UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1791

ALTICE USA, INC.,
Plaintiff-Appellee,
v.

NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY; NO. 3-19-cv-21371

Brief of Appellants

GURBIR S. GREWAL
Attorney General of New Jersey
JEREMY M. FEIGENBAUM
State Solicitor
ALEC SCHIERENBECK
Deputy State Solicitor
MELISSA H. RAKSA
Assistant Attorney General
MELIHA ARNAUTOVIC
ERIN M. HODGE
Deputy Attorneys General
New Jersey Attorney General's Office
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625
Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

In New Jersey, it has long been unlawful for a cable company to charge a consumer for cable service after that consumer terminates service. N.J.A.C. § 14:18-3.8. But in 2016, the New Jersey Board of Public Utilities received a flood of complaints from upset New Jersey consumers reporting that one company, Altice USA, Inc., was doing just that. In response to these reports, the Board launched an investigation, initiated a civil-enforcement proceeding, and ultimately determined that Altice had run afoul of New Jersey's law. As a result, the Board ordered Altice to cease improperly charging consumers for services they never received, refund the consumers it harmed, and pay a penalty for its repeated violations. Altice, in turn, appealed the Board's order to a state court of appeals, the next step in a state administrative enforcement proceeding in New Jersey, and litigation concerning Altice's violations remains ongoing in that court.

Just weeks after filing its appeal in state court, however, Altice initiated this separate federal-court action to collaterally attack the Board's ongoing enforcement action. And in the proceedings below, the district court rewarded Altice's gambit, enjoining the Board's officers from enforcing New Jersey's law against Altice on the ground that it is expressly preempted by the federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521–573 (the "Cable Act" or the "Act").

The district court's decision should be reversed for two reasons. *First*, the district court erred in failing to dismiss this action under *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* requires courts to abstain in the face of certain ongoing state proceedings, including a range of civil-enforcement proceedings initiated by a state's agencies to sanction wrongful conduct. This so-called *Younger* abstention doctrine "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty. Ethics Comm'n. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). For good reason: abstention ensures that federal courts accord state courts due respect, and recognizes that state courts are entirely capable of resolving the questions of federal law before them. The Board's civil-enforcement action—brought in the name of the State to sanction Altice for violating state consumer protection laws—is just the kind of proceeding to which both the Supreme Court and this Court have repeatedly deferred. And, in this case, New Jersey state courts are perfectly capable of resolving the preemption issue Altice raises here—and which Altice has raised in state court too. Because this federal suit must be dismissed, the Court need not go further to resolve this appeal.

Second, the district court erred in holding that the Cable Act preempts New Jersey's law. According to the district court, the Cable Act preempts New Jersey's rule, known as the Proration Requirement, because the Cable Act prevents the States

from regulating "rates for the provision of cable service." 47 U.S.C. § 543(a). But the Proration Requirement does not regulate "rates," let alone Altice's rates "for the provision of cable service." Instead, New Jersey allows a cable company to charge whatever rate it wishes for service. And once a consumer terminates service, New Jersey continues to allow a company to assess its chosen rate—but, according to the Proration Requirement, only for the period that service was actually provided. Nothing in the Cable Act suggests that rules preventing a cable company from charging for service it *does not* provide regulate rates for the "provision of cable service." *Id*. Nor does anything in the Act endorse Altice's view that it must be allowed to charge consumers for service it never actually provides. To the contrary, the Cable Act expressly preserves the power of the states to enforce consumer protection laws like the Proration Requirement. That is all New Jersey has sought to do through its state civil enforcement action.

The district court's judgment should be reversed.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over Altice's preemption claims pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review both the district court's order granting judgment on the pleadings and its *Younger* abstention decision. *PDX N., Inc. v. Comm'r New Jersey Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 877 & n.1 (3d Cir. 2020).

STATEMENT OF ISSUES

I. Whether federal courts should abstain from hearing Altice's federal suit under *Younger* and its progeny.

II. Whether the Cable Act preempts New Jersey's Proration Requirement.

STATEMENT OF RELATED CASES

After the Board determined that Altice had repeatedly violated New Jersey law, Altice appealed the Board's determination in the New Jersey Appellate Division. *See In the Matter of 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 (App. Div.) ("Altice's State Appeal"). In that pending state appeal. Altice argues—as it does here—that the Board's actions are preempted by the Cable Act.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

For over 60 years, "federal, state, and local authorities" have "regulate[d] different aspects of cable television." *City of New York v. FCC*, 486 U.S. 57, 59 (1988). And in the federal Cable Act, enacted in 1984, Congress reaffirmed that "Federal, State, and local authorit[ies]" each exercise "authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3); *see also* H.R. Rep. No. 98-934, at

22 (1984) (explaining the Cable Act was enacted to "provide and delineate ... the authority of Federal, state, and local governments to regulate cable systems").

Accordingly, in addition to setting out subjects for exclusive federal control, the Cable Act establishes a range of areas that remain the domain of state and local regulation. To take one example, "[t]he Cable Act le[aves] franchising to state or local authorities." *City of New York*, 486 U.S. at 61. Likewise, the Cable Act leaves to the states their traditional authority to enact consumer protection laws. 47 U.S.C. § 552(d)(1) ("Nothing in this subchapter shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law" unless "specifically preempted by this subchapter."); *see also Pennsylvania v. Navient Corp.*, 967 F.3d 273, 294 (3d Cir. 2020) (finding "consumer protection is a field that states have traditionally occupied"). So too, the Act expressly reserves to the states their authority to set "customer service requirements," 47 U.S.C. §552(d)(2), which include "requirements related interruption of service; *disconnection*; *rebates and credits to consumers*; [and] deadlines to respond to consumer requests or complaints," H.R. Rep. No. 98-934 at 79 (1984) (emphasis added).

The Cable Act also carves out a subset of areas that neither state nor federal authorities may regulate. At issue here, the Act provides—subject to certain

exceptions not relevant in this appeal[1]—that "[n]o Federal agency or State may regulate the *rates for the provision of cable service*." 47 U.S.C. § 543(a)(1) (emphasis added); *see id.* § 543(a)(2).

Pursuant to the Cable Act's "dual, federal-state regulatory system," New Jersey has enacted the New Jersey Cable Television Act, N.J.S.A. § 48:5A-1, *et seq.*, ("the New Jersey Cable Act"), which "vest[s] the [Board] with the power to regulate cable television companies." *In re RCN of NY*, 892 A.2d 636, 640 (N.J. 2006). The New Jersey Cable Act gives the Board—made up of five Commissioners—the authority to establish regulations governing cable systems, as well as the power to investigate and enforce the statute and Board regulations through civil administrative proceedings. *See* N.J.S.A. § 48:5A-9. Section 48:5A-51 of the New Jersey Cable Act also provides that any knowing violation of its provisions constitutes a criminal offense, and that violations of the statute or Board rules, regulations, or orders are punishable by a civil penalty of up to $10,000 for repeat offenses. The Board may impose these civil penalties through "summary proceedings instituted by the [B]oard in the name of the State." *Id.*

[1] For example, the Act provides that "the rates for the provision of cable service … shall not be subject to regulation by the [Federal Communications Commission ("FCC")] or by a State or franchising authority" "*[i]f* the [FCC] finds that a cable system is subject to effective competition." 47 U.S.C. § 543(a)(2) (emphasis added). For purposes of this appeal, Defendants do not dispute that Altice is subject to effective competition. JA17.

Neither the New Jersey Cable Act nor its implementing regulations dictate how much a cable company may charge its customers for service. A cable company is, accordingly, free to charge any amount for a month of cable service. Likewise, nothing in New Jersey law mandates that cable companies sell their services on a monthly basis—indeed, a cable company can theoretically choose to sell services to consumers in any increment of time, from a daily charge to an annual one or beyond.[2] Accordingly, a cable company could, if it wished, choose to sell cable service at a rate of $10 a day, $500 a month, or even $1,000 every six weeks.

