No. 00-878

In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL., PETITIONERS

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a state commission's action relating to the enforcement of a previously approved Section 252 interconnection agreement entered into pursuant to the Telecommunications Act of 1996 is a "determination under [Section 252]" and thus is reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. IV 1998).

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

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OPINIONS BELOW

The opinion of the court of appeals as initially issued (Pet. App. 6a-22a) is reported at 179 F.3d 566. The opinion was amended by a subsequent order (Pet. App. 3a-5a) that is not reported. The opinion of the district court (Pet. App. 23a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1999, and amended on August 9, 1999. A petition for rehearing was denied on August 9, 2000. On November 3, 2000, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 28, 2000. The petition for a writ of certiorari was filed on November 28, 2000, and was granted on March 5, 2001. The jurisdiction of

this Court rests on 28 U.S.C. 1254(1). On August 8, 2001, the Court granted the motion of the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is set forth in the appendix to the petition at 36a. Sections 251 and 252 of the Telecommunications Act of 1996 are set forth in the appendix to petitioners' brief at 1a-22a. Citations of that Act are of the 1999 Supplement to the United States Code.

STATEMENT

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The 1996 Act establishes procedures to encourage competition in local telecommunications markets, including the requirement that incumbent carriers enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The Act authorizes state public utility commissions to assume certain regulatory authority respecting those agreements (commonly referred to as interconnection agreements) and provides that such exercises of authority are subject to review in federal district court. 47 U.S.C. 252(e)(6). This case concerns whether federal judicial review extends to decisions of state commissions interpreting and enforcing interconnection agreements and, if so, whether state commissions or state commissioners, in their official capacities, may be made

parties to those proceedings consistent with the Eleventh Amendment.

1. For many years, most telephone service in the United States was provided by AT&T and its local-exchange affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, 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.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). In 1982, AT&T entered into a consent decree in settlement of that suit that required AT&T to divest its local exchange operations. The newly independent Bell Operating Companies, together with approximately 1,500 non-Bell carriers, continued to provide monopoly local exchange service in their respective service areas. What remained of AT&T continued to provide nationwide long-distance service, increasingly in competition with other long-distance carriers, such as MCI and Sprint. See H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 48-50 (1995).

a. In considering how to facilitate the entry of competitors into local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's entire local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the

existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Congress addressed those concerns in Sections 251 and 252 of the 1996 Act. It imposed various obligations on all local exchange carriers, incumbents and new entrants alike, including the obligations to provide number portability (so that a consumer may change carriers without changing telephone numbers), to allow competitors to have access to certain services (*e.g.*, directory assistance) and facilities (*e.g.*, poles, ducts, conduits, and rights-of-way), and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The underlying dispute in this case concerns an arrangement to pay reciprocal compensation, which is a payment made by the carrier whose customer originates a call to the carrier whose facilities are used to complete the call.

Congress also imposed on incumbent carriers the obligation to open their networks to new entrants in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are

entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4).[1]

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding reciprocal compensation, interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration if the parties cannot conclude an agreement through negotiation. 47 U.S.C. 252(b).

The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and in regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), arbitrate disputes that arise in the negotiation of the agreements, and exercise review and enforcement authority. If a state commission elects not to assume such authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

b. All interconnection agreements, whether arrived at through negotiation or arbitration, are subject to approval by the state commission or, if it declines that role, the FCC. 47 U.S.C. 252(e)(1) and (5). A negotiated agreement may be approved by the state commission (or the FCC) only if it does not "discriminate[]

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[1] The Court is currently considering a challenge to the methodology developed by the Federal Communications Commission (FCC) for establishing the rates that incumbents may charge new entrants for interconnection and access to network elements. See *Verizon Communications, Inc.* v. *FCC*, Nos. 00-511 et al. (to be argued Oct. 10, 2001).

against a telecommunications carrier not a party to the agreement" and is "consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state commission (or, if it declines that role, the FCC) will resolve any open issue. Such issues may concern the rates, terms, and conditions under which competitors will interconnect with or lease network elements from incumbents, as well as the charges that the incumbent and the new entrant will pay each other for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). Once an agreement has been concluded through arbitration, the parties must submit it to the state commission (or, if it declines that role, the FCC) for approval. An arbitrated agreement may be approved only if it complies with Sections 251 and 252 of the Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B).

The 1996 Act provides for federal court "[r]eview of State commission actions" with respect to interconnection agreements. 47 U.S.C. 252(e)(6) (title). The Act states, in relevant part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6). The Act divests state courts of "jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

Where a state commission has elected not to assume regulatory authority under the 1996 Act and the FCC has acted in its place, the Act provides that the FCC proceeding and "any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6). The FCC's final orders with respect to interconnection agreements are reviewable, as are other final orders of the FCC, in the federal courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*

2. Pursuant to Sections 251 and 252 of the 1996 Act, respondent Ameritech, the incumbent local exchange carrier in Illinois, negotiated interconnection agreements with several carriers seeking to enter that market. Each of those agreements provided for the payment of reciprocal compensation "[a]s [d]escribed in the Act." J.A. 8a, 13a, 19a, 30a, 38a.

