* [rate] *regulation under this section*." *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 3, 106 Stat. 1406, 1467 (adding 47 U.S.C. § 543(b)(5)(C)). That makes *Finneran*'s analysis regarding the same types of charges obsolete. New Jersey cannot point to one form of preempted rate regulation to justify another.

As the district court recognized, *Finneran* is "distinguishable" because it involved a prohibition on fees "charged in addition to the cable provider's monthly rates for the provision of cable service."[6] JA33 (quotation marks omitted). By

[6] The same is true of the difference between early termination fees and Altice's whole-month billing policy. An early termination fee is a *separate* fee charged by a provider *in addition* to the monthly rate in exchange for allowing a customer to

contrast, the Pro Rata Requirement regulates Altice's monthly charge for cable service. New Jersey's argument that this is a "distinction without a difference," BPU Br. 39, ignores the essential difference here—Altice does not provide cable service for periods of less than a month. Altice's "provision of cable service" is measured in monthly increments. Whether the consumer does not to use their cable for several days during the month or chooses to cancel their service, they nonetheless chose to receive cable service during that month. This is entirely different from the fee described in *Finneran*.

C. Labeling the Pro Rata Requirement a "consumer protection" or "customer service" requirement cannot save it from preemption.

The Board also contends that its Pro Rata Requirement cannot be rate regulation because the Cable Act elsewhere permits states to adopt "consumer protection" measures and "customer service requirements." BPU Br. 40–48. But there is no indication that Congress intended to insert such a massive loophole into the Cable Act, and that reading would make a hash of the careful federal-state balance Congress has fashioned. Because rate regulation is specifically preempted,

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terminate their service contract before its expiration. These fees typically attach to longer-term contracts lasting a year or more, rather than to month to month contracts. Altice does not impose an extra fee on customers for terminating their month-to-month service. Rather, a customer who wishes to cancel is just not entitled to *rebate* for service she already paid for and is entitled to continue to receive through the end of the month. Again, Altice's practice in this regard is akin to the way many other goods and services are sold. The fan who leaves the Springsteen concert early does not get a refund, but nor does she pay a penalty. Altice's policy is the same.

any state law that constitutes rate regulation is itself preempted. It does not matter whether the state labels its regulation a consumer protection or customer service measure.

It is easy to see why that must be the case. Congress was clear that states cannot engage in rate regulation where cable providers face effective competition. But if the Board's reading of the Cable Act were correct, states could easily subvert that prohibition through creative (and not so creative) labeling. After all, virtually any effort to regulate rates can be cast as a way to protect consumers or enhance "customer service."

The Board's rule is a case in point. As mentioned above, the Board's own regulations have long acknowledged that mandatory proration is a form of rate regulation. *See* N.J. Admin. Code § 14:18-16.7(a)(1); *supra* at 8. Now that the Board's Pro Rata Requirement has been challenged in court, the Board conveniently argues that its rule is not rate regulation at all but a consumer protection measure. BPU Br. 2–3, 15, 29–30, 40. The Court should affirm the district court's common-sense reading of the Cable Act to prevent this attempt to circumvent the Cable Act.

1. The Board cannot regulate cable rates under the guise of "consumer protection."

Regarding consumer protection, the Cable Act provides that states and franchising authorities may enact "any consumer protection law, *to the extent not specifically preempted by this subchapter*." 47 U.S.C. § 552(d)(1) (emphasis added).

Section 543(a)(1) – which is found in the same subchapter of Title 47 – does "specifically" preempt rate regulation. *See id.* § 543(a)(1). If New Jersey's Pro Rata Requirement is rate regulation, that is the end of the inquiry, and Section 552(d)(1) is irrelevant. The plain text shows that consumer protection measures are preempted if they constitute rate regulation. JA34 (District Court Opinion). As the district court in *Spectrum Northeast* explained, labeling a proration requirement "as a consumer protection law . . . simply begs the question." *Spectrum Ne. LLC v. Frey*, 496 F.Supp.3d 507, 515 (D. Me. 2020); *see also* JA34 (District Court Opinion); *City of Dubuque v. Grp. W Cable, Inc.,* No. C 85–1046, 1987 WL 11826, at *2 (N.D. Iowa Feb. 25, 1987) ("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, pt. IV, at 79 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4716 (same).

