Nos. 98-652 and 98-653

In the Supreme Court of the United States

OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

BELL ATLANTIC CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether certain provisions of the Telecommunications Act of 1996 applicable to the activities of the Bell Operating Companies (47 U.S.C. 271-275) constitute "bills of attainder," violate separation of powers principles, or deny those companies the equal protection of the laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a[1]) is reported at 154 F.3d 226. The opinion of the district court (Pet. App. 54a-73a) is reported at 981 F. Supp. 996.

[1] "SBC Pet." refers to the petition for a writ of certiorari in No. 98-652; "Bell Atl. Pet." refers to the petition in No. 98-653. "Pet. App." refers to the appendix to the petition in No. 98-652. (The appendices to the petitions are identical.)

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. The petition for a writ of certiorari in No. 98-652 was filed on October 19, 1998, and the petition for a writ of certiorari in No. 98-653 was filed on October 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into seven corporate entities known as "Regional Bell Operating Companies." See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom*. *Maryland* v. *United States*, 460 U.S. 1001 (1983). After recent mergers, that number now stands at five: Bell Atlantic, BellSouth, SBC Communications, Ameritech, and U S WEST.

The consent decree, overseen for many years by the federal district court in Washington, D.C., prohibited

the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. In approving the restriction on long-distance service,[2] the district court explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities (through which all calls must pass) to impede long-distance competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *AT&T Co.*, 552 F. Supp. at 187-188, 223. The court cited related concerns in approving the restrictions on information services and equipment manufacturing. See *id.* at 189-191.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, comprehensively overhauled the regulation of all telephone markets. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress sought to open local markets to full competition for the first time by requiring all incumbent local exchange carriers (LECs), including

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[2] The district court divided the Bell Companies' collective geographical regions into approximately 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983). The relevant restriction in the consent decree permitted the BOCs to provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the Bell Companies to carry.

the BOCs, to make their networks and services available to new entrants in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires the incumbents to "interconnect" their networks with those of other carriers, and to do so "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Second, Section 251(c)(3) entitles potential competitors to lease elements of an incumbent's network, again at "just, reasonable, and nondiscriminatory" rates, terms, and conditions. Finally, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. Several important issues concerning those local competition provisions are now pending before this Court in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (argued Oct. 13, 1998), and consolidated cases.

Congress also enacted a set of provisions—applicable to the BOCs and "any successor or assign" (47 U.S.C. 153(4)(B) (Supp. II 1996))—that "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing * * * a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 66 (D.C. Cir. 1998) (emphasis in original). The most basic of those provisions is Section 601(a) of the 1996 Act, 110 Stat. 143, which terminates the prospective effect of the AT&T consent decree. In place of the decree, Congress created a transitional regulatory framework governing the BOCs' entry into certain new markets, both to ensure orderly progress towards full and fair competition in telecommunications and to give the BOCs a strong incentive to facilitate the realization of that goal.

Section 271 addresses BOC entry into the long-distance market. That provision automatically entitles all BOCs to provide, for the first time, "out-of-region" long-distance services: *i.e.*, long-distance services originating outside the States in which a BOC was authorized to provide local telephone service on the date of the statute's enactment. 47 U.S.C. 271(b)(2), (i).[3] Section 271 also introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, also for the first time, full long-distance telephone service to customers within their "in-region" States. After "consult[ing]" with the relevant state public utility commission, and after both "consulting" with the Department of Justice and giving "substantial weight" to its views, the FCC is to grant a BOC's in-region long-distance application if it finds the following (47 U.S.C. 271(d)): (1) that the BOC has satisfied certain statutory requirements designed to open its local exchange market to competition (47 U.S.C. 271(c)); (2) that, for an interim period, the BOC will conduct its long-distance operations in accordance with the structural separation requirements of 47 U.S.C. 272;[4] and (3)

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[3] Section 271 also provides that the BOCs may immediately provide, to customers located anywhere in the country, "incidental" long-distance services, 47 U.S.C. 271(b)(3), including audio and video programming and commercial mobile services, "gateway information services" linking local customers to information service clearinghouses, and centralized signaling services. See 47 U.S.C. 271(g).