New Jersey law does, however, prevent cable companies from charging their consumers for services that the consumers never actually receive. Specifically, N.J.A.C. § 14-18-3.8(c)—known as the Proration Requirement—provides that "initial and final bills shall be prorated as of the date of the initial establishment and final termination of service." *See also id.* § 14:18-3.8(a) (providing that bills "shall be prorated upon establishment and termination of service"). Under this rule, once a consumer terminates service, a cable company cannot charge a consumer for the remainder of a billing period as if the consumer continued to receive service. If a

[2] New Jersey law does require that "[b]ills for cable television service … be *rendered* monthly, bi-monthly, quarterly, semi-annually or annually," N.J.A.C. § 14:18-3.8 (emphasis added), but this rule concerns how often a provider sends a bill to a customer requesting payment, not the increment of time for which that consumer is charged. Thus, a cable provider could charge a consumer $10 a day for cable service, so long as bills are "rendered" to the consumer on a "monthly, bi-monthly, quarterly, semi-annual[] or annual[]" basis. *Id.*

consumer pays for a billing period in advance, and then cancels service before the billing period ends, the Proration Requirement entitles that consumer to a refund corresponding to the period when no service was received. This refund is assessed using the cable company's own rate.

B. The Board's State Civil Enforcement Proceedings Against Altice

Altice provides cable television, internet, and telephone services to consumers in New Jersey. It offers consumers monthly subscription plans, paid in advance at the beginning of each month. Altice entered New Jersey's market in May 2016, when it acquired Cablevision Systems Corporation. JA275–76. Cablevision, for its part, had long adhered to New Jersey's Proration Requirement, in accordance with both the clear terms of the rule itself and a separate agreement between the Board and Cablevision. JA272–75. Indeed, when the Board approved Altice's merger, Altice expressly agreed that it would "abide by applicable customer service standards … including but not limited to … Title 14 … Chapter[] … 18"—which sets out the Proration Requirement, *see* N.J.A.C. § 14:18-3.8(c)—and those "requirements related to billing practices and termination," JA144.

Shortly after the merger, however, the Board began to receive complaints from consumers reporting that Altice had begun to violate the Proration Requirement. JA276. For example, one consumer complained that while they terminated service and returned cable equipment to Altice just four days into a billing cycle, Altice

charged them for an entire month of service. JA226. Another complained that they were charged for an entire month even though they received service for only six days. JA226. In response to inquiries from the Board's staff, Altice revealed that it had changed its policy—without notice or approval from the Board—and had ceased providing prorated refunds to consumers who terminated their cable service prior to the end of a billing cycle. JA276.

After reviewing over 100 complaints from consumers, and in light of Altice's refusal to alter its new practice, the Board initiated civil enforcement proceedings against the company by issuing a formal Order to Show Cause on December 18, 2018. JA178; *see* N.J.S.A. § 48:5A-9. That order set out the basis for the Board's belief that Altice had violated the Proration Requirement. JA179–80. It also directed Altice to file an answer and submit evidence for further consideration by the Board. JA180.

Ultimately, based on its investigation and evidentiary review, the Board found that Altice had violated the Proration Requirement and the Board's own prior orders. JA230–31. As a result, the Board directed Altice to "immediately Cease and Desist from its failure to comply with existing rules that require Altice to prorate monthly bills upon inception and termination of service." JA230. It ordered Altice to issue refunds to consumers harmed by the Company's policy, and to conduct an audit to

determine which consumers were entitled to refunds. JA230–31. And it imposed a $10,000 monetary penalty as a sanction for Altice's violations. JA231.

On November 26, 2019, Altice appealed the Board's order to the New Jersey Appellate Division—the traditional next step in a state enforcement action under New Jersey's administrative procedures. Notice of Appeal, Altice's State Appeal, (Docket No. A-001269-19); *see also PDX*, 978 F.3d at 883. In that appeal, Altice argues—precisely as it does in this action—that the Board's Proration Requirement is preempted under the federal Cable Act.[3] As of the date of this filing, that appeal remains pending.

C. Altice Initiates This Action While State Litigation Is Ongoing

Just weeks after filing its appeal in state court, on December 13, 2019, Altice initiated this separate federal-court action by filing a complaint in the District of New Jersey. JA47. On December 23, 2019, the district court dismissed the complaint for lack of subject matter jurisdiction because Altice had brought claims against the Board itself rather than against its five commissioners. JA5. On December 27, 2019, Altice filed a motion for reconsideration and sought permission

[3] In that pending state action, Altice also raises state-law claims not at issue here. Brief for Appellant at 10-18, Altice's State Appeal (Docket No. A-001269-19). Altice's Amended Complaint in this action likewise raises one state-law claim, rooted in the New Jersey Constitution, which the federal district court rightly declined to reach. JA109–111.

to file an amended complaint against the Board's five commissioners in their official capacities ("Board Members" or "Defendants"). The amended complaint requests both declaratory and injunctive relief against Defendants. JA112–13.

On January 22, 2020, the district court granted leave to amend, construed Altice's motion as one for a preliminary injunction, and enjoined the Board Members from enforcing the Board's Order sanctioning Altice on the ground that the Proration Requirement is preempted by the federal Cable Act. JA3–4.

On March 23, 2021, the district court granted Altice's motion for judgment on the pleadings and denied Defendants' cross-motion to dismiss. JA25–36. As to *Younger* abstention, the district court recognized that federal courts abstain in the face of ongoing civil-enforcement actions, but nevertheless declined to abstain based on a single consideration: the supposed absence of a "criminal analog" to the civil enforcement proceedings at issue here. *See* JA29–30 (finding that because of the supposed lack of a criminal analog, "the Court need not consider other issues relevant to the *Younger* abstention determination").

As to preemption, the district court held that because consumer protection is a field traditionally occupied by the states, courts must presume that the Cable Act does not preempt New Jersey's Proration Requirement absent a clear and manifest Congressional intent. JA30. But the district court found that the Cable Act's prohibition on the regulation of "rates for the provision of cable service," 47 U.S.C.

§ 543(a)(2), expressly preempts the Proration Requirement, because a "prohibition on charges for service that was not provided ha[s] the effect of prescribing a daily rate for the service that was provided before the cancellation," JA32 (quoting *Spectrum Northeast LLC v. Frey*, 496 F. Supp. 3d 507, 514 (D. Maine 2020)). The district court also held that the Cable Act's savings clauses—which state both that "nothing" in the Cable Act should be read to preempt consumer protections laws unless "specifically preempted" by the Act, 47 U.S.C. § 552(d)(1), and that "nothing" in the Act preempts state "customer service requirements," *id.* § (d)(2)—do not require a contrary result. JA33–36.

This appeal follows.

SUMMARY OF ARGUMENT

I. Black letter principles of *Younger* abstention require dismissal of this suit in favor of the parallel civil-enforcement proceeding currently ongoing in state court. That is sufficient basis to reverse the decision below.

Under *Younger*, federal courts must decline jurisdiction in the face of certain civil-enforcement proceedings. The Board proceedings at issue—initiated by the Board in its sovereign capacity, using a formal investigative and charging process that resembles a criminal action, and designed to sanction Altice for violating state law—bear all the hallmarks of the civil-enforcement actions to which federal courts must defer. The district court's contrary conclusion was based on its view that there

is no "criminal analog" to the Board's civil-enforcement action—that is, that there is no criminal statute that vindicates similar state interests. But that is wrong for two independently sufficient reasons. First, there is an obvious criminal analog: the same provision of the New Jersey Cable Act that gives the Board power to impose the civil penalties at issue here *also* makes it a criminal offense to knowingly violate New Jersey's cable laws. *See* N.J.S.A. § 48:5A-51. Second, even where there is no criminal analog, case law makes clear that this single consideration cannot be the basis for declining to abstain under *Younger*.