The Eighth Circuit's opinion in *Cellco Partnership v. Hatch*, 431 F.3d 1077, 1082–83 (8th Cir. 2005), is instructive in this regard. *Cellco* involved a challenge to a Minnesota statute that prohibited wireless carriers from modifying the terms and conditions of their service contracts in a way that could result in increased rates for service, unless a carrier gave its customers 60 days' notice and received their affirmative consent. *Id.* at 1081–82. The statute effectively voided the opt-out structure commonly found in the terms of existing wireless contracts. *Id.* at 1083.

On appeal, the Eighth Circuit held that this requirement was preempted rate regulation because it "prevents providers from raising rates for a period of time, and thus fixes the rates." *Id.* at 1082.

Minnesota argued that its statute was a permissible "consumer protection measure," but the Eighth Circuit rejected that argument as "overbroad." *Id.* "Any measure that benefits consumers," the court explained, "including legislation that restricts rate increases, can be said in some sense to serve as a 'consumer protection measure.'" *Id.* at 1082–83. "To avoid subsuming the regulation of rates . . . the meaning of 'consumer protection' in this context must exclude regulatory measures, such as [Minnesota's statute], that directly impact the rates charged by providers." *Id.* at 1083.

So too here. Any other interpretation of the Cable Act would give states license to regulate rates however they please, so long as they cite some "consumer protection" rationale. State regulation rarely comes labeled as "rate regulation." The point is that the Board's Pro Rata Requirement regulates rates and therefore is expressly preempted. Section 552(d)(1) is not an exception to that rule.

The Board tries to blow past this unambiguous text, insisting that the Section 552(d)(1) must be read as limiting Section 543(a)(1). *See* BPU Br. 40–44. That is precisely backwards. The Cable Act allows states to adopt consumer protection measures *unless* those measures are specifically preempted. 47 U.S.C. § 552(d)(1).

Section 543(a)(2) is one such preemption provision. It is true that statutes should be read as a whole, but that does not mean the Court should ignore a statute's plain text.

The Board's analogies to FCC decisions and Supreme Court cases badly miss the mark. First, this case has nothing to do with negative option billing. BPU Br. 43–44. Negative option billing occurs when a cable operator charges a customer for services they have not requested. *See* 47 U.S.C. § 543(f). But there is no question that Altice's subscribers have agreed to purchase a full month of cable service and to pay for that service in advance. The only issue here is whether Altice may hold subscribers to their agreements if they decide to cancel part-way through – *i.e.*, whether Altice can collect the monthly charge the subscriber has already agreed to pay.

Under Altice's whole-month billing policy, both the customer and the cable operator get exactly the deal they agreed to. The customer receives service on a monthly basis at the stated rate, and Altice gets the benefit of knowing that the customer will remain a customer for the entire month and will not drop her subscription the day after the final episode of her favorite show airs. Forcing Altice to prorate the subscriber's final monthly bill disrupts that bargain and creates uncertainty for cable operators. While New Jersey may prefer a different policy, Congress expressly left these judgments to the marketplace in any franchise area

where cable providers are subject to effective competition, as Altice is in New Jersey.

The Board's citations of cases involving savings clauses are even farther afield. For example, *Geier v. American Honda Motor Co.* involved a federal statute that preempts state motor vehicle safety standards. 529 U.S. 861, 865 (2000) (15 U.S.C. § 1392(d)). The issue in the case was whether the statute preempted state tort liability for auto manufacturers (it did), and the savings clause at issue provided that compliance with federal rules "does not exempt any person from liability under common law," implying that "there are some significant number of common-law liability cases to save." *Id.* at 868. This has no bearing at all on the Cable Act, which "saves" consumer protection measures "*to the extent not specifically preempted by this subchapter*." 47 U.S.C. § 552(d)(1) (emphasis added).[7] The admonition to read preemption provisions and savings clauses together does not magically erase this part of the text.

[7] The Board's other citations are equally irrelevant. *See Wyeth v. Levine*, 555 U.S. 555 (2009) (preemptive effect of FDA approvals on state product liability claims); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (preemption of tort claims under the Federal Boat Safety Act); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (ERISA preserves "any law of any State which regulates insurance, banking, or securities"); *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 841 (9th Cir. 2009) (same).