[4] The interim provisions of Section 272 require the BOCs to set up separate affiliates if they wish to engage in manufacturing, origination of most non-incidental in-region long-distance services, or long-distance information services other than electronic publishing or alarm monitoring. 47 U.S.C. 272(a) and (b); see also 47 U.S.C. 272(f) (sunset).

that granting the application would serve "the public interest, convenience, and necessity" (47 U.S.C. 271(d)(3)).

Section 273 separately authorizes a BOC to manufacture and provide telecommunications equipment once the FCC has found that the BOC has satisfied the conditions set forth in Section 271 for providing in-region long-distance service. Finally, Sections 274 and 275 impose short-term restrictions on the BOCs' electronic publishing and alarm monitoring services. Under Section 274, a BOC or BOC affiliate may not, until February 8, 2000, disseminate electronic publishing by means of the BOC's basic telephone service, except through a "separated affiliate" or joint venture. 47 U.S.C. 274(a), 274(g)(2). Section 275 requires BOCs that were not providing alarm monitoring services as of November 30, 1995, to wait until February 8, 2001, to begin doing so. 47 U.S.C. 275(a).

3. Petitioner SBC Communications Inc., through its wholly-owned subsidiaries (Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell), provides local telephone service to customers in Texas, Missouri, Oklahoma, Arkansas, Kansas, Nevada, and California. In April 1997, SBC filed an application under Section 271 to provide in-region long-distance telephone service in Oklahoma. The FCC denied the application on the ground that SBC had not satisfied Section 271's threshold competitive requirements. *In re Application of SBC Commun. Inc.*, 12 F.C.C.R. 8685 (1997), aff'd, 138 F.3d 410 (D.C. Cir. 1998).

Six days after the FCC's decision, SBC, along with its wholly-owned BOC subsidiaries and several other affiliates, filed this suit in the United States District Court for the Northern District of Texas, challenging the constitutionality of Sections 271 through 275. A

number of interested parties ultimately intervened. On December 31, 1997, the district court held that the challenged provisions were unconstitutional bills of attainder. Pet. App. 73a. In a subsequent order, the court stayed its decision pending appeal. *Id.* at 76a-77a.

The court of appeals reversed. The court first held that the challenged provisions of the 1996 Act are not "bills of attainder" because they do not "punish" the BOCs. *E.g.*, Pet. App. 31a-35a. The court also rejected petitioners' claims that the challenged provisions violate the separation-of-powers doctrine (*id.* at 35a-39a) and equal protection principles (*id.* at 39a).[5] Judge Smith, dissenting, would have invalidated the challenged provisions as bills of attainder. *Id.* at 41a-53a.

ARGUMENT

To date, two courts of appeals have ruled on the BOCs' bill-of-attainder challenge to the 1996 Act: the Fifth Circuit below, and the District of Columbia Circuit in *BellSouth Corp.* v. *FCC*, 144 F.3d 58 (1998). Those two courts reached the same conclusion. In *BellSouth*, the D.C. Circuit rejected many of the same arguments that petitioners present here, upheld the constitutionality of Section 274, and observed that the BOCs' constitutional claims were "somewhat undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *Id.* at 66 (em-

[5] The court of appeals also rejected a First Amendment challenge limited to Section 274. Pet. App. 40a (following *BellSouth*, 144 F.3d at 67-71). Petitioners have not sought this Court's review of that holding, and they have thus waived any First Amendment challenge. Sup. Ct. R. 14(1)(a).

phasis in original). The BOCs recently challenged Section 271 itself before another panel of the D.C. Circuit, and that case is pending. See *BellSouth Corp.* v. *FCC*, No. 98-1019 (D.C. Cir.) (argued Sept. 25, 1998). Unless and until petitioners persuade some court of appeals to depart from the current consensus, there is no need for this Court to consider petitioners' attack on integral provisions of an intricate legislative compromise that they themselves once supported (see Pet. App. 33a-35a).

1. A statute is a "bill of attainder" within the meaning of the constitutional prohibition only if it both applies with specificity *and* imposes punishment. *E.g.*, *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). Those two elements are distinct: no regulation, no matter how specific, is a bill of "attainder" unless it is actually "punitive." See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 472-473 (1977); *BellSouth*, 144 F.3d at 64.