The three so-called *Middlesex* factors, which courts also assess in determining whether to abstain under *Younger*, likewise weigh decisively in favor of abstention. When Altice filed this federal action, there was already an ongoing state judicial proceeding—one that remains pending today. Those state proceedings implicate important interests, including New Jersey's well-established interests in upholding its consumer-protection laws and in enforcing those laws through state agencies and state courts. And those proceedings, it is undisputed, offer Altice every opportunity to raise the preemption argument it presses here. Since *Younger* abstention applies, that is reason enough to reverse the district court and dismiss the case.

II. If this Court reaches the preemption issue, it should hold that the federal Cable Act does not preempt the Proration Requirement. Where a party contends that Congress expressly preempted regulation in an area—like consumer protection—

that has been traditionally occupied by the states, courts apply a heavy presumption against preemption. In this case, the text, structure, and purpose of the Cable Act all suggest that Congress did not intend to preempt laws that stop cable companies from charging consumers for service they never received.

On the text, § 543(a) of the Act prevents states from regulating (1) "rates" (2) "for the provision of cable service." But the Proration Requirement regulates neither. First, under the rule, cable companies can set any rate for cable service—at whatever price, and for whatever period of time they wish. Rather than alter a cable company's rates, the rule explicitly allows a company to apportion the charge for a final period of service according to the *company's own rate*. What the company cannot do, however, is assess its rate for the period after the consumer terminates service. Said another way, New Jersey's law does not change rates; it changes the practice of charging a consumer for service never delivered. Second, the Proration Requirement does not regulate "the provision of cable service." To the contrary, the Proration Requirement comes into play only if "the provision of cable service" has *ended* because a consumer terminated service. To preempt the Proration Requirement, this Court would need to read the phrase the "provision of service" as necessarily including the absence of service. That interpretation is textually dubious, and it is certainly not one this Court can adopt in light of the presumption *against* preemption.

The structure and purpose of the Cable Act further suggest that Congress did not intend to preempt consumer protection laws like the Proration Requirement. For one, Congress expressly provided that "nothing" in the relevant portion of the Act should be read to prevent a state from enforcing its consumer protection laws unless "specifically preempted." And § 543(a) does not preempt rules like the Proration Requirement at all, much less specifically. In fact, the FCC itself has held that the Cable Act shelters similar consumer protection laws that, while touching upon when a cable company may bill a subscriber, do not attempt to regulate the reasonableness of rates. For another, the Cable Act also includes a savings clause allowing states to pass laws concerning "customer service requirements." The available history makes clear that Congress intended this provision to give states the power to regulate both disconnection and refunds—that is, what the Proration Requirement regulates. New Jersey has acted within lawful bounds in protecting its consumers.

STANDARD OF REVIEW

Both "a trial court's ... determination of whether *Younger* abstention is proper" and its "judgment on a Rule 12(c) motion for judgment on the pleadings" are reviewed de novo. *PDX*, 978 F.3d at 881 n.11 (quoting *Hamilton v. Bromley*, 862 F.3d 329, 333 (3d Cir. 2017)); *see also Zimmerman v. Corbett*, 873 F.3d 414, 417 (3d Cir. 2017) ("We review a denial of a motion for judgment on the pleadings de

novo."); *Kovacs v. N.J. Dep't of Lab. & Workforce Dev.*, 841 F. App'x 435, 436 (3d Cir. 2021) ("We review the District Court's abstention de novo.").

ARGUMENT

I. YOUNGER REQUIRES DISMISSAL OF THIS FEDERAL ACTION

Under the doctrine known as *Younger* abstention (named for its progenitor, *Younger v. Harris*), federal courts must "abstain from exercising jurisdiction over a particular claim where resolution of that claim in federal court would offend principles of comity by interfering with an ongoing state proceeding." *Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010). As the Supreme Court has explained, "*Younger* ... and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex*, 457 U.S. at 431. This abstention doctrine reflects "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Id*. (quoting *Younger*, 401 U.S. at 44).

The Supreme Court and this Court have laid out a clear test for when *Younger* abstention is warranted. Under *Younger*, federal courts abstain to avoid interfering with three types of ongoing state proceedings: (1) "state criminal prosecutions," (2)

"certain 'civil enforcement proceedings,'" and (3) "civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 70 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989)); *PDX,* 978 F.3d at 882 (same). Where a federal suit risks interference with an ongoing state civil-enforcement proceeding, the court must ask whether the state proceeding is "akin to criminal prosecution[]" in "important respects," including whether it has been initiated by a state actor to sanction wrongful conduct. *Sprint*, 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). If the ongoing state court civil-enforcement proceeding qualifies, courts consider the three "*Middlesex* factors: (1) whether there are 'ongoing judicial proceeding[s]'; (2) whether those 'proceedings implicate important state interests'; and (3) whether there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *PDX*, 987 F.3d at 883 (quoting *Middlesex*, 457 U.S. at 432). Where the proceeding falls into the "class of cases" *Younger* covers, "abstention is required." *Sprint*, 571 U.S. at 72; *see also PDX,* 978 F.3d at 881 n.11 (same).

A. The Ongoing State Civil Enforcement Action Against Altice Qualifies for *Younger* Abstention

The proceeding against Altice bears all the "hallmarks" of those ongoing state civil-enforcement actions that trigger *Younger* abstention. *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014). To "assess whether underlying

proceedings are quasi criminal in nature"—that is, whether they have certain traits in common with the criminal proceedings to which *Younger* abstention was first applied—courts ask if:

> "(1) the action was commenced by the State in its sovereign capacity, (2) the proceeding was initiated to sanction the federal plaintiff for some wrongful act, and (3) there are other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges ... [and] whether the State could have alternatively sought to enforce a parallel criminal statute."

PDX, 978 F.3d at 882–83 (quoting *ACRA*, 748 F.3d at 138). These "characteristics" are not "always required" for abstention to be warranted, but instead describe the traits "commonly" shared by the "class of enforcement actions entitled to *Younger* abstention." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737 (9th Cir. 2020) (quoting *Sprint*, 571 U.S. at 79).

In the face of analogous state civil-enforcement proceedings, both the Supreme Court and this Court have repeatedly held that *Younger* mandates abstention. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schs.*, 477 U.S. 619 (1986) (abstaining in light of state administrative hearing concerning civil-rights violations); *Middlesex*, 457 U.S. 423 (state bar disciplinary hearing); *Moore v. Sims*, 442 U.S. 415 (1979) (state child-removal proceeding); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state-court civil fraud proceeding); *Huffman*, 420 U.S. at 604 (state-initiated civil nuisance proceeding); *PDX*, 978 F.3d at 871 (state administrative action concerning misclassification of workers); *Gonzalez v.*

Waterfront Comm'n of N.Y. Harbor, 755 F.3d 176 (3d Cir. 2014) (state employee disciplinary hearing). Although these cases involved *civil* enforcement actions initiated via administrative action or through litigation, they shared features with criminal actions—an investigation, followed by a state-initiated proceeding to sanction the wrongful conduct—that brought them within the class of cases that require abstention. Those considerations likewise demand that federal courts abstain in favor of the Board-initiated state civil-enforcement proceeding against Altice here.

First, "the underlying action was commenced by New Jersey in its sovereign capacity." *PDX*, 978 F.3d at 883; *see also Trainor*, 431 U.S. at 444 (abstaining in light of ongoing civil proceeding "brought by the State in its sovereign capacity"). The Board initiated its action against Altice under its statutory authority to "enforce[]" a state "rule, regulation or order" "by summary proceedings instituted by the [B]oard in the name of the State." N.J.S.A. § 48:5A-51(b). Those state enforcement proceedings involved a formal Order to Show Cause asking why the Board should not penalize Altice for its failure to follow state law, and they culminated in a Cease and Desist Order setting out the Board's findings, assessing penalties, and ordering Altice to refund the consumers it harmed and to stop these violations.[4] JA230–31;

[4] As this Court recently explained, the fact that Altice was the party that filed the first appeal to the state appellate court does not change this analysis because the "administrative action was commenced by New Jersey in its sovereign capacity" and the appeal "only occurred because of the [Board's] actions." *PDX*, 978 F.3d at 883.

see also ACRA, 748 F.3d at 140 ("[W]here the Supreme Court has applied *Younger* abstention ... cases involved a state entity that commenced civil or administrative proceedings by filing some type of formal complaint or charges.").