2. Mandatory proration is not a "customer service" requirement.

The Board's argument that its Pro Rata Requirement is a "customer service requirement" under Section 552(d)(2) fares no better. BPU Br. 44 (quoting 47 U.S.C. § 552(d)(2)). The argument fails because, as the district court below and the district court in *Spectrum Northeast* explained, mandatory proration "cannot be characterized" as a customer service requirement. JA34–35; *see also Spectrum Ne.*, 497 F.Supp.3d at 515.

The ordinary meaning of the term "customer service," refers to the way a cable operator interacts with its subscribers. *See Oxford English Dictionary Online*, https://www.oed.com/view/Entry/46319 (last visited Aug. 19, 2021) (defining "customer service" as "assistance and advice provided by a company to those people who buy or use its products or services"); *Spectrum Ne.*, 497 F.Supp.3d at 516. For example, customer service includes how a cable operator handles calls from subscribers who have questions about their bills, want to order a new service, or need to report a service outage.

The Cable Act and the FCC's implementing rules track this ordinary understanding of the term. Section 552(b) directs the FCC to adopt "customer service requirements" for cable operators, which Congress defined to include standards like "cable system office hours and telephone availability;" "installations, outages, and service calls;" and "communications between the cable operator and

the subscriber (including standards governing bills and refunds)." 47 U.S.C. § 552(b) (emphasis added). And to implement this section of the Cable Act, the FCC has adopted customer service rules governing cable operators' business hours, maintenance and staffing of toll-free customer service lines, and how quickly cable operators must complete service installations or respond to service interruptions. *See* 47 C.F.R. § 76.309(c). Notably, although Section 552(b) directs the FCC to adopt standards "governing bills and refunds," it does so in the context of regulating "communications" about those bills and refunds, not the substance of providers' rates. 47 U.S.C. § 552(b)(3).

Despite what the Board says, BPU Br. 45–56, the district court clearly recognized that the phrase "customer service requirements" is not limited to the examples in Section 552(b)(1)–(3). JA35 (citing *Spectrum Ne.*, 497 F.Supp.3d at 516). But while Section 552(d)(2) allows states and franchising authorities to "impose[] 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. § 552(d)(2), that does not grant states the authority to regulate rates by labeling such regulation as "customer service."

Rather, this provision may enable a state to require cable providers to issue rebates owed to customers in a timely manner or adopt stricter requirements for the

timeliness of issuing rebates. Still, it does not give states authority to regulate the rates through a system of rebates or credits. A state could not, for example, declare that all cable companies must provide service at $10 per month by drafting its statute as a customer service requirement to "rebate" any excess.

The Board offers no persuasive rebuttal. It invokes a reference to the customer service provision encompassing "rebates and credits to consumers" in a committee report accompanying the Cable Act. *See* BPU Br. 44 (quoting H. Rep. No. 98-934, at 79 (1984)). But legislative history cannot vary the Act's plain text, and in any case, that reference refers to "communications" about rebates, as discussed above. *See, e.g.*, *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 314 (3d Cir. 2010). And as noted above, on the same page of the legislative history, Congress warns against imposing rate regulation under the guise of consumer protection. *See* H.R. Rep. No. 98-934 pt. IV, at 79, *supra*.

The Board also argues that Section 552(d)(2) is somehow exempt from Section 543(a). BPU Br. 46. But Section 552(d)(2) is equally subject to Section 556(c)'s express statement that state regulations that are inconsistent with the Cable Act – which includes state rate regulation – are preempted. Moreover, the cardinal rule of statutory interpretation is that statutes must be read as a whole. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (statutory provisions must be read "in their context and with a view to their place in the overall statutory scheme" (quoting *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))); *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010). Congress was clear that states cannot engage in rate regulation where cable providers face effective competition. That prohibition would have little meaning if a direct regulation of rate structure could be recast as a "customer service requirement." *See Cellco*, 431 F.3d at 1082–83 (holding, in the context of "consumer protection measures" that the meaning of "consumer protection" must exclude laws that "directly impact the rates charged by providers").

* * *

For all these reasons, the district court correctly held that the proration provision is preempted.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), as well as the Third Circuit's Local Appellate Rules 28.3(d) and 31.1(c), the undersigned hereby certifies that:

1. That Howard J. Symons, the attorney whose name appears on the brief, is a member of the bar of this Court.

2. This brief complies with the type-limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: August 23, 2021

/s/ Howard J. Symons
Howard J. Symons

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I certify that on August 23, 2021 the foregoing document was electronically filed with the United States Court of Appeals for the Third Circuit by using the CM/ECF system.

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