This Court employs a common-sense approach in determining what constitutes a "punitive" law for attainder purposes, focusing on "whether the challenged statute falls within the historical meaning of legislative punishment," on "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," and on "whether the legislative record evinces a congressional intent to punish." See *Selective Serv. Sys.*, 468 U.S. at 852 (internal quotation marks omitted). "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); see also *Selective Serv.*, 468 U.S. at 855-856 n.15.

The flaw in petitioners' bill-of-attainder challenge here is simple: nothing in the challenged provisions can plausibly be characterized as "punishment."

a. This Court has invalidated statutes as "bills of attainder" only five times in this Nation's history. In each of those cases, the legislature had imposed punitive disabilities on adherents of a despised political movement (either the Confederacy or the Communist Party) that was "thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965); see also *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *United States* v. *Lovett*, 328 U.S. 303 (1946). In each of those cases, the Court invalidated the legislation upon determining that the sanctions at issue—reflecting a "judgment censuring or condemning" individuals for their politics (*Brown*, 381 U.S. at 453-454)—were not reasonably related to a legitimate nonpunitive purpose. See, *e.g.*, *id.* at 454-455; *Lovett*, 328 U.S. at 314; *Cummings*, 71 U.S. at 319-320; *Garland*, 71 U.S. at 377-378; see also *Hawker* v. *New York*, 170 U.S. 189, 198 (1898) (discussing *Cummings* and *Garland*).

Nothing about the provisions at issue here resembles the legislation struck down in those five cases. Business regulations based on corporate economic power and incentives, unlike sanctions based on an individual's political affiliation, are a legal commonplace. See, *e.g.*, *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 664 (1994). They rest not on a desire to "punish" the regulated corporations, but on a recognition of the objective dangers posed by monopoly power. See *North American Co.* v. *SEC*, 327 U.S. 686, 711 (1946).

Here, Congress recognized that the local exchange remains a crucial bottleneck facility for long-distance

and other services; that the BOCs "provide over 80% of local telephone service in the United States" (H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 49 (1995)); and that, as under the consent decree, the distinctive geographical and demographic characteristics of the BOCs' markets justified competitive protections for those markets that were not needed elsewhere (see pp. 17-20, *infra*). Thus, at the same time that it released the BOCs from the prospective effect of the consent decree, Congress enacted Sections 271 through 275, both to give the BOCs incentives to open their monopoly markets to robust competition and, for a transitional period, to preserve a level playing field in the long-distance and other markets. See *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998); *BellSouth*, 144 F.3d at 65-66, 70; Pet. App. 7a. As a former FCC chairman told Congress, such restrictions were needed "not because the BOCs are venal," but because, in the absence of such provisions, "they would be following the natural instincts of rational businessmen" in using their monopoly power to defeat competition. *Telecommunications Policy Act (Part I): Hearings Before the Subcomm. on Telecomm. & Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 426 (1990) (testimony of Richard E. Wiley); accord H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 50 (1994) ("as [the consent decree court] has stated, the line-of-business restrictions themselves are not punitive in nature, but are prophylactic measures") (internal quotation marks omitted).[6]

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[6] Petitioners suggest that the market-opening provisions of Sections 251 and 252 suffice to ensure local competition. See SBC Pet. 6-7, 20-21 n.8. That argument is without merit. While Sections 251 and 252 establish a general framework for opening

Those regulatory provisions are thus no more "punitive" in character than the many other statutes that exclude certain corporations from particular lines of business to protect competition or promote other economic goals. See *BellSouth*, 144 F.3d at 65.[7] Such line-of-business restrictions have never been thought to implicate the Bill of Attainder Clause, and for good reason: they do not "fall[] within the historical meaning

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local markets to competition, Congress recognized that those provisions would not achieve full competition overnight. See, *e.g.*, 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (remarks of Sen. Kerrey); *id.* at S8161 (letter from State Attorneys General). Indeed, the FCC's most recent industry survey shows that the incumbent LECs have retained control of approximately 97.5% of all local exchange revenues. See FCC, *Telecommunications Indus. Rev.: 1997*, Tab. 4 (Oct. 1998) (lodged with this Court in No. 97-826). Congress recognized that, by linking removal of the remaining line-of-business restrictions to the development of local competition, the challenged provisions would give the BOCs an important economic incentive to facilitate the process of opening their traditional monopoly markets to full competition.