The parties submitted the interconnection agreements to the Illinois Commerce Commission (ICC) for approval as specified in 47 U.S.C. 252(e)(1). The ICC assumed regulatory authority and approved the agreements. Soon after the ICC approved the agreements, a dispute arose between Ameritech and the competing carriers concerning whether the obligation to pay reciprocal compensation under the agreements applied to calls made to Internet service providers (ISPs) to obtain access to the Internet. Ameritech took the position that its obligation to pay reciprocal compensation "[a]s [d]escribed in the Act" did not extend to such Internet-bound calls.

The competing carriers petitioned the ICC for relief, seeking orders directing Ameritech to pay reciprocal compensation under the terms of its interconnection agreements. The ICC assumed regulatory authority to resolve the dispute, invoking its "jurisdiction under the [state] Public Utilities Act and Section 252 of the Telecommunications Act of 1996." J.A. 112a. The ICC concluded that Ameritech was required to pay reciprocal compensation for Internet-bound calls.

3. Ameritech sought review of the ICC's decision in the United States District Court of the Northern District of Illinois, asserting that the ICC's decision was contrary to federal law and invoking the court's jurisdiction under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. J.A. 127a, 140a-141a (claim that ICC's order is inconsistent with FCC's declaratory ruling that ISP-bound calls are not "local" for purposes of reciprocal compensation under 1996 Act and FCC's implementing regulations); see also U.S. Br. 19 note 3, *Verizon Maryland Inc.* v. *Public Serv. Comm'n of Md.*, Nos. 00-1531 et al. (discussing FCC's declaratory ruling). Ameritech named as defendants the competing carriers and the ICC commissioners in their official capacities.

The ICC commissioners moved to dismiss. They argued that the district court lacked subject-matter jurisdiction and, in any event, that they were immune from suit under the Eleventh Amendment.

The district court denied the motion. The court held that 47 U.S.C. 252(e)(6) gives district courts jurisdiction to review state commission decisions interpreting and enforcing previously approved interconnection agreements. Pet. App. 28a-29a. The court therefore did not consider whether jurisdiction also existed under 28 U.S.C. 1331. Pet. App. 29a & n.3. In addition, the court held that the commissioners were not entitled to

Eleventh Amendment immunity from Ameritech's action for two reasons: first, the court held that a state commission waives its Eleventh Amendment immunity by voluntarily participating in the federal regulatory scheme created by the 1996 Act; and, second, the court held that the doctrine of *Ex parte Young* permits official capacity actions against state commissioners seeking prospective relief from ongoing violations of the 1996 Act. *Id.* at 30a.

The district court upheld the ICC's decision on the merits in a separate opinion. *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, No. 98-C-1925, 1998 WL 419493 (N.D. Ill. July 23, 1998).

4. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 6a-22a.[2]

First, the court of appeals held that the ICC commissioners were not immune under the Eleventh Amendment from Ameritech's suit. The court reasoned that state commissions waive their Eleventh Amendment immunity by electing to exercise regulatory authority under the 1996 Act. Pet. App. 12a-13a (citing *MCI Telecomms. Corp.* v. *Illinois Commerce Comm'n*, 168 F.3d 315 (1999), modified on reh'g, 222 F.3d 323 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001)).

Second, the court of appeals held that the district court had jurisdiction under 47 U.S.C. 252(e)(6) to review the ICC's decision construing and enforcing the interconnection agreements between Ameritech and its competitors. The court reasoned that Section 252(e)(6)

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[2] While noting that its jurisdiction over the ICC's appeal was "somewhat problematic" because the district court decided the merits before reaching the ICC's jurisdictional defense, the Seventh Circuit concluded that those "formal defects" did not preclude appellate jurisdiction. Pet. App. 11a-12a.

"provides for judicial review of 'state commission actions,' not simply review of 'interconnection agreements.'" Pet. App. 13a-14a (citing *MCI*, 168 F.3d at 320). The court nonetheless noted that Section 252(e)(6) authorizes judicial review of commission actions only for compliance with federal law. *Id.* at 15a.

