No. 20-1104

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

COMCAST OF MAINE/NEW HAMPSHIRE, INC., et al.,
Plaintiffs-Appellees,

v.

JANET MILLS, in her official capacity as
the Governor of Maine, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maine
(No. 1:19-cv-00410)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Washington Legal Foundation has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. Because the economy tends to suffer when the federal government and state governments impose overlapping regulations on the same conduct, WLF appears often as *amicus curiae* in important preemption cases. See, e.g., *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Dolin v. GlaxoSmithKline LLC*, 901 F.3d 803 (7th Cir. 2018).

Maine seeks to force cable-television providers to offer channels, and even individual programs, à la carte. The district court found that this demand violates the First Amendment, and this Court can and should affirm on that ground. But there is another reason to block Maine's effort: the federal government has expressly preempted state regulation of how cable television is provided—how it is served—to

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

customers. The trial court rejected this preemption argument. WLF urges this Court to accept it.

SUMMARY OF ARGUMENT

Section 544(f) of the federal Cable Act says that a State "may not impose requirements regarding the provision or content of cable services, except as expressly provided" elsewhere in the Act. 47 U.S.C. § 544(f)(1). "Provision" means "the act or process of providing." *Webster's New Collegiate Dictionary* 921 (1979). Selecting the television channels or programs *to be provided* is integral to the "process" of "providing" cable television.

In 2019 Maine's legislature enacted LD 832, which dictates how channels or programs *shall be provided*: it says that a cable operator must "offer subscribers the option of purchasing access to cable channels, or programs on cable channels, individually." When a group of cable operators and content providers challenged LD 832 in this lawsuit, Maine could cite nothing in the Cable Act that "expressly" authorized it to pass its new law. Its law therefore falls within the plain meaning of the preemption clause in § 544(f). The district court

acknowledged as much, writing that, when given "its plain meaning," § 544(f) preempts LD 832. (Order 5.)

But the district court then *diverged* from § 544(f)'s plain meaning. The "context of § 544(f)," the court said, required that § 544(f) be given a *non*-plain meaning. (*Id.*) After considering two other parts of the Cable Act, legislative history, case law, and a (supposed) presumption against express preemption, the court concluded that, as used in § 544(f), "provision" *actually* means something like "content." (*Id.* at 15.) Given that § 544(f) already says "provision *or content*," this reading makes no sense, and none of the material the court examined proves otherwise.

A. The trial court claimed that a natural reading of "provision" turns § 544(e) of the Act, which bars States from regulating "subscriber equipment" or "transmission technology," into surplusage. But under their usual definitions, "provision," "subscriber equipment," and "transmission technology" each retain a distinct scope. Even if the terms overlap slightly, mere overlap does not trigger the surplusage canon. Moreover, the court's misuse of the canon created more surplusage than it removed, by making the word "provision" duplicative of the word "content."

The trial court also invoked § 552(d), which protects state consumer-protection laws from preemption. The court worried that reading "provision" too broadly would sweep all consumer-protection laws into its ambit, thereby wrecking those laws' § 552(d) shelter. But the normal meaning of "provision," as used in § 544(f), preempts LD 832 while leaving ordinary consumer-protection laws intact.

B. The meaning of § 544(f) being clear, the trial court had no grounds for dipping into the Cable Act's legislative history. In any event, that material never discusses § 544(f). And like most legislative history, it points in any direction one wants to go. It shows, at least as much as it shows anything else, that the Act aims to stop States from regulating the cable industry.

C. The trial court discussed some case law, all of which stands on a single decision, *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1990). That decision never looks closely at the word "provision"; it manufactures ambiguity by refusing to accept that the statute means what it says; and it misreads the statute's legislative history in much the way the court here did.

D. The Supreme Court once employed a presumption against express preemption. In 2016, however, it reversed course, concluding that a court should simply "focus on [a federal law's] plain wording," which "necessarily contains the best evidence of Congress's pre-emptive intent." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). The trial court treated the dead presumption as a reason "to interpret § 544(f) narrowly." (Order 20.) That, obviously, was a mistake. Regardless, even a "narrowing" of § 544(f)'s phrase "provision or content" must leave each word some work to do. The trial court's fundamental error was to treat both words as meaning simply "content."