[7] *E.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (affirming FCC regulation proscribing cross-ownership of television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. 24 (Seventh) (prohibiting banks from underwriting or issuing securities); Bank Holding Company Act, 12 U.S.C. 1843(a)(2) (prohibiting bank holding companies, with certain exceptions, from acquiring or retaining "direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company"); see also *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947) (upholding Section 32 of the Banking Act of 1933, which prohibits a partner or employee of a firm primarily engaged in securities underwriting from being a director of a national bank); Federal Credit Union Act, 12 U.S.C. 1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community); Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913.

of legislative punishment," and they obviously "can be said to further nonpunitive legislative purposes." *Selective Serv. Sys.*, 468 U.S. at 852; see also *Brown*, 381 U.S. at 453-454 (distinguishing the Banking Act of 1933, which rested on a "general knowledge of human psychology," from laws "censuring or condemning" individuals "thought to present a threat to the national security"). Indeed, petitioners cite *no* case in which any court has invalidated, as "punishment," any restriction on a corporation's entry into any kind of market, let alone entry by corporations as heavily regulated as those here. That fact, together with the very abundance of line-of-business restrictions throughout the national economy, belies petitioners' suggestion (*e.g.*, SBC Pet. 15, 23-24) that there could be something inherently or historically "punitive" about such restrictions.

Despite petitioners' efforts to equate the two (*e.g.*, SBC Pet. 14-15), therefore, economic regulation of this kind is a far cry from legislation designed to punish flesh-and-blood members of vilified political groups by prohibiting them from "practicing a profession" (*Lovett*, 328 U.S. at 315) The challenged provisions do not, of course, prohibit anyone from practicing any profession,[8]

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[8] In any event, even provisions that *do* prohibit individuals from practicing a profession are permissible "'when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" *BellSouth*, 144 F.3d at 65 (quoting L. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988), in turn citing *Hawker*, 170 U.S. at 196, and *DeVeau* v. *Braisted*, 363 U.S. 144 (1960)). "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the

nor do they target disfavored political ideologies. Indeed, the challenged regulations do not specifically apply to any particular group of corporate managers or directors. For example, if a BOC were to sell off its network to some other company (say, GTE), that new company, as the "successor or assign" of the BOC (47 U.S.C. 153(4) (Supp. II 1996)), would be no less subject than the BOC itself to the in-region long-distance restrictions of Section 271. Conversely, when a BOC acquires an independent LEC, the 1996 Act does not prohibit the BOC from providing full in-region long-distance service in the newly acquired LEC's local service area (except in States that the BOC itself served before 1996). See 47 U.S.C. 271(i)(1). Those facts further confirm (if further confirmation were necessary) that Congress treated the BOCs differently from other companies because of the nature of the regional markets they serve (see pp. 17-20, *infra*), not because of any desire to "punish" them for misconduct.

b. Petitioners' characterization of the challenged provisions as "punishment" is particularly implausible for an independent reason as well. As the D.C. Circuit recently observed in rejecting the BOCs' bill-of-attainder challenge to Section 274, the 1996 Act "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth*, 144 F.3d at 66 (emphasis in original). Even apart from the benefits the BOCs derive from a defined statutory procedure for full entry into in-region long-distance markets, see *ibid.*, the challenged provisions

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individual comes about as a relevant incident to a regulation of a present situation." *Flemming*, 363 U.S. at 614 (citation omitted).

immediately entitle the BOCs to provide, for the first time, long-distance service to customers outside their local service regions, 47 U.S.C. 271(a) and (b)(2); to provide "incidental" long-distance services to customers anywhere in the country, 47 U.S.C. 271(b)(3); and to play a significantly greater role in activities related to the manufacture of telecommunications equipment, 47 U.S.C. 273.