Finally, the court of appeals held that the ICC's underlying decision with respect to reciprocal compensation for ISP calls "does not violate the [1996] Act or the FCC's interpretation of the Act." Pet. App. 20a.[3]

SUMMARY OF ARGUMENT

This Court has recognized that, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their public utility commissions, to elect to play a role in that regulation, but only as a part of a regime that explicitly provided for federal judicial review of their actions to ensure compliance with the new federal standards. With respect to the core local competition obligations

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[3] Because the court of appeals affirmed the ICC's underlying ruling on the merits, there is a question as to petitioners' standing to seek review of the court's jurisdictional and Eleventh Amendment holdings. See U.S. Pet. 14, *United States* v. *Public Service Comm'n of Md.*, No. 00-1711 (identifying that standing concern in petition seeking review of the Fourth Circuit's decision in *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279 (2001)). The petitions for certiorari filed by the United States and Verizon Maryland Inc. in the Fourth Circuit case present the three questions that are presented in this case, as well as an additional question of jurisdiction under 28 U.S.C. 1331. The Court granted those petitions limited to the Section 1331 question. 121 S. Ct. 2448 (2001). No standing concerns exist in the Fourth Circuit case.

imposed by Sections 251 and 252, the 1996 Act does not allow the state commissions to exercise federal regulatory authority without federal judicial oversight. Thus, whether a state commission is approving or rejecting a new interconnection agreement, or is interpreting or enforcing an agreement already in effect, this Court's observation in *Iowa Utilities Board* holds true: "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 379 n.6.

I. Petitioners do not dispute that Congress vested the federal district courts with jurisdiction—indeed, exclusive jurisdiction—to review state commissions' decisions approving or rejecting interconnection agreements for compliance with the 1996 Act. Petitioners contend, however, that Congress did not also intend the district courts to exercise jurisdiction to ensure that, when state commissions subsequently construe and enforce such interconnection agreements, they do so consistently with the Act. Petitioners' position, which has been rejected by four of the five courts of appeals that have considered it, should be rejected by this Court as well.

Congress made clear in Section 252(e)(6) of the 1996 Act that "any case in which a State commission makes a determination under this section [*i.e.*, Section 252]" is reviewable in district court for compliance with the Act. 47 U.S.C. 252(e)(6). A state commission "makes a determination under" Section 252 not only when it approves or rejects a new interconnection agreement, but also when it construes or enforces an existing agreement, because a state commission's authority to regulate such agreements under the new federal regulatory regime established by the Act derives from Section 252.

A contrary conclusion is not suggested by the fact that Section 252 expressly prescribes standards to govern the state commissions' review of interconnection agreements only at the initial approval stage. Congress would have understood that a state commission's authority to approve an interconnection agreement necessarily includes the authority to construe and enforce the agreement, both at the time that the agreement is submitted for the commission's approval and at subsequent times when disputes arise between the parties concerning the application of the agreement in a particular context. Indeed, a state commission's authority to assess whether an agreement meets the requirements of the 1996 Act would be illusory if the commission could not assure that the agreement continued to meet those requirements in its performance. Moreover, in a companion provision of the Act, Congress expressly precluded state court review of state commission decisions "approving or rejecting an agreement." 47 U.S.C. 252(e)(4). Presumably, Congress would have used the same language in Section 252(e)(6) had it intended to authorize federal judicial review *only* of those decisions, and not of decisions construing or enforcing agreements.

The FCC, too, has concluded that a state commission's authority under Section 252 is not limited to the initial approval or rejection of interconnection agreements. In construing a provision of the 1996 Act that authorizes the FCC to assume jurisdiction when a state commission declines to "carry out its responsibility under [Section 252]," 47 U.S.C. 252(e)(5), the FCC determined that a state commission exercises "responsibility under" Section 252 when it construes and enforces an existing interconnection agreement. *In re: Starpower Communications, LLC Petition for Preemp-*

tion of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11,277 (2000). The FCC's understanding of the scope of Section 252 is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Petitioners' contrary interpretation of the 1996 Act would produce a curious, confusing, and easily manipulatable regulatory regime, under which identical issues of federal law could be resolved only in federal court, or only in state court, based solely on the fortuity of when the issue arose. Such an approach would inject additional uncertainty into dealings between competing carriers and, in some instances, could encourage carriers to defer raising issues of interpretation until after an agreement was approved. Nothing in the text of Section 252(e)(6), or any other provision of the Act, suggests, much less compels, such an inherently problematic result.

II. State public utility commissions and their commissioners are not immune under the Eleventh Amendment from suits, such as this one, challenging their determinations with respect to interconnection agreements under the 1996 Act. That is the case for two independently sufficient reasons—one or both of which have been accepted by four of the five courts of appeals that have considered the question.

A. Congress conditioned the States' exercise of regulatory authority under the 1996 Act—authority that Congress was under no obligation to grant and the States are under no obligation to accept—on the States' waiver of their Eleventh Amendment immunity from suits in federal court to review their exercise of that authority. This Court recently confirmed that Congress may condition a federal "gratuity"—*i.e.*, some

economic or other benefit that Congress is free to withhold—on the recipient State's waiver of its sovereign immunity from suits involving that gratuity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). Congress took an analogous approach here by giving the States the opportunity voluntarily to participate in an integrated regulatory regime involving both authority and reviewability in federal court of exercises of such authority.