Second, the civil-enforcement action was undoubtedly "initiated to sanction the federal plaintiff for some wrongful act[s]": namely, violations of New Jersey law. *PDX*, 978 F.3d at 883 (quoting *ACRA*, 748 F.3d at 138); *see also Gonzalez*, 755 F.3d at 182. The Board commenced its administrative proceeding to punish Altice for violating the Proration Requirement. *See ACRA*, 748 F.3d at 140 (finding state civil-enforcement proceeding was not quasi-criminal where underlying conduct was not "unlawful"). Among other sanctions, the Board imposed a $10,000 penalty against Altice for its transgressions. JA230; N.J.S.A. § 48:5A-51(b) (providing that a third or subsequent violation of state law may be punished by a "penalty" of up to $10,000). As this Court has explained, such "[p]enalties are, by their very nature ... a sanction for wrongful conduct." *PDX*, 978 F.3d at 884. "Accordingly ..., this second factor favors finding this is a civil enforcement action that is quasi-criminal in nature." *Id.*

Third, the Board's civil-enforcement action exhibited the "other similarities to criminal actions" that courts have emphasized. *ACRA*, 748 F.3d at 138. For one,

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Ultimately, "[t]he fact that [Altice] is technically the party seeking review before the [Appellate Division] is a mere function of New Jersey administrative procedure." *Id.*

the Board's action began with "a preliminary investigation that culminated with the filing of formal charges." *Id.*; *see also Sprint*, 571 U.S. at 79–80 ("Investigations are commonly involved, often culminating in the filing of a formal complaint or charges."). After receiving consumer complaints about Altice's conduct, the Board launched an investigation that included meetings and settlement conferences with the company, and protracted efforts by Board staff to resolve Altice's violations. JA276–77. The Board's inquiry resulted in a formal Order to Show Cause that charged Altice with violating the proration rule, much like an indictment in a criminal case. JA178–82. And, ultimately, the Board's administrative proceeding resulted in a Cease and Desist Order, which concluded that Altice had violated the rule and imposed sanctions. JA230–31. The State's actions here thus resemble the course of a traditional criminal process—investigation, a charge, and, ultimately, a sanction—underscoring that the comity interests that animate *Younger* doctrine apply equally to this case.

Here, moreover, there is a clear "criminal analog" to the Board's civil enforcement action—another sign (though hardly the only sign) that this proceeding demands deference. *PDX*, 978 F.3d at 884. New Jersey law makes any knowing violation of the New Jersey Cable Television Act a criminal misdemeanor offense. *See* N.J.S.A. § 48:5A-51(a) ("Any person ... who shall knowingly violate any of the provisions of the [act] ... is guilty of a misdemeanor."). And the very same statutory

provision that makes a knowing violation of the act a criminal offense—§ 48:5A-51—also gives the Board the power to impose the very civil penalties at issue here. *Id.* § 48:5A-51(b). In other words, the New Jersey Legislature has determined that the State's interest in ensuring that cable companies follow New Jersey law can be "vindicated" both through civil penalties imposed in Board-initiated enforcement proceedings and "through enforcement of a parallel criminal [law]." *ACRA*, 748 F.3d at 139.

It is of no moment that, in this case, the State chose to vindicate its interests through a civil-enforcement proceeding that resulted in civil penalties, rather than in a criminal proceeding. After all, when determining if there is a criminal analog to a civil-enforcement proceeding, the "question is not whether the current action is criminal or whether criminal charges are warranted" but whether the State would be able to "vindicate[] similar interests by enforcing its criminal ... statute[s]." *PDX*, 978 F.3d at 884 (quoting *Gonzalez*, 755 F.3d at 182); *see also Trainor*, 431 U.S. at 444 (abstaining where the "state authorities also had the *option* of vindicating these policies through criminal prosecutions") (emphasis added). That makes sense: were it otherwise, *Younger* would never apply to civil-enforcement proceedings at all, which are by definition civil rather than criminal. Nor is it relevant whether the precise conduct that Altice engaged in could be the subject of a criminal charge

under N.J.S.A. § 48:5A-51(a).[5] For purposes of the threshold *Younger* inquiry, courts ask only whether the kind of civil-enforcement proceeding at issue is "closely related to criminal statutes which prohibit" similar misconduct. *ACRA*, 748 F.3d 138 (quoting *Huffman*, 420 U.S. at 604). And because New Jersey punishes violations of its cable laws with criminal prosecutions and civil-enforcement proceedings, there should be no doubt that the Board's enforcement action in this case has a "criminal analog." *PDX*, 978 F.3d at 884.

The district court's failure to abstain—based *solely* on its erroneous view that there is no criminal analog to the civil action at issue here—is thus untenable for two reasons. *See* JA29–30 (explaining that the state action failed under the "third *Sprint* factor" and "[a]bstention is ... not appropriate on this basis alone") (internal citation and quotation marks omitted).[6] First, it is simply wrong: as recounted above, there

[5] A "case-specific inquiry" into whether the precise conduct at issue could have been subject to criminal sanction "would make the application of *Younger* turn on a complex, fact-intensive analysis, in tension with the Supreme Court's admonition that jurisdiction should be government by 'straightforward rules under which [courts] can readily assure themselves of their power to hear a case.'" *Bristol-Myers*, 979 F.3d at 737–38 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

[6] When the district court first confronted this case, in its earlier decision granting a preliminary injunction, it identified two additional factors that, in its view, weighed against abstention: (1) that the Board's proceeding was "not designed to sanction Altice for any wrongful act"; and (2) that the proceeding "did not follow any investigation" or involve "a formal complaint or criminal charge." JA15. But for the reasons already explained, *supra* at 20–22, both of those determinations are untenable—especially in light of this Court's decision in *PDX*, 978 F.3d at 871,

is a criminal analog—the very same statutory provision that supported Board-initiated civil proceedings for violations of New Jersey's cable statutes also allows for criminal enforcement actions in certain circumstances.[7] But second, and at least as importantly, the district court erred by putting determinative weight on this single consideration. "[T]hough the availability of parallel criminal sanctions may be a relevant datum ... it is not a necessary element when the state proceeding otherwise sufficiently resembles a criminal prosecution." *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 194 (1st Cir. 2015); *see also Bristol-Myers*, 979 F.3d at 737–38 (explaining that not every one of the *Sprint* factors must be satisfied in order for

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which issued between the district court's issuance of a preliminary injunction and the decision on review. *See id.* at 884 (explaining that monetary "[p]enalties are, by their very nature …, a sanction for wrongful conduct); *id.* at 883 (abstaining in favor of state proceeding involving audits and "formal assessments after the culmination of those audits"). And in the decision on review, the district court distinguished *PDX* based *only* on the supposed absence of a criminal analog in this case. JA29–30.

[7] The district court's suggestion that Defendants failed to "identif[y] … any criminal statutes aided by or related to [the Board's] order" is erroneous. Decision at 5. Below, Defendants cited N.J.S.A. § 48:5A-51—the provision that establishes that violations of New Jersey's cable laws can give rise to both criminal liability and civil penalties—in support of their argument that *Younger* abstention was appropriate. Br. in Opp'n, ECF Dkt. 50 at 10 n.1. And in any event, it was *the district court itself* that improperly elevated this single consideration to dispositive status. *See infra* at 24-25. It is thus little surprise that Defendants' briefing did not dwell on the presence or absence of an analogous criminal statute, given that this was one factor of many, and that it points in the same direction as the broader inquiry.

abstention to be warranted, and that a civil proceeding to sanction deceptive acts in commerce "fit[] comfortably within the class of cases described in *Sprint*").