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING TO DECLARE MAINE'S LD 832 PREEMPTED BY § 544(F) OF THE FEDERAL CABLE ACT.

The economist Ronald Coase used to say that if you torture the data long enough, it will confess. The same principle applies to statutes. The traditional tools of statutory construction are useful and important, but they can easily be misused.

The trial court used those tools to build the conclusion that § 544(f)'s "context" demands an empty reading of the word "provision."

But the court's work was tainted by a starting assumption that the phrase "provision or content," in § 544(f), simply *must* mean just "content," full stop. Even if that assumption made sense (it doesn't), it was not for the trial court to alter the meaning of the statute. A federal court has "no roving license" to "disregard clear language"—not even if the court is convinced that "Congress 'must have intended' something" different. *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). Statutory construction is a means of understanding what a law *says*, not of forcing a law to say what one thinks it *should* say.

A. Other Parts of the Cable Act.

1. Section 544(e).

Section 544(e) of the Cable Act bars a State from restricting a "cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e). If, the district court reasoned, a regulation of "subscriber equipment" or "transmission technology" is likewise a regulation of the "provision . . . of cable services," § 544(e) is duplicative of § 544(f). Section 544(f) must be read narrowly, the district court therefore concluded, if § 544(e) is not to be rendered "unnecessary." (Order 5-6.)

But the most natural reading of § 544(e) and § 544(f) contains no surplusage. "Subscriber equipment" and "transmission technology" (§ 544(e)) refer to the technical logistics of supplying cable television, while "provision . . . of cable services" (§ 544(f)) refers to how television content is sold, presented, or packaged. The district court thus had no good reason to depart from the ordinary meaning of § 544(f), under which, as the court itself acknowledged, LD 832 is preempted.

There is, by contrast, a strong reason *not* to deviate from § 544(f)'s ordinary meaning. It can be safely assumed that Congress usually seeks to give each word *some* meaning, but not that it seeks to avoid *any* overlap between words. The surplusage canon therefore aims merely to ensure that each term has "*some* independent operation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) (emphasis added). Whatever overlap might exist between § 544(e) and § 544(f) is partial. The two subsections use different words that have distinct scopes, leaving no role for the surplusage canon to play. Yet the trial court effectively rewrote § 544(f). There was simply no need to do that.

If anything, the trial court's use of the surplusage canon created problems where none existed. "The canon is particularly unhelpful when," as here, "both interpretive outcomes" might "lead to some sort of surplusage." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 699 (D.C. Cir. 2014). The court avoided a debatable minor surplusage only to create an obvious major one. "I would extend § 544(f) to cover requirements regarding programming-related decisions," the trial judge wrote, "only if they had the effect of either prohibiting a cable operator from providing particular programming or requiring a cable operator to provide particular programming." (Order 15.) "Programming," of course, is just another word for "content." The court thus defined "provision" to mean no more than "the provision *of content*." But § 544(f) already says "regarding the provision *or content* of cable services." Rather than ensure that the words "provision" and "content" have distinct meanings, the court in effect struck the word "provision" from the statute. It leapt from the frying pan to the fire.

2. Section 552(d).

Section 552(d) says that "[n]othing" in the Cable Act "shall be construed to prohibit any State . . . from enacting or enforcing any

consumer-protection law, to the extent not specifically preempted by" the Act itself. 47 U.S.C. § 552(d)(1). The district court believed that a broad reading of the word "provision" in § 544(f) might lead to the preemption of "*any* consumer protection law involving the cable industry," because "such laws would all be 'requirements regarding the provision . . . of cable services.'" (Order 6.) If *all* consumer-protection laws were preempted by § 544(f), the court noted, § 552(d) would be pointless.

Concerns about the hypothetical outer limits of § 544(f) are irrelevant. If the word "provision" in § 544(f) is given, not a broad or a narrow meaning, but simply its ordinary meaning, it plainly preempts a state law, such as LD 832, that attempts to regulate how cable television is packaged or presented. Only an unnecessarily expansive reading of "provision," meanwhile, would threaten all state consumer-protection laws.