As this Court has recognized, the 1996 Act transformed the regulation of local telecommunications competition, imposing a new federal regulatory regime in an area that previously was regulated by the individual States. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. Congress allowed the States, through their state commissions, to play a role in the new regime, but only as part of a scheme that explicitly contemplates review of their actions to ensure compliance with federal standards. Congress left the States free to decline that regulatory role—as one State has done—and to leave the role to be performed by the FCC instead. Accordingly, by voluntarily exercising regulatory authority under the 1996 Act to approve, reject, interpret, or enforce interconnection agreements, a State impliedly waives its sovereign immunity from suits challenging the manner in which it exercises that authority.

Contrary to petitioners' contention, the 1996 Act sufficiently put the States on notice of the condition attached to Congress's offer of federal regulatory authority. Section 252(e)(6), which authorizes federal court "[r]eview of State commission actions" under the Act, is most naturally read as providing for such review in actions against state commissions. Section 252(e)(6)

declares that, "[i]n *any* case in which a State commission makes a determination under [Section 252]," review is available in federal district court to "*any* party aggrieved by such determination." 47 U.S.C. 252(e)(6) (emphasis added). In order to assure that judicial review is available to "any [aggrieved] party" in "any case," Section 252(e)(6) must be understood as authorizing proceedings against state commissions, because in some categories of cases there may be no party to defend the challenged determination in federal court other than the state commission. Moreover, Congress would have understood that, in a proceeding to review the FCC's exercise of regulatory authority under the Act, the FCC and the United States necessarily would be parties. See 28 U.S.C. 2344; Fed. R. App. P. 15(a). Congress surely intended that, in an analogous proceeding to review state commissions' exercise of regulatory authority under the Act, state commissions would be parties.

Petitioners also suggest that Congress's grant of federal regulatory authority to the States in the 1996 Act is not properly characterized as a "gift" under *College Savings Bank*, because the States, rather than the United States, previously had regulated most aspects of local telecommunications. But such arguments ignore the fundamental change in local telecommuniations regulation wrought by the 1996 Act. Congress, acting within its constitutional authority to regulate commerce, could have preempted all state regulation in areas encompassed by the Act. Consequently, Congress also could give States the choice whether to exercise new federal regulatory power that they would not otherwise possess and could condition that choice on compliance with the requirements of the Act, including a waiver of sovereign immunity.

B. In any event, because this is a suit against the individual ICC commissioners in their official capacities to enjoin their enforcement of an order that assertedly violates the 1996 Act, the suit is not barred by the Eleventh Amendment for an additional reason. Under the exception to the States' Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), the federal courts may adjudicate suits against state officers in their official capacities to secure their prospective compliance with federal law. This Court has repeatedly reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997).

There is no merit to petitioners' contention that the *Ex parte Young* exception is unavailable in this case under the rationale of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). This case is unlike *Seminole Tribe* in all relevant respects. The 1996 Act does not create its own "carefully crafted and intricate remedial scheme," *id.* at 73-74, under which parties may challenge the determinations of state commissions with regard to interconnection agreements. There is consequently no reason in this case, as there was in *Seminole Tribe*, to foreclose the use of a judicially crafted remedial scheme under *Ex parte Young*.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION TO REVIEW DECISIONS BY STATE COMMISSIONS INTERPRETING OR ENFORCING PREVIOUSLY APPROVED INTERCONNECTION AGREEMENTS

A. Section 252(e)(6), titled "Review of State commission actions," authorizes federal district courts to exercise jurisdiction over "any case in which a State commission makes a determination under this section,"

i.e., Section 252. 7 U.S.C. 252(e)(6). Section 252(e)(6) further provides that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." *Ibid.*[4] Section 252(e)(6) does not, by its terms, confine federal judicial review to state commission actions approving or rejecting interconnection agreements as an initial matter. It instead authorizes federal judicial review of *all* state commission "determination[s]" with respect to interconnection agreements for compliance with the local competition provisions of the 1996 Act—not only determinations concerning the approval or rejection of new agreements, but also determinations concerning the interpretation or enforcement of existing agreements.