Multiple precedents make clear the significant error in elevating the "criminal analog" consideration into a single dispositive test. For one, in *Middlesex* the Supreme Court held that abstention was warranted in light of a "state disciplinary proceeding intended to punish [a] lawyer for violating ethical rules," even though there could be no criminal analog to the ethical violations at issue, which concerned intemperate and racially insensitive remarks in violation of a code of professional responsibility. *Sirva*, 794 F.3d at 194 (citing *Middlesex*, 457 U.S. at 432–35); *see Middlesex*, 457 U.S. at 428 (describing the conduct at issue). And for another, in *Ohio Civil Rights Commission*, the Supreme Court held that a federal court should have abstained due to a state civil-rights proceeding concerning alleged workplace sex discrimination, despite no suggestion that the conduct at issue—unlawful termination of a pregnant employee—could be subject to criminal penalty. 477 U.S. at 627–28. These approaches are sensible: the abstention inquiry seeks to holistically decide whether the structure and purpose of a civil-enforcement action is sufficiently like a criminal action such that the interests underlying *Younger* apply. Although it does not matter here—given that there *is* a criminal analog to the Board's actions—it is thus clear that the presence of such an analog is relevant but not dispositive.

In short, all of the threshold factors this Court laid out most recently in *PDX* counsel in favor of abstention. The district court's contrary conclusion relied on two errors: that the existence of a criminal analog is dispositive and that there is no criminal analog here. Deference is warranted to the ongoing enforcement proceeding against Altice.

B. The *Middlesex* Factors Favor Abstention

The "additional" *Middlesex* factors also counsel in favor of abstention. *Sprint*, 571 U.S. at 81 (noting that the "three *Middlesex* conditions … [ar]e not dispositive" but are "*additional* factors appropriately considered by the federal court before invoking *Younger*") (emphasis in original). As explained above, those three factors are "(1) whether there are 'ongoing judicial proceeding[s]'; (2) whether those 'proceedings implicate important state interests'; and (3) whether there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *PDX*, 987 F.3d at 883.

First, since Altice's federal action was filed, there has at all times been an "ongoing state proceeding that [is] judicial in nature." *Gonzalez*, 755 F.3d at 182–83. After the Board issued its Cease and Desist Order, Altice appealed the Board's order to the Appellate Division of the New Jersey Superior Court, where it remains under review by that court. *See supra* at 9–10. Only after that appeal was underway did Altice commence this federal action raising the very same issue presented in

Altice's state appeal. "Consistent with the Supreme Court's repeated approach when confronted with administrative matters appealable to the state courts," this Court treats "an administrative adjudication and the subsequent state court's review of it ... as a unitary process for *Younger* purposes." *Gonzalez*, 755 F.3d at 183 (quoting *Sprint*, 571 U.S. at 78); *see also ACRA,* 748 F.3d at 138 n.9 ("We ... assume, for purposes of this opinion, that the Commission's review ... and the [appeal to state court] are both components of a single state proceeding."). So "there was and is an ongoing state proceeding that is judicial in nature." *Gonzalez*, 755 F.3d at 183.[8]

Second, "these proceedings implicate an important state interest." *PDX*, 978 F.3d at 885. When courts "inquire into the substantiality of the State's interest in its proceedings" they do "not consider the merits" of the particular enforcement-action at issue, but rather "the importance of the generic proceedings to the State." *Id.* (quoting *O'Neill v. City of Phila.*, 32 F.3d 785, 791–92 (3d Cir. 1994)). Here, the State's interest is plain. New Jersey has an interest in ensuring that regulated cable-

[8] This would remain true even if the state court proceeding were stayed. *See PDX*, 978 F.3d at 885 ("state proceedings are 'ongoing' for *Younger* abstention purposes, notwithstanding [a] state court's stay of" proceedings' if the state proceeding 'was pending at the time [the plaintiff] filed its initial complaint in federal court" (quoting *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 408–09 (3d Cir. 2005)). The New Jersey Appellate Division has, however, *twice* denied Altice's efforts to stay its state appeal in light of this federal action, underscoring that state courts are poised to resolve Altice's federal-law claims irrespective of this improper federal suit. Stay Denial Order (Jun. 1, 2021), Altice's State Appeal, (Docket No. A-001269-19); Stay Denial Order (May 7, 2020).

utilities follow New Jersey law—including state consumer-protection rules—and a concomitant interest in enforcing New Jersey law through "enforcement actions" brought by the State and in "its courts." *Id.* As the Board's action against Altice illustrates, civil-enforcement proceedings not only allow the State to direct cable utilities to follow state law, but allow it to order companies to return to consumers ill-gotten gains as well as sanction rule-breaking with civil penalties. Federal courts have held that state proceedings that serve similar interests in consumer protection "fit[] comfortably within the class of cases" in which "abstention under *Younger* is warranted." *Bristol-Myers*, 979 F.3d at 738 (proceeding under "statute that punishes those who engage in deceptive acts in commerce" served important interest).[9]

Third, the state proceedings offer Altice an "adequate opportunity to raise [its federal] challenges." *Sprint*, 571 U.S. at 81; *see also Middlesex*, 457 U.S. at 432. Altice has never denied that it may present its preemption defense in the state court.

[9] Nor is the State's interest lessened simply because Altice is raising a preemption defense here. Although this Court in stray language two decades ago suggested that "preemption challenges ... are often inappropriate vehicles for abstention," *Zahl v. Harper*, 282 F.3d 204, 210 (3d Cir. 2002), that consideration has played no role in the Supreme Court's intervening abstention cases. And, as this Court held more recently, it is irrelevant: parties like Altice cannot be allowed to "sidestep[]" a State's interest by "arguing federal preemption supersedes any state interest to the contrary" because federal courts must "not consider the merits 'when [they] inquire into the substantiality of the State's interest in its proceedings.'" *PDX*, 978 F.3d at 885 (quoting *O'Neill*, 32 F.3d at 791-92). As a result, in *PDX*, this Court applied *Younger* to another case involving a preemption defense to a state administrative enforcement action. *Id.*

In fact, as mentioned in detail above, in Altice's state appeal—which has been fully briefed in the State's intermediate court of appeals—the company has presented the exact federal preemption issue raised here. It should be resolved there.

Because the state's civil-enforcement action is quasi-criminal in nature, and because the *Middlesex* factors are easily satisfied, the district court erred in declining to abstain under *Younger*. And because Altice's federal action must be dismissed under *Younger*, that is sufficient grounds to resolve this appeal.

II. THE PRORATION REQUIREMENT IS NOT PREEMPTED BY THE CABLE ACT

If this Court reaches the preemption question, it should reverse the district court. State consumer protection laws like the Proration Requirement implicate a strong presumption against preemption, which Altice cannot overcome because the text, structure, and purpose of the Cable Act all undermine its reading.

Begin with the standard. "Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). Where, as here, the question is one of express preemption, courts "start[] with the basic assumption that Congress did not intend to displace state law." *Id.* at 116 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). This "presumption against preemption" "applies with particular force" in fields that have traditionally been subject to state regulation. *Id.* at 116; *see also Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 & n.5 (3d

Cir. 2018) (finding that in "areas of traditional state regulation ... we apply a presumption against preemption"); *Bedoya v. American Eagle Express, Inc.*, 914 F.3d 812, 817 (3d Cir. 2019) ("[W]e 'presume claims based on laws embodying state police powers are not preempted.'") (quoting *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 84 (3d Cir. 2017)). As this Court has recognized, "consumer protection is a field that states have traditionally occupied." *Navient*, 967 F.3d at 294; *see also Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 43 (1st Cir. 2005) (agreeing that "consumer protection" is one "subject … over which the states have traditionally exercised their police powers"). Because the Proration Requirement is a consumer protection rule, it is thus entitled to a "strong presumption against preemption." *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016).