Indeed, the BOCs themselves have recognized that enactment of the challenged provisions, together with the termination of the consent decree, represents a net benefit for them. As the court of appeals explained (Pet. App. 33a-35a), the BOCs actively supported the Act while it was pending in Congress—not, of course, because they benefited from the local competition provisions (see pp. 3-4, *supra*), but because they very much benefited from the replacement of the consent decree with the new provisions of Sections 271 through 275. As this Court has indicated, legislation cannot be said to "punish" its subjects unless, at a bare minimum, it "depriv[es]" them of "rights * * * previously enjoyed." *Cummings*, 71 U.S. at 320. The most important provision challenged here—Section 271—does not even meet that threshold requirement. See also *BellSouth*, 144 F.3d at 66 (upholding the short-term provisions of Section 274 (see p. 6, *supra*) even though they reimpose certain electronic publishing restrictions that had recently been removed from the MFJ).

c. Because they cannot plausibly characterize the challenged provisions as "punitive," petitioners devote much of their discussion to the provisions' specificity, as though specificity alone could convert a nonpunitive statute into a bill of attainder. But that approach erroneously conflates two distinct issues. The need to show specificity and the need to show punitiveness are sepa-

rate requirements for any bill-of-attainder challenge, and there is "no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the *punishment* analysis." *BellSouth*, 144 F.3d at 64 (emphasis added).

Indeed, much of petitioners' argument reads as though this Court had never decided *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). That case involved the constitutionality of a statute enacted shortly after President Nixon's resignation, in response to an agreement he signed regarding the disposition of his presidential records. *Id.* at 432. The statute overrode the agreement and established rules governing disposition of the records. The statute applied to no other records and repeatedly referred to the former President by name. *Id.* at 433-434. The "essence" of President Nixon's constitutional challenge to that statute, like the essence of petitioners' arguments here, was that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-470.

The Court rejected that challenge and upheld the statute. It explained that President Nixon's expansive interpretation of the Bill of Attainder Clause "would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." 433 U.S. at 470. The Court observed that a variety of other valid statutes "also single out identifiable members of groups to bear burdens or disqualifications"; for example, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court had upheld the "transfer of rail pro-

perties of eight railroad companies to [a] Government-organized corporation." 433 U.S. at 471 n.34. In sum, the Court concluded, just as "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment * * * even if the law disadvantages an individual or identifiable members of a group," neither does "the mere specificity of a law * * * call into play the Bill of Attainder Clause." *Id.* at 471 n.33.

In *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court revisited this area and reaffirmed the central holding of *Nixon* and similar cases. A valid bill-of-attainder challenge, the Court explained, "requires not merely 'singling out' but also *punishment*." *Id.* at 239 n.9 (emphasis in original). In the absence of punishment, Congress may legislate not just with great specificity, but may in fact "legislate a legitimate class of one." *Ibid.* (internal quotation marks omitted). That principle is fatal to petitioners' bill-of-attainder claim here.[9]

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[9] The lower courts have also repeatedly rejected bill-of-attainder challenges to regulatory statutes directed at named entities. See, *e.g.*, *Fresno Rifle & Pistol Club, Inc.* v. *Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992) (rejecting bill-of-attainder challenge to California statute barring specific brands of assault weapons because "[t]he type of economic punishment about which [the weapons' manufacturers] complain is not of the type 'traditionally judged to be prohibited by the Bill of Attainder Clause'") (quoting *Nixon*, 433 U.S. at 475); *United Nuclear Corp.* v. *Cannon*, 553 F. Supp. 1220, 1226-1228 (D.R.I. 1982) (rejecting bill-of-attainder challenge to Rhode Island statute requiring specific nuclear power company to post $10 million decontamination bond); see also *Nixon*, 433 U.S. at 470-472 & nn. 33, 34; *Maine Cent. R.R. Co.* v. *Brotherland of Maintenance of Way Employees*, 813 F.2d 484, 488-491 (1st Cir.), cert. denied, 484 U.S. 825 (1987).