It should be emphasized at the outset that interconnection agreements are, to a significant extent, creatures of federal law. Congress required incumbent local exchange carriers and potential competitors to negotiate interconnection agreements in good faith. See 47 U.S.C. 251(c)(1). Congress also provided for compulsory arbitration if the negotiations fail, see 47 U.S.C. 252(b); prescribed the subjects to be addressed by interconnection agreements, see, *e.g.*, 47 U.S.C. 251(b) and (c); and established standards—and directed the FCC to establish standards—with regard to the

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[4] If the state commission has declined to act, and the FCC has assumed regulatory responsibility pursuant to Section 252(e)(5), federal court review of the FCC's orders is available under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and the FCC proceeding and "judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6).

content of those agreements, see, *e.g.*, 47 U.S.C. 251(d)(2), 252(d).[5]

Congress would thus have known that issues of federal law (*i.e.*, compliance with Sections 251 and 252 and the FCC's regulations promulgated thereunder) would arise not only at the time that an interconnection agreement was negotiated or arbitrated, but also during the term of the agreement as the parties disagreed about the meaning of a given provision and the state commission was called upon to resolve the disagreement. Indeed, state commission determinations that interpret and give effect to existing agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act. Congress could not have intended to foreclose federal court review of claims by an aggrieved carrier that a state commission has interpreted or enforced an

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[5] The 1996 Act provides that carriers may enter into a negotiated interconnection agreement "without regard to" the requirements of Sections 251 and 252(d). 47 U.S.C. 252(a)(1). As a practical matter, however, negotiated agreements ordinarily incorporate those requirements to the same extent as arbitrated agreements because, if one party does not agree to such a requirement in negotiations, the other party can demand arbitration by the state commission to impose the requirement. 47 U.S.C. 252(b)(1). Moreover, an incumbent has an incentive not to agree in negotiations to terms more favorable than those required by Sections 251 and 252(d), because non-party carriers then are entitled to demand the same terms from the incumbent. 47 U.S.C. 252(i). See *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (noting that "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act").

existing agreement in a manner inconsistent with federal law.[6]

Petitioners' contrary approach would produce a curious, confusing, and easily manipulatable regulatory regime in which two different judicial systems were assigned interrelated but mutually exclusive tasks of reviewing state commission decisions on identical issues. Such issues could be resolved only in federal court, or only in state court, based solely on the fortuity of when the issue arose—in federal court if the issue arose at the formation of the agreement, but in state court if the issue arose during the term of the agreement. A party could evade federal court review (except potentially by this Court) simply by waiting to raise an issue until after an agreement was approved. There is no indication in the language of Section 252(e)(6), or any other provision of the 1996 Act, that federal court review depends upon the timing of a claim rather than its substance, or that Congress would have intended such a manifestly irrational system.

B. Petitioners principally contend (Br. 16-20) that state commission decisions interpreting or enforcing interconnection agreements are not reviewable in

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[6] Petitioners acknowledge (Br. 24) that, because different issues of interpretation may arise at different times over the term of an interconnection agreement, "interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements." It is particularly understandable, given the rapidity of technological change within the telecommunications industry, that important interpretive issues may not arise until an agreement has been in place for some time. For example, the underlying issue in this proceeding—whether federal law requires that reciprocal compensation be paid on calls to ISPs—has become increasingly important to carriers over the years as more of their customers have sought access to the Internet.

federal district court because they are not "determination[s] under this section" within the meaning of Section 252(e)(6). Petitioners are mistaken.

Petitioners concede, as they must, that a state commission acts "under" Section 252 when it approves or rejects an interconnection agreement as an initial matter. The authority to approve or reject an interconnection agreement necessarily includes the authority to determine what the agreement is. That authority may be exercised not only when an agreement is initially presented to a state commission for its approval, but also when disputes subsequently arise between the parties about the application of the agreement in a particular context.

An implicit condition of a state commission's approval of any interconnection agreement is that the parties will carry out the agreement in accordance with the commission's understanding of its terms. Otherwise, the commission's determination that an agreement does not discriminate against non-party carriers, serves the public interest, convenience, and necessity, and complies with Sections 251 and 252, see 47 U.S.C. 252(e)(2), could become meaningless. That condition contemplates that the commission may later be called upon to clarify what the agreement provides. Such determinations, although separate in time from the commission's initial approval of the agreement, are nonetheless incident to that approval and may be indistinguishable in substance from determinations made at the initial approval stage. Indeed, they are precisely the same determinations that the commission could have made at that earlier stage if the parties and the commission had foreseen the dispute that would arise as to the meaning

of the agreement.[7] Accordingly, whether or not an interconnection agreement has already taken effect, a state commission makes a "determination" under Section 252 when it declares what the agreement is.[8]

It is for such reasons that every court of appeals that has addressed the question, with the exception of the Fourth Circuit, has held that, when a state commission interprets or enforces an existing interconnection agreement, the commission makes a "determination under [Section 252]." See, *e.g.*, *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission."), cert. denied, 121 S. Ct. 896 (2001); accord *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000); but see *Bell Atlantic MD, Inc.* v. *MCI*

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[7] Cf. *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992) (deferring to EPA's understanding of the meaning of EPA-approved state water quality requirements in the context of resolution of an interstate compliance dispute).