Where the presumption against preemption applies, courts decline to hold that the State's use of its "historic police powers" is "superseded by [a] [f]ederal [a]ct unless that was the *clear and manifest purpose* of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added); *see also, e.g., Roth v. Norfalco LLC*, 651 F.3d 367, 375 (3d Cir. 2011) (same). That is a high burden: where the "presumption in favor of state law applies," courts must "accept 'a plausible alternative reading … that disfavors preemption,'" even if it would not be the best reading. *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 369 (3d Cir. 2012) (quoting *Bates v. Dow*

Agrosciences LLC, 544 U.S. 431, 449 (2005)); *see also Farina*, 625 F.3d at 118 (adding that if "the text of a pre-emption clause is susceptible of more than one plausible reading," the presumption means that "courts ordinarily accept the reading that disfavors preemption.") (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 129 (2008)). To discern whether there is at least a plausible interpretation that would avoid preemption, courts look "primarily to the text of an express preemption provision," while also considering the "context of the regulatory scheme as a whole," as well as its "purpose[]." *Farina*, 625 F.3d at 118; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (considering the plain "language," "statutory framework," "structure and purpose") (citation omitted).

Here, every signal of congressional intent—from the text of the Cable Act, to its structure and purpose—demonstrates that Altice cannot meet its burden to prove that federal law preempts rules like the Proration Requirement. *See Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 230 (3d Cir. 2001) ("[T]he party claiming preemption bears the burden of demonstrating that federal law preempts state law."). Because Altice's interpretation is far from the best reading of the Cable Act, it is certainly not the only *plausible* one, and the presumption against preemption thus forecloses Altice's claim.

A. The Proration Requirement Does Not Regulate "Rates for the Provision of Cable Service"

Under § 543(a) of the Cable Act, the States may not regulate "rates for the provision of cable service." But the Proration Requirement does not regulate "rates" at all—much less rates "for the provision of cable service."

First, the Proration Requirement is not a "rate" regulation. Because the Cable Act does not define the term "rate" or "rates," those terms take on their ordinary, contemporary meaning. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018) ("our job is to interpret the words consistent with their 'ordinary meaning ... at the time Congress enacted the statute.'"). The 1981 edition of Webster's Third New International Dictionary, released shortly before the Cable Act went into effect in 1984, offers various definitions of "rate." Among other things, it defines "rate" as "a fixed relation ... between two things," as in a "ratio," as well as "a charge, payment, or price fixed according to a ratio, scale, or standard," as in "drapery fabrics bought at the rate of a dollar a yard." Webster's Third New International Dictionary 1884 (1981) ("Webster's"). Particularly relevant here, Webster's states that in the context of utility charges, a "rate" is the "*charge per unit* of a public-service commodity (as electric, gas, water)"—*e.g.*, "an electric rate of 7 cents per kilowatt-hour." *Id.* (emphasis added). A rate, in other words, is not a price (100 dollars), or a unit of

utility service sold (1 month of cable internet), but the *ratio* between the price and the unit (100 hundred dollars *per* month).

The Proration Requirement does not alter "rates" under the plain meaning of that term. Rather, the Proration Requirement leaves the setting of rates entirely up to cable companies like Altice. Under the Proration Requirement, Altice can set whatever price it wishes for cable service, and it can elect to sell service in any increment of time. Altice could, accordingly, offer cable service at the rates of $10 per day, $100 per week, or—if it wished—$1000 per month. *See supra* at 7. The Proration Requirement instead takes a cable company's rate as a given. Once a cable company establishes its own rate, the Proration Requirement requires the company to apportion the charge for a final period of service *according to the company's own rate*. Thus, if a company charges $100 per month, and a consumer terminates service halfway through a month, the Proration Requirement applies the $100 per month rate, but requires the company to charge only the $50 corresponding to the half of the month when the consumer actually received service. The proportion between price and unit of service—namely, the company's "rate"—remains the same. That is, after all, what it means to "prorate." Webster's at 1820 (defining "prorate" as "to divide, distribute, or assess *proportionately*") (emphasis added).

Below, Altice suggested the Proration Requirement "regulates rates because it forces Altice to sell its service by the day at the same rate it sells its service by the

month." Altice Br., ECF Dkt. 48-1 at 12-13. Tellingly, Altice's argument concedes that New Jersey law does not alter the rate it charges for service, but applies "the same rate" Altice itself has elected to charge. *Id.* But beyond that accurate concession, Altice is entirely wrong: nothing in the Proration Requirement forces Altice to sell monthly and daily service at the same price. Consistent with New Jersey law, Altice could offer consumers any number of options: from daily to monthly or yearly charges, each with its own price. If it wished to encourage consumers to enter into longer-term plans, Altice could—perfectly consistent with the Proration Requirement—offer a lower rate for monthly service than daily service. But once a consumer enters into an agreement with Altice—at a rate determined by Altice—the Proration Requirement requires Altice to apply that rate according to when the consumer actually receives service, as opposed to charging a consumer for service they never receive.

A simple example illustrates that the Proration Requirement does not force Altice to sell its services at a "daily" rather than a "monthly" rate. If a consumer pays $100 a month for cable, and terminates service on September 15, the Proration Requirement entitles that consumer to a $50 refund corresponding to half the bill, because September has 30 days. But if that same consumer terminated service on February 15, the Proration Requirement would entitle the consumer to a refund of $46.43, because February has 28 days. If the Proration Requirement required Altice

to adopt *daily* rates, then a consumer would owe the same amount for 15 days of service, whether termination occurred in September or February. Because the law follows Altice's own *monthly* billing rate, however, the appropriate refund changes in proportion to the length of a month: roughly $3.33 per day of unused service in September, and roughly $3.57 per day of unused service in February, but always at the rate of $100 a month. At all times, the relevant rate is the one chosen by Altice.

Second, even if the state law Proration Requirement could be considered "rate regulation," it is not a regulation of "rates *for the provision of cable service*" under the Act. 47 U.S.C. § 543(a) (emphasis added). To the contrary, by its express terms, New Jersey's law comes into play only *after* the "final termination of service," N.J.A.C. § 14:18-3.8(c)—that is, when "the provision of cable service" has ended, 47 U.S.C. § 543(a). While the Cable Act thus prevents States from regulating rates while cable signals are flowing into consumers' homes, it plainly does not prevent States from regulating cable company charges after service is terminated—namely, when there is *no* provision of cable service anymore.

The district court's contrary view, that the Proration Requirement must be preempted by the federal Cable Act, renders the statutory phrase "for the provision of cable service" entirely superfluous. 47 U.S.C. § 543(a). Section 543(a) preempts the regulation of rates "*for the provision of* cable service," not simply rates "related to cable service." *Id.* (emphasis added). Yet under the district court's reading—

where charges for service *not* provided constitute rates for the provision of cable service—the words "for the provision of cable service" add nothing whatsoever to the preemptive scope of that provision. It is axiomatic that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). As applied here, that basic canon of interpretation suggests that the Cable Act preempts only rates for the provision of cable service, not *all* cable company charges or billing practices. Had Congress intended to craft the broader preemptive provision envisioned by the district court, it could have easily done so. Instead, while Congress left markets to determine, through competition, the price of cable service, it did not prevent states from regulating *other* cable company practices—like the underhanded billing tactic at issue here—that have nothing to do with delivering service to customers.

The Second Circuit adopted precisely this view in *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992). There, the court considered whether the Cable Act prohibited states from regulating "downgrade charges"—fees assessed when consumers downgraded to a less expensive level of cable service (say, when a consumer drops a subscription to HBO). *Id.* at 92. As in this case, the cable industry argued that the state regulation was preempted by § 543(a) of the Cable Act. The Second Circuit disagreed. As it explained, "[s]ection 543(a) pre-empts all 'rates

for the provision of cable services,' not 'all rates for cable services.'" *Id.* at 99 (quoting 47 U.S.C. § 543(a)) (emphasis in original). And the Court declined to adopt the "tortured" and "linguistically unlikely proposition that the customer is 'provided' with cable service when services ... are removed." *Id.* Moreover, *Finneran* went on, Congress could have easily written § 543(a) to preempt all rates "relate[d] to" cable service if it had intended to do so, but "[i]nstead ... pre-empt[ed] only those state rules that regulate rates charged by cable companies for providing services to customers." 954 F.2d at 101–02. To respect the law Congress wrote, this Court should hold the same. Indeed, if anything, the Proration Requirement is even further from the "provision of cable service" than the downgrade charge in *Finneran*. While a consumer who pays a downgrade charge continues to receive some cable service (minus whatever premium subscription is dropped), the Proration Requirement applies where a consumer has terminated service altogether—when there is no longer any provision of service.