2. Petitioners challenge, on a variety of grounds, the substance of Congress's distinction between the local-exchange progeny of the Bell System (and "any successor or assign," 47 U.S.C. 153(4)), and the so-called "independent" local exchange carriers. As discussed, that challenge cannot help petitioners' bill-of-attainder claim, because they cannot meet their independent burden of showing that the provisions themselves are "punitive." See *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious"). Petitioners thus alternatively challenge the distinction under equal protection and separation of powers principles. As the court of appeals observed, however, the challenged provisions do "not even arguably" violate those principles. Pet. App. 41a.

a. It has long been settled that federal regulation of ordinary economic activity is consistent with the equal protection component of the Due Process Clause so long as there is a rational basis for any challenged classification. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Dandridge* v. *Williams*, 397 U.S. 471, 484-485 (1970). The provisions challenged here easily meet that test. See Pet. App. 39a.

The provisions establish transitional entry procedures for the companies that had previously been barred, under the AT&T consent decree, from the long-distance and related markets. As the House Energy and Commerce Committee explained, the statute "naturally focuses on the BOCs and their affiliates, because they uniquely [we]re seeking release from restrictions imposed under the MFJ." H.R. Rep. No. 559, *supra*, Pt. 1, at 50. Indeed, other LECs, including Cincinnati Bell, Southern New England Telephone, and Sprint, had already begun to provide long-distance service. See

USTA C.A. Br. 3-5. It was entirely rational for Congress to distinguish between companies that it was admitting into the long-distance market for the first time and companies that had always been free to provide long-distance service.

Congress also reasonably found that the BOCs' monopoly power continued to pose unique concerns for the development of competition, and that those concerns justified the creation of a transitional regulatory scheme in place of the restrictions of the now-vacated consent decree. As the House Judiciary Committee explained, "the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast geographical region; the local exchange operations of even the Bells' closest runners-up are widely dispersed." H.R. Rep. No. 559, *supra*, Pt. 2, at 93.[10] For example, whereas "the BOCs are regions of contiguous states which together serve almost all of the large population centers in the country," H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1, at 32 (1995), "GTE serves less than three percent of America's urban markets," and its operations are chiefly located in "widely dispersed small- and medium-sized cities and suburban and rural territory." *Id.* at 31. For that reason, witnesses told Congress, special legislation was needed to protect competition only in traditional BOC markets: "The potential incentive and ability of a BOC, which

[10] In evaluating the BOCs' market power, Congress appropriately took into account the fact that no BOC operates independently, because each is wholly owned and operated by a regional conglomerate (of which there were seven at the time of enactment, and of which there are now only five). See p. 2, *supra*. SBC's effort to compare the market power of a hypothetically divested Nevada Bell with that of other local exchange carriers (Pet. 21 n.9) is thus without merit.

controls nearly one-seventh of the country, to disadvantage a competing interexchange competitor, is far greater than for other companies that offer both local and interexchange service." *The Role of the Department of Justice: Hearing Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 66 (1995) (testimony of then-Assistant Attorney General Bingaman);[11] see also *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs" in Section 274 is "quite reasonable").

Finally, the distinction Congress drew—between the corporate successors to the Bell System monopoly and the "independent" telephone companies—was of course the same distinction drawn for many years by the district court that had entered the AT&T and GTE consent decrees. See pp. 2-3, *supra* (discussing basis for decree restrictions). For example, in approving GTE's acquisition of Sprint over objections that GTE should be subject to the same type of restrictions imposed on

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[11] See also *ibid.* ("Even GTE, the largest of the independent companies, generally serves non-urban areas, and its local operations are geographically dispersed. That is why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary."). A variety of witnesses emphasized the importance of this distinction. See, *e.g.*, H.R. Rep. No. 850, 102d Cong., 2d Sess, at 93 (1992) (quoting testimony of Professor Monaghan) ("As courts have found, each of the RBOCs has market power significantly greater than the only other comparably sized local exchange carrier, in that GTE's widely dispersed exchanges are primarily rural and suburban in character and otherwise differ from the RBOCs.") (footnotes omitted); *Competitive Status of the Bell Operating Companies: Hearing Before the Subcomm. on Telecomm., Consumer Protection, and Fin. of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 86 (1986) (testimony of then-Assistant Attorney General Douglas H. Ginsburg) (similar).