[8] The ICC itself acknowledged in this proceeding that Section 252 is a source—although, in the ICC's view, not the only source — of its authority to interpret and enforce interconnection agreements. See J.A. 112a (asserting jurisdiction under Section 252 and state law).

WorldCom, Inc., 240 F.3d 279, 301-307 (4th Cir.), cert. granted, 121 S. Ct. 2448 (2001) (Nos. 00-1531, 00-1711).[9]

The FCC has also concluded that state commissions act under Section 252 when they interpret or enforce existing interconnection agreements. See *In re: Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,277 (2000). There, a state commission (unlike the ICC in this case) declined to exercise regulatory authority to construe a provision of an existing interconnection agreement concerning reciprocal compensation. The FCC assumed regulatory authority over the dispute, pursuant to Section 252(e)(5), on the ground that the state commission had

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[9] The Fourth Circuit suggested that a state commission does not act under Section 252 when it construes an existing interconnection agreement that was negotiated between the parties (as was the agreement in this case), because Section 252 authorizes state commission to review such agreements as an initial matter only to assure that they are consistent with the public interest, convenience, and necessity and do not discriminate against non-party carriers. See *Bell Atlantic*, 240 F.3d at 302-303. But whether a state commission is evaluating a negotiated agreement under the standards of Section 252(e)(2)(A) or an arbitrated agreement under the standards of Section 252(e)(2)(B), the state commission first has to decide what the agreement is. The state commission's resolution of antecedent questions concerning the meaning of the agreement is thus a necessary component of its "determination under [Section 252]." And, where the state commission clarifies the meaning of an agreement previously approved under the standards of Section 252(e)(2)(A) or (B), the commission is likewise acting under Section 252. The mere fact that the commission announces its interpretation after, rather than at the same time as, its initial approval of the agreement does not detract from the status of that interpretation as a "determination under [Section 252]."

declined to "'carry out its responsibility' under section 252." *Id.* (para. 6). The FCC thus determined that a state commission's "'responsibility' under section 252" includes "interpret[ing] and enforc[ing] existing interconnection agreements." *Ibid.*[10] Because the FCC's interpretation of the 1996 Act is eminently reasonable, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). See *Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 946.[11]

C. Petitioners next contend (Br. 19) that Section 252(e)(4), which declares that "[n]o State court shall

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[10] The Fourth Circuit attempted to distinguish *Starpower* on the ground that Section 252(e)(5) refers to a state commission's "responsibility under this section [*i.e.*, Section 252]" whereas Section 252(e)(6) refers to a state commission's "determination under this section [*i.e.*, Section 252]." See *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 303 n.6. The difference in terminology, to the extent it has any significance at all, is a consequence of the fact that Section 252(e)(5) is concerned with the activities of state commissions, whereas Section 252(e)(6) is concerned with the end products of those activities. But that difference in terminology does not detract from the relevance of *Starpower* to the question here. *Starpower* makes clear that a state commission exercises "responsibility under" Section 252 when it construes or enforces an existing interconnection agreement. It thus follows that the state commission's resulting determination with respect to how the agreement is to be construed or enforced is a "determination under" Section 252.

[11] The FCC's conclusions in *Starpower* concerning the source of state commissions' authority to interpret and enforce existing interconnection agreements qualify for deference under *Chevron*, because Congress delegated authority to the FCC to make rules carrying the force of law in this area, see 47 U.S.C. 251(d)(1), and the interpretation at issue was promulgated in a preemption proceeding mandated by Congress, see 47 U.S.C. 252(e)(5). Cf. *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001).

have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section," implies that Congress contemplated that state courts *would* have jurisdiction to review state commissions' orders with respect to existing agreements. It does not follow, simply because Congress did not expressly foreclose state court review of state commission decisions interpreting or enforcing agreements that were previously approved, that Congress intended to confine federal court review to state commission decisions approving or rejecting agreements as an initial matter. Nothing in the text of Section 252(e)(4), Section 252(e)(6), or any other provision of the 1996 Act hints at such an intent.

To the contrary, Section 252(e)(4) manifestly undermines petitioners' position here. Section 252(e)(4) demonstrates that, when Congress intended to refer *only* to decisions of state commissions "approving or rejecting an agreement," Congress did so in those unequivocal terms. Congress did not use those same terms in describing the scope of federal court review under Section 252(e)(6). Instead, Congress chose more expansive language—providing for federal court review in "*any* case in which a State commission makes a determination under this section"—and its choice should be given significance. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Thus, although Congress did not expressly preclude state court review of state commission orders interpreting or enforcing interconnection agreements, Congress also did not confine federal court review under

Section 252(e)(6) to state commission orders approving or rejecting agreements as an initial matter. Rather, Congress used language that encompasses decisions interpreting or enforcing agreements already in existence.