Nor is *Finneran*'s textual reading of § 543(a) unique. In *Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights*, 178 Mich. App. 117 (Mich. Ct. App. 1989), the court likewise noted that § 543(a) "does not refer to rates or fees generally but refers only to rates for the 'provision' of cable service." *Id.* at 124. Accordingly, it held that a state law limiting disconnection fees was not preempted under § 543(a) because "[a] disconnect fee has nothing to do with the *provision* of

cable service, but instead is a fee imposed upon the cancellation of a particular service." *Id.* at 124–25 (emphasis added). Said another way, those two courts held that the statutory phrase "provision of cable service" means what it says—it prevents the States from regulating how much is charged for service, but not whether and when charges, fees, and proration may be warranted *absent* service. By Altice's atextual logic, by contrast, nothing can stop it from charging consumers even for the period *before* they become customers of Altice (e.g., requiring them to pay for service on June 1–14 even if a customer signed up for the first time for service on June 15)—as such a charge would equally constitute "the provision of cable service." 47 U.S.C. § 543(a).

The district court's attempt to distinguish *Finneran*—drawn from *Spectrum Northeast LLC v. Frey*, 496 F. Supp. 3d 507 (D. Maine 2020), which is currently on appeal to the First Circuit—fails. According to the district court, "[t]he downgrade fees at issue in *Finneran*" were not rates for the provision of cable service because those fees concerned "a one-time cancellation or deinstallation fee," whereas the Proration Requirement regulates "the rate that Altice may charge for providing a certain quantity of cable service before a customer cancels service." JA33 (quoting *Spectrum*, 496 F. Supp. 3d at 514). As a threshold matter, that distinction is simply wrong: the Proration Requirement does not concern what Altice charges for "service *before* a customer cancels service," *id.* (emphasis added), but rather what Altice may

charge for service *after* it is cancelled—just like the downgrade charge at issue in *Finneran*. Regardless, it is a distinction without a difference: whether the state law speaks to a "one-time" fee or to proration says nothing about whether those requirements are "for the provision of cable service." And the district court identified no reason why a "deinstallation fee" is not a "rate for the provision of cable service" if the Proration Requirement, which also concerns charges assessed when service is eliminated, falls within the ambit of § 543(a). That is because, as a matter of logic and language, no such distinction exists.

Nothing in the unpublished Nebraska state trial court decision in *Windstream Nebraska, Inc. v. Nebraska Public Service Commission*, No. CI-10-2399, 2011 WL 13359491 (Neb. Dist. Ct. June 9, 2011), suggests a different result. Although the district court relied on that decision below for the proposition that proration rules are preempted, *Windstream* did not involve the Cable Act, cable services, or federal preemption of any state regulation. Instead, that case concerned whether a Nebraska state agency exceeded its authority under state law by imposing a proration requirement on telephone companies. And were that not enough, the text of the Nebraska statute at issue was sharply different from § 543(a): it prohibited not only "rate regulation" but regulation as to "rates *and charges*," *id.* at *4 (quoting Neb. Rev. Stat. § 86-139), and it nowhere limited itself to rates "for the provision of ... service." That court thus did not grapple with the Cable Act's text nor with the

problems of superfluity that Altice's reading would introduce into it. And as that case did not involve preemption at all, the Nebraska court did not apply the powerful presumption against preemption—that is, the aforementioned presumption in favor of state regulatory authority that this Court must apply here.

Because the Proration Requirement is neither a state regulation of "rates," nor a regulation concerning "the provision of cable service," it is not preempted under the best textual reading of § 543(a) of the Cable Act. And because the presumption against preemption requires courts to accept even a "plausible reading" of § 543(a) that would avoid preemption, *Farina*, 625 F.3d at 118 (quoting *Altria*, 555 U.S. at 129); *see also, e.g., Federal-Mogul*, 684 F.3d at 369; *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 489 (3d Cir. 2013), Altice plainly cannot prevail.

B. The Structure and Purpose of the Cable Act Disfavor Preemption

Not only does the text of § 543(a) foreclose Altice's arguments, but the text is reinforced by the rest of the Cable Act, which makes clear that Congress intended to *preserve* state authority to impose consumer protection laws like this one.

There are two distinct provisions of the Cable Act that make clear the limited preemptive reach of § 543(a). First, in § 552(d)(1) of the Act, Congress provided that "[n]othing" in the Cable Communications subchapter "shall be construed to prohibit any State … from enacting or enforcing any consumer protection law" unless it is "specifically preempted by this subchapter." There can be no dispute that

the New Jersey law is aimed at consumer protection, and that the state court action here seeks to "enforce" a consumer protection rule. As explained above, the entire goal of New Jersey's law is to protect consumers against charges for service they are never provided, a classic form of consumer protection. Rather, the question is how to harmonize the savings clause § 552(d)(1) with the preemption provision in § 543(a), and whether the district court erred in its approach.

In seeking to square these two provisions, the district court took too cramped a view. According to the district court, the Act's consumer protection savings clause is irrelevant to the preemption analysis because the savings clause states that it may be "specifically preempted" by other provisions of the Act, and (to the district court's mind) § 543(a) specifically preempts "rates for the provision of cable service." JA34. That is wrong: the role of this Court is to "read together" the Act's "express pre-emption provision and its savings clause" to give them *both* their full intended effect. *Wyeth*, 555 U.S. at 597 (Thomas, J., concurring). Even a preemption provision that would, on its own, have "broad preemptive force" can be narrowed by a "savings clause" which "reclaims a substantial amount of ground." *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 841 (9th Cir. 2009) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002)); *see also Rush*, 536 U.S. at 365 (recognizing, in light of broad savings clause, that Court "'ha[d] no choice' but to temper" preemption provision). In *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000),

for example, the Court held that "[w]ithout the [relevant] saving clause, a broad reading of [an] express pre-emption provision arguably might pre-empt" certain state actions, but "[g]iven the presence of the saving clause," "the broad reading cannot be correct." *Id.* at 868; *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (holding that a statute's "savings clause buttresses th[e] conclusion" that an express preemption clause should not be "read broadly.").

In other words, a savings clause like the one in § 552(d)(1) aids construction of the rest of the Act, including express preemption provisions. *See Navient*, 967 F.3d at 288 ("To identify the domain expressly preempted by Congress, we read 'the words of a statute . . . in their context and with a view to their place in the overall statutory scheme.'") (quoting *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019)). Congress's deliberate decision to preserve all state consumer protection laws unless "specifically preempted" is thus an additional cause, on top of the presumption against preemption, to read § 543(a) narrowly. After all, if the consumer protection savings clause added nothing to the Cable Act beyond the default presumption against preemption, it would be meaningless. And especially in light of the compelling textual analysis laid out above, the consumer protection savings clause is the final nail in the coffin for Altice's position.