the BOCs by the AT&T Consent Decree, the district court explained: "Each of the regional [Bell] companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered." *United States* v. *GTE Corp.*, 603 F. Supp. 730, 737 (D.D.C. 1984). Congress's rationale in enacting Sections 271 through 275 was no less reasonable.[12]

b. Petitioners further argue (SBC Pet. 26; Bell Atl. Pet. 17-23) that the 1996 Act violates separation-of-powers principles because it alters the prospective

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[12] Petitioner Bell Atlantic contends (Pet. 24-28) that economic legislation cannot identify regulated parties by name without violating equal protection guarantees. That argument is irreconcilable with modern equal protection principles, as the court of appeals recognized (Pet. App. 39a). See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 306 (1976) (upholding legislation making special provision for two vendors as against other vendors and overruling *Morey* v. *Doud*, 354 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds"); *Maine Cent. R.R.*, 813 F.2d at 488-491 (refusing to apply heightened scrutiny to legislation "'select[ing] a single person for adverse treatment,'" and holding that, under this Court's precedent, a "classification does not become irrational or unconstitutional solely because it is specific"); see also *Plaut*, 514 U.S. at 239 & n.9 (discussed at pp. 21-22, *infra*); *Nixon*, 433 U.S. at 471 & n.33; *Erb* v. *Morasch*, 177 U.S. 584, 586-587 (1900). Bell Atlantic's reliance (Pet. 27) on the government's brief in opposition to certiorari in *Atonio* v. *Wards Cove Packing Co.*, 513 U.S. 809 (1994) (denying certiorari), is similarly without merit. *Atonio* involved the validity of a provision in a civil rights statute that provided "the plaintiffs in one pending case with significantly less protection against discrimination * * * than the plaintiffs in any other pending case." 98-1767 U.S. Br. in Opp. at 8. The government's filing expressly distinguished the civil rights legislation at issue there from a provision (such as the ones challenged here) that is "solely an economic regulation." *Ibid.*

equitable terms of the AT&T consent decree—albeit, "as a whole," to the *benefit* of the BOCs themselves (*BellSouth*, 144 F.3d at 66). As an initial matter, that argument conspicuously ignores the fact that the only provision of the 1996 Act that directly addresses the consent decree is Section 601(a)(1), 110 Stat. 143, which terminates the decree's prospective effect. Petitioners obviously do not object to that provision. In any event, even if we place that anomaly to one side (see pp. 23-24, *infra*), petitioners' separation-of-powers argument is without merit.

As the court of appeals explained, "Congress may change the law underlying ongoing equitable relief, even if * * * the change is specifically targeted at and limited in applicability to a particular injunction, and even if the change results in the necessary lifting of that injunction." Pet. App. 36a (emphasis omitted). That proposition is firmly rooted in this Court's precedents. In *Pennsylvania* v. *Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 429, 431-432 (1855), the Court upheld a law declaring a particular bridge to be a lawful post road despite a judicial decree to the contrary. Similarly, in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court upheld a statute changing the law that governed two expressly named, pending lawsuits. Finally, in *Plaut*, while invalidating a statute that "*retroactively* command[ed] the federal courts to *reopen* final judgments" (514 U.S. at 219 (emphasis added)), the Court took care to reaffirm the constitutionality of provisions, like those at issue in *Wheeling Bridge* and here, that merely "alter[] the *prospective* effect of injunctions entered by Article III courts" (*id.* at 232 (emphasis added)).

Plaut also refutes petitioners' "not-too-well-defined argument" (Pet. App. 38a) that the specificity of the

challenged provisions could somehow offend separation-of-powers principles even if it does not violate the Bill of Attainder Clause. The problem with the statute at issue in *Plaut*, the Court held,

> consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized * * *, or that it is not accompanied by an 'almost' violation of the Bill of Attainder Clause, or an 'almost' violation of any other constitutional provision.