Congress may have concluded that state court review of state commission orders interpreting or enforcing interconnection agreements should not be entirely foreclosed because, in some cases, the order might turn on issues of state statutory or common law. Cf. 47 U.S.C. 252(e)(3) (state commission may enforce certain state-law requirements in review of interconnection agreements). Congress may have sought to give carriers the option of seeking review of such orders in either federal court or state court, depending upon whether, among other things, the order implicates predominantly federal-law or state-law claims. Of course, if a case presenting both federal-law claims and state-law claims were to be brought in state court, a defendant would ordinarily have the option to remove the case to federal court, at least for the adjudication of any federal-law claims. See 28 U.S.C. 1441.

In any event, the question here is not, as petitioners suggest (Br. 19), whether Congress "intend[ed] to preclude customary state court review of * * * determinations made by state commissions * * * interpreting and enforcing agreements." Rather, the question is whether Congress intended to preclude *federal* court review of such determinations for compliance with federal law. Congress evinced no such intent. The Court is not required to decide in this case whether, or to what extent, state courts may exercise concurrent jurisdiction to review orders of the sort at issue here.

D. Petitioners note (Br. 19) that federal judicial review under Section 252(e)(6) is addressed "to deter-

min[ing] whether the agreement * * * meets the requirements of section 251 of this title and this section [*i.e.*, Section 252]," and argue that a district court is not engaging in that inquiry when it reviews a state commission's order interpreting or enforcing an existing agreement. Again, petitioners are mistaken.

Although, as petitioners observe (*ibid.*), federal judicial review for compliance with Sections 251 and 252 "should occur at the time the agreement is approved," subsequent disputes concerning the interpretation and enforcement of the agreement also must be resolved in compliance with Sections 251 and 252. Thus, when a state commission construes a provision of an existing agreement, and an aggrieved party seeks judicial review under Section 252(e)(6) on the ground that the construction is inconsistent with the 1996 Act (as Ameritech did in this case), the district court is being asked to "determine whether the agreement," as so construed and applied, "meets the requirements of" Sections 251 and 252.[12]

E. Petitioners argue (Br. 24) that Congress would not have seen any need for state commissions' orders interpreting and enforcing interconnection agreements to be reviewed in federal court for consistency with federal law. To the contrary, Congress surely understood that federal court review serves an important

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[12] Alternatively, when a state commission construes a disputed provision of an existing interconnection agreement, the commission might be viewed as "approving" a new agreement between the parties (*i.e.*, the existing agreement as it is newly understood and clarified), thereby making federal review available even under petitioners' restrictive understanding of Section 252(e)(6). That understanding would not necessarily require a construction of Section 252(e)(4) that ousts the state courts of jurisdiction to review state commission decisions construing existing agreements.

purpose: to promote the development and application of a more consistent body of federal law to govern the rights and obligations of parties under interconnection agreements. After all, Congress assigned the federal courts exclusive responsibility for reviewing state commission decisions approving or rejecting interconnection agreements in the first instance. And the same issues of federal law that arise at the approval/rejection stage also arise at the interpretation/enforcement stage. Congress could not have intended to leave the federal courts powerless to review the determinations of state commissions, in the course of interpreting or enforcing interconnection agreements, to assure that those decisions do not conflict with federal law or significantly alter the terms of agreements approved in the federal courts' initial review. See *Brooks Fiber Communications*, 235 F.3d at 497 (observing that Congress would not have created a regime under which "certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved").

As a practical matter, inconsistent decisions from the federal and state courts on the same, or similar, issues of federal law—or even the possibility of such inconsistent decisions—could significantly impede the interconnection process envisioned by the 1996 Act.[13] State

[13] To be sure, if the state courts possess concurrent jurisdiction with the federal courts to review state commission orders interpreting or enforcing interconnection agreements (a question not presented here), some potential exists for inconsistent decisions. But state courts ordinarily would decide cases challenging such state commission orders on federal-law grounds only when the plaintiffs chose to file the case in state court and the defendants chose not to remove the case to federal court under 28 U.S.C. 1441.

regulators could be torn between conflicting decisions of the state and federal courts on the same issue of federal law in attempting to carry out their responsibilities under the 1996 Act. And telecommunication carriers could face greater uncertainty, and thus potentially greater cost, in entering into interconnection agreements. Parties to such agreements could be tempted, for example, to engage in regulatory gamesmanship by waiting to raise critical issues until after an agreement has been approved. Accordingly, federal court review of state commission determinations interpreting and enforcing interconnection agreements for compliance with federal law not only comports with the statutory text but also advances Congress's overriding purpose to facilitate the expeditious development of competition in local telecommunications markets.[14]