B. The Cable Act's Legislative History.

The trial court found that the legislative history of the Cable Act supported its reading of § 544(f). That material shows, the court said, that Congress passed the Act, including § 544(f), to prevent

"government officials from controlling the content of cable programming." (Order 8.)

The court reached for the legislative history far too quickly. Such material "is not the law." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019); see Kenneth A. Shepsle, *Congress is a "They," not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L & Econ. 239 (1992). Even if it can "illuminate ambiguous text," it cannot "muddy clear statutory language." 139 S. Ct. at 1814. The trial court understood that when given "its plain meaning," § 544(f) preempts LD 832. The dispute should have ended there. Dusting off the legislative history needlessly complicated the matter.

After consulting the legislative history without cause to do so, the trial court proceeded to misuse it. The court claimed that the legislative history has something pertinent to say about "§ 544(f) specifically." (Order 8.) One might think, from the way the court weaved a quotation of § 544(f)'s text into its discussion of the legislative history, that this is so. (See *id.*) But it's not. The court focused on statements in a House Report to the effect that *one* of the aims of the Cable Act *as a whole* is to protect cable operators' ability to control the content of their

programming. (*Id.* at 7-8.) The court tried, in effect, to bolster its analysis with one of the Act's underlying purposes. But "even the most formidable argument concerning the statute's purposes could not overcome . . . the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012).

The use of legislative history generally amounts to little more than looking over the heads of a crowd and picking out one's friends. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). That's an apt description of what the district court did here. The court seized upon the House Report's statements about the importance of private, rather than government, control over content (Order 7-8); but that same report says that the Act *also* aims to create "a *national* policy to guide the development of cable." H.R. Rep. 98-934, 1984 U.S.C.C.A.N. 4655, 4656 (emphasis added); to provide "appropriate *de*regulation in certain respects to the provision of cable service," *id.* (emphasis added); to provide "the cable industry with the *stability* and *certainty* that are essential to its growth and development," *id.* at 4657 (emphasis added); and to *protect* "cable companies from unnecessary regulation," *id.* at 4666. The Act itself

confirms that it aims to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6).

The district court acknowledged that complying with LD 832 "will be costly" (Order 18), and that LD 832 "will significantly change how cable operators do business in Maine" (*id.* at 19). What that means, given the competing passages of legislative history just quoted, is that in a dispute over whether § 544(f) preempts LD 832, the Act's legislative history offers no more support for one side than the other.

Invoking perhaps the weakest form of "legislative history" of all, the trial court opined that Congress acquiesced to a reading of § 544(f) in *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1990)—a case to which we turn shortly—by failing to contest it in later amendments of the Cable Act. (Order 9 n.4.) But to divine "a controlling legal principle" from "the absence of corrective legislation" is to "walk on quicksand." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *C. Bank of Denver, N.A. v. First*

Interstate Bank of Denver, 511 U.S. 164, 186 (1994). The acquiescence canon applies, moreover, "only to holdings of the court of last resort . . . [or] *uniform* holdings of lower courts." Scalia & Garner, supra, at 323-24 (emphasis added). "Uniform" in this context means a broad consensus—an array of authority "significant enough that the bar can justifiably regard the point as settled law." *Id.* at 325. Nothing like that exists here.

C. Case Law.

The district court invoked *United Video*, 890 F.2d 1173, as support for its reading of § 544(f). Section 544(f) governs not only a State, but also a "Federal agency." At issue in *United Video* was an FCC regulation that barred a cable station from infringing a broadcast station's exclusive right to broadcast a syndicated program in a given local market. A group of cable companies argued, among other things, that the regulation was a "requirement[] regarding the provision or content of cable services" blocked by § 544(f).

The "only" argument the companies "offer[ed]" was "that the meaning of § 544(f) is clear on its face." *Id.* at 1188. *United Video* responds, in a single sentence, that a requirement "regarding . . .

provision or content" might be, not a requirement that connects to content *or* to *how* content is *provided*, but merely a requirement about *what* content is *required*. *Id.* at 1188. The court simply ignored the meaning of the broad term "regarding." Like its synonym, "relating to," see *Webster's Third International Dictionary* 470, 1911 (1965), "regarding" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (quoting *Black's Law Dictionary*, 1158 (5th ed. 1979)). Many regulations can "stand in some relation" to "the provision or content of cable services" without mandating or prohibiting specific content.