514 U.S. at 239. Specificity itself, the Court reaffirmed, does not make a statute unconstitutional: "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Id.* at 239 n.9. Finally, *Plaut* forecloses the distinction, reasserted here by Bell Atlantic (Pet. 26), between statutes conferring benefits on designated individuals and those imposing burdens on them. The Court explained (514 U.S. at 239 n.9): "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also *punishment*, see, *e.g.*, [*Lovett*, 328 U.S. at 315-318], and a case which says that Congress may legislate 'a legitimate class of one,' [*Nixon*, 433 U.S. at 472]." See also *Maine Cent. R.R. Co.*, 813 F.2d at 488-491 (discussed in note 12, *supra*).

3. Bell Atlantic (Pet. 28) encourages the Court to "take the whole case and decide, as well, the severability of the Special Provisions." In fact, that severability issue need never be decided, because the provisions at issue are constitutional. If that were not the case, however, and if those provisions were invalidated, the severability question would indeed become exceptionally urgent.

Invalidation of Sections 271 through 275 would plainly require invalidation of the other major provision of the 1996 Act applicable specifically to the Bell Companies: Section 601(a)(1), which prospectively terminates the effect of the AT&T consent decree. See 110 Stat. 143. That provision and Sections 271 through 275 were enacted together as inextricably related components of "a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs." Pet. App. 33a; *SBC Communications*, 138 F.3d at 412 (content of 1996 Act "was the subject of great debate," and "[t]he end product was a compromise between the competing factions"). Petitioners cannot plausibly contend (cf. Bell. Atl. Pet. 29) that it would effectuate congressional intent to lop off only the portions of that "hard-fought compromise" that the BOCs dislike. See *BellSouth*, 144 F.3d at 66 n.8.[13] Indeed, if petitioners really believe that

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[13] In passing, Bell Atlantic cites Section 708 of the Communications Act of 1934, 47 U.S.C. 608, which provides as a general matter that invalidation of one provision of the Act shall not affect "the remainder of the Act." See Bell Atl. Pet. 28. (As codified, the word "Act" appears as "chapter"—Chapter 5 of Title 47—which essentially encompasses the Communications Act. See 47 U.S.C. 609.) Bell Atlantic had good reason to give Section 708 only a perfunctory "see also" citation: Unlike most other provisions of the 1996 Act, Section 601(a)(1) of that Act is *not* codified with the

Congress wanted to "punish" them by subjecting them to more onerous conditions than those that existed under the consent decree, they cannot seriously argue at the same time that Congress would have wished to set them free from continuing judicial oversight in the absence of statutory regulation.

Bell Atlantic suggests (Pet. 28) that if invalidation of Sections 271 through 275 would require invalidation of Section 601(a)(1), it would also require invalidation of all the common carrier provisions of the 1996 Act, including the very provisions that this Court is now reviewing in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826, and consolidated cases. We disagree with that proposition, but we note the following inescapable point. If successful, petitioners' challenge would threaten to unravel much of the 1996 Act, to the great detriment of American consumers.[14] The result of that unraveling could be a return to a telecommunications world dominated by judicial decrees rather than positive lawmaking by Congress and its delegates. Review

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Communications Act, but is merely referred to in the codifier's historical notes. See 47 U.S.C. 152 note (Supp. II 1996). In any event, even if Section 601(a)(1) of the 1996 Act were part of the Communications Act, the obvious interrelationship between that provision and Sections 271 through 275 would rebut any contrary presumption of severability created by 47 U.S.C. 608. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

[14] Petitioners mistakenly invoke the interest of consumers as a basis for granting them full and immediate entry into the long-distance market. SBC Pet. 30. There are two short answers to that argument. First, Congress resoundingly rejected petitioners' view of the best way to promote consumer interest in the long run. Second, invalidation of that congressional judgment would not in any event give petitioners the windfall that they seek for themselves, because, as discussed, Section 601(a)(1) is inseverable from the provisions that petitioners challenge.

of the severability question would be only the first step in a very long process of litigation.

Fortunately, however, this Court need not accept Bell Atlantic's invitation to grant certiorari on that severability question, because there is no reason for the Court to consider petitioners' underlying claims on the merits. As explained above, those claims are unsound. And, so long as the courts of appeals maintain their current consensus to that effect, further review by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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