The FCC itself has recognized that the consumer protection savings clause preserves the states' authority to regulate "the circumstances under which a cable

operator may bill a subscriber for a particular service" notwithstanding § 543(a)'s prohibition on rate regulation. *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 F.C.C.R. 4316, ¶ 128 (1994) ("Cable Order"). Specifically, the FCC has read the Cable Act to permit states to limit "negative option billing"—a practice in which a company charges a subscriber for service that the subscriber has not affirmatively requested. As it has explained, although the Act refers to these billing practices in the very section governing "[r]egulation of rates," 47 U.S.C. § 543, *see id.* § 543(f), state laws regulating this practice are "more in the nature of a consumer protection measure rather than a rate regulation per se." Cable Order, ¶ 128. Because the Act shelters state consumer protection measures unless "specifically preempted," the FCC has read the Act as "preserv[ing] the ability of a state or local government … to regulate negative option billing." *Id.*

State regulation of negative option billing is especially instructive in this case because the Proration Requirement also respects "the circumstances under which a cable operator may bill a subscriber"—namely, whether a company may charge the consumer for services after termination of service—"rather than the reasonableness of the actual rate charged." *Id.*; *see also Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 194 (D.C. Cir. 1995) (upholding authority to regulate negative option billing as

a "consumer protection provision rather than rate regulation"). Like negative option billing, the Proration Requirement is well within states' congressionally-reserved power to implement consumer protection laws. In both cases, the FCC's approach buttresses New Jersey's position—an express savings clause can and should be read to circumscribe overbroad readings of § 543(a).

There is a second relevant savings clause—§ 552(d)(2)—that likewise shields the Proration Requirement from preemption. Under this provision, which contains no carveout for laws elsewhere preempted in the Act, "[n]othing in this subchapter shall be construed to prevent the establishment or enforcement of … any State law, concerning customer service that imposes customer service requirements." 47 U.S.C. § 552(d)(2). While the Cable Act does not define the term "customer service requirement," the legislative history is instructive. *See Roth*, 651 F.3d at 375 (noting that where the text is ambiguous, courts may discern Congress's preemptive intent through "the statute's legislative history"). As a report issued by the House Committee on Energy and Commerce explained, "customer service means the direct business relation between a cable operator and a subscriber" and "[c]ustomer service requirements include requirements related to interruption of service; *disconnection*; [and] *rebates and credits to consumers*." H.R. Rep. 98-934 at 79 (1984) (emphasis added); *see also Finneran*, 954 F.2d at 97 (relying on this legislative history for the same proposition); FCC, *Local Franchising Authorities' Regulation of Cable*

Operators & Cable Television Serv., 84 Fed. Reg. 44725, 44736 (2019) (affirming that this history informs the meaning of "customer service requirements" under the Cable Act). The Proration Requirement falls well within that domain. It is a rule related to the "disconnection" of service—that is, what happens after service is terminated. And where a cable company charges for a full billing cycle in advance, the Proration Requirement requires the company to issue a "rebate[]" or "credit[]," *id.*, corresponding to the period of the cycle that follows termination of service, N.J.A.C. § 14:18-3.8(c). The savings clause directly applies.[10]

The district court held that the Proration Requirement is not a customer service requirement, JA34–36, but its analysis—drawn verbatim from another district court decision in *Spectrum Northeast*, 496 F. Supp. 3d 507—falls short in three material respects. *First*, as to the text of § 552(d)(2), *Spectrum Northeast* (and thus the court below) emphasized heavily that, under the Act, "customer service requirements … include, at a minimum" rules governing "cable system office hours"; "installations, outages, and service calls"; and "communications between the cable operator and the subscriber (including standards governing bills and refunds)," and that proration is none of these things. 47 U.S.C. § 552(b). But as the plain text of the statute

[10] Even though *Spectrum Northeast* disagreed with the State's ultimate conclusion, it was forced to acknowledge that "the legislative history of the Cable Act supports the view that 'customer service requirements' may encompass some requirements that cable operators provide rebates and credits to subscribers." 496 F. Supp. 3d at 516.

establishes, these examples are expressly illustrative, and are only the "minimum" standards that a State may "exceed." *Id.* § 552(d)(2). Thus, as the district court in *Spectrum Northeast* was forced to concede, state laws "requiring cable operators to grant credits, rebates, or refunds might meet this definition." 496 F. Supp. at 516. The court even recognized that under *Finneran* states may regulate "cancellation fees," in line with Congress's purpose in crafting the savings clause. *Id*. But there is no difference between such "rebates or refunds" and proration—which of course *is* a refund for the period in which a customer received no service.

Second, *Spectrum Northeast* concluded that Proration Requirement was not a customer service requirement under the Act despite the ready analogy to credits, rebates, or refunds because the Proration Requirement was "unambiguously prohibited" by the text of § 543(a), and a savings clause cannot "create[] an exception to" § 543(a). *Spectrum Northeast*, 496 F. Supp. 3d at 516–17. But that runs into a number of its own problems. For one, unlike the consumer protection savings clause discussed in detail above, § 552(b) contains no carveout for those state laws that are elsewhere preempted in the Act—a distinction the district court ignored. For another, even if this savings clause did contain such a carveout, there would still be a need to read the savings clause and the express preemption together to give them both their full intended effect—another reason to read the text of § 543(a) narrowly. Reading § 543(a) narrowly is not "creat[ing] an exception" to

the preemption provision, *Spectrum Northeast*, 496 F. Supp. 3d at 516–17, it is construing § 543(a) in context, with a view to its place in the overall scheme of the Cable Act.

Third and finally, the district court ultimately concluded that the state rule had to fall because allowing a rule like the Proration Requirement would undermine the supposed "overarching purposes of the Cable Act"—i.e., the desire to establish "a national policy concerning cable communications"—because it would allow states to establish different rules with respect to proration and refunds. *Id.* It is obvious, however, that Congress did not intend to establish a single set of national regulations respecting every aspect of cable service. After all, the Act sets out a range of areas that remain the purview of state and local regulation, *supra* at 5–6, including the express protections for consumer protection laws and state customer service requirements at issue here, 47 U.S.C. § 552(d), which necessarily allow different consumer protection regimes to be implemented and enforced by different states.

Moreover, as *Finneran* explained, the purpose behind § 543(a)'s express rate-regulation provision actually cuts *against* preemption of state rules like the Proration Requirement. "Congress' purpose in section § 543 was not to curtail regulation in the abstract but rather to do so in order to allow market forces to control the rates charged by cable companies." 954 F.2d at 100. But punishing a consumer who terminates service with Altice, like the downgrade charges at issue in *Finneran*,

"insulate[s] cable companies from market forces" by "sharply limit[ing] the incentive" to switch to a competitor. *Id.* Altice's no-proration policy is a transparent attempt to hold consumers captive to Altice, and to wring dollars out of consumers who are headed out the door. The policy stifles competition in the marketplace for cable service and it serves no salutary purpose other than increasing Altice's profits. That is, ultimately, what is at stake here: Altice's effort to earn money not by providing a quality service at a rate of its choosing, but by charging New Jersey consumers for a service that it is not providing.

Nothing in the Cable Act suggests that Congress gave cable companies carte blanche to charge unwitting consumers for services they never received. To the contrary, the Act evinces a clear intent to preserve the states' historic power to pass rules that protect consumers against underhanded billing practices. The Proration Requirement fits comfortably within that regime and is not preempted.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

Dated: July 9, 2021

By: /s/ Alec Schierenbeck
Alec Schierenbeck (NJ ID # 372492021)
Deputy State Solicitor

CERTIFICATION OF BAR MEMBERSHIP

I certify that that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: July 9, 2021

By: /s/ Alec Schierenbeck
Alec Schierenbeck (NJ ID # 372492021)
Deputy State Solicitor

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), as well as L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,052 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 word-processing system in Times New Roman, 14 point font.
3. Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies.
4. The electronic brief has been scanned for viruses with a virus protection program, McAfee VirusScan Enterprise + Antispyware Enterprise, version 8.8.0, and no virus was detected.

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By: /s/ Alec Schierenbeck
Alec Schierenbeck (NJ ID # 372492021)
Deputy State Solicitor

CERTIFICATE OF SERVICE

I certify that on July 9, 2021, the foregoing Appellants' Merits Brief was electronically filed with the clerk of the court with the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system.

Dated: July 9, 2021

By: /s/ Alec Schierenbeck
Alec Schierenbeck (NJ ID # 372492021)
Deputy State Solicitor