After manufacturing ambiguity in a single sentence (and engaging in an aside about the use of the word "require" in a distinct subsection of the Act), *United Video* takes the same set of faulty steps the district court took here. It jumps straight to the legislative history; it discusses only the House Report's *general* statements about keeping the government out of content decisions, *id.* at 1188-89; it bypasses the Report's other policy statements; and it reads the word "provision" out

of the statute, *id*. at 1189. In short, it uses ambiguous legislative history to "muddy clear statutory language." *Azar*, 139 S. Ct. at 1814.

Two other aspects of *United Video* merit a word. First, the cable companies there were arguing that they should be allowed to broadcast programs in far-flung markets where others had already paid for exclusive distribution rights. The equities of the case might have exerted a strong pull on the court's reading of § 544(f). Second, the respondent in *United Video* was not a State but the FCC. The regulation at hand applied nationwide. One factor that was *not* at play in the case, therefore, was the risk that States might impose a patchwork of competing regulations on cable companies. The House Report's statements about the need for a "*national* policy" were not pertinent in *United Video*. They are immensely important here.

Although the district court discussed two other cases, both simply "followed *United Video*." (Order 11 (discussing *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp. 1518, 1545-46 (M.D. Ala. 1992); *Morrison v. Viacom, Inc.*, 52 Cal. App. 4th 1514, 1531-32 (1997)).)

D. The (Defunct) Presumption Against Preemption.

"I am required," the district judge wrote, "to interpret § 544(f) narrowly." (Order 20.) The judge drew this conclusion from *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), which embraced a presumption against express preemption. When a state law regulates an area traditionally subject to a State's police powers, *Medtronic* said, it can be preempted only by a federal law with a "clear and manifest" preemptive effect. *Id*.

But *Medtronic*'s anti-preemption presumption is almost certainly no longer good law. A more recent authority, *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), says that a court considering "an express pre-emption clause" should "not invoke any presumption against pre-emption." It should "instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *Id*. This court's sister circuits have been quick to recognize that *Franklin* replaced *Medtronic*. See *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 761-62 & n.1 (4th Cir. 2018) (applying *Franklin*); *Dialysis Newco, Inc. v. Cmty. Health Sys. Group Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019) (same);

Watson v. Air Methods Corp., 870 F.3d 812, 817 (8th Cir. 2017) (same); *Atay v. Cnty of Maui*, 842 F.3d 688, 699 (9th Cir. 2016); (same); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (same). Although the switch has not been universal, see *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (applying *Medtronic*), the "best course is simply to follow as faithfully as [possible] the wording of the express preemption provision, without applying a presumption one way or the other," *Air Evac EMS*, 910 F.3d at 762 n.1.

Even if one were inclined (quixotically) to reject the great weight of authority holding that "the Supreme Court has . . . changed its position on the presumption against [express] preemption," *Dialysis Newco*, 938 F.3d at 258, the presumption would have nothing to contribute here. Raising the old presumption from the dead would just revive the question of what the word "provision" means when it sits alongside the word "content." A presumption that compels a court to construe a statutory term "narrowly" does not empower the court to strike the term from the statute altogether. So a "narrow" construction of "provision" cannot give "provision" and "content" the same meaning. And if "provision" must mean something, apart from "content," it is

exceedingly hard to see how the *packaging* of the content provided could fall outside that semantic space.

CONCLUSION

The order granting a preliminary injunction should be affirmed.

June 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the page limit set forth in Circuit Rule 29-2(c)(2). The brief contains 3,357 words.

(ii) That 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 it has been prepared using Microsoft Office Word 2010 and is set in 14-point Century Schoolbook font.

June 3, 2020

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I certify that on June 3, 2020, I filed the foregoing brief of Washington Legal Foundation via the CM/ECF system and served the foregoing via the CM/ECF system on all counsel who are registered CM/ECF users.

/s/ Corbin K. Barthold