F. Finally, whether or not Section 252(e)(6) vests the district courts with jurisdiction to review state commission orders interpreting and enforcing existing interconnection agreements for compliance with federal

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[14] As a last resort, petitioners contend (Br. 27-28) that Section 252(e)(6) "should be read to confine federal court review to arbitration and approval decisions to avoid the difficult Eleventh Amendment questions raised by this case." As explained below, the canon of constitutional avoidance has no application in this case because construing Section 252(e)(6) to authorize suits against state commissions or their commissioners does not present serious Eleventh Amendment problems. In any event, the Court could not long avoid the Eleventh Amendment question, which also arises with respect to federal court challenges to state commission decisions approving or rejecting interconnection agreements, which petitioners concede are within the scope of Section 252(e)(6). See, *e.g.*, *AT&T Communications* v. *BellSouth Telecomms.*, 238 F.3d 636 (5th Cir. 2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001).

law, the district courts possess such jurisdiction under 28 U.S.C. 1331. As noted above, Ameritech invoked the district court's jurisdiction pursuant to both provisions. Although neither the district court nor the Seventh Circuit found it necessary to address the question (see Pet App. 24a, 29a n.3), Section 1331 remains available as an alternate basis for federal jurisdiction in this context. Because the Court did not grant certiorari on that question in this case, we have addressed the question in our brief in *Verizon* v. *Public Service Comm'n of Maryland*, No. 00-1531 (consolidated with *United States* v. *Public Service Comm'n of Maryland*, No 00-1711).

II. THE ELEVENTH AMENDMENT DOES NOT BAR SUITS AGAINST STATE COMMISSIONS OR THEIR COMMISSIONERS SEEKING PROSPECTIVE RELIEF FROM THEIR DETERMINATIONS UNDER THE 1996 ACT

State public utility commissions and their commissioners are not entitled to Eleventh Amendment immunity from suits, such as this one, seeking review of their orders approving, rejecting, construing, or enforcing interconnection agreements under the 1996 Act. That is so for two independent reasons. First, a State waives its immunity from suit in federal court under the 1996 Act by electing to participate in the regulatory scheme established by the Act. Second, the doctrine of *Ex parte Young* permits suits against state commissioners in their official capacities to secure their prospective compliance with the 1996 Act.

It should be emphasized that the only remedy available in federal court to a party aggrieved by a state commission order under Section 252 is a judicial

determination that the order is contrary to federal law and therefore is unenforceable. The same remedy is available to a party aggrieved by an order issued by the FCC under Section 252 in circumstances where the State has elected not to exercise regulatory authority under the 1996 Act. The aggrieved party cannot, in either instance, obtain monetary relief against the State or the United States. A state commission's obligation to appear in federal court to defend a Section 252 determination—the same obligation that is imposed on the FCC—does not constitute a significant intrusion into state sovereignty, especially given that the States can avoid that obligation altogether by electing to leave the exercise of regulatory authority under the 1996 Act to the FCC.[15]

[15] Even if the Eleventh Amendment were a bar to suits under the 1996 Act against state commissions or their commissioners, state commissions' decisions approving, rejecting, construing, or enforcing interconnection agreements would be reviewable in federal court for compliance with federal law, so long as sufficient adversariness existed between the private parties to create an Article III case or controversy. Cf. pp. 35-36, *infra* (describing instances in which such adversariness between private parties may not exist). Those private parties would be required by principles of claim and issue preclusion to give effect to the federal court's decision in the case. A state commission could be expected to give effect to the decision as well. If a state commission nonetheless refused to do so, the question whether an injunction could issue against the commissioners in an action under *Ex parte Young* is distinct from the *Ex parte Young* question presented in this case.

A. Congress Conditioned The States' Participation In The New Regulatory Scheme Created By The 1996 Act On The States' Waiver Of Immunity From Suits Challenging Their Determinations Under The Act

1. This Court has recognized that, as a condition for a grant of federal authority to a State, Congress may require the State to waive its immunity from suit with respect to its exercise of that authority. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999) (discussing *Petty*). That is what Congress did in the 1996 Act. Congress invited the States to participate, if they chose to do so, in the federal regulatory scheme established by the Act. Congress conditioned such participation, however, on the States' acceptance of a reguatory regime that specifically made their determinations under the Act subject to review in federal court. Accordingly, when Illinois accepted Congress's invitation to regulate under the Act—which Illinois was free to decline—Illinois waived the ICC's immunity from suits such as this one.

In *Petty*, Congress consented to a compact between two States to engage in the construction of bridges and the operation of ferries across navigable waters of the United States. Congress, in the Act approving the compact, attached a condition that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of * * * any court * * * of the United States over or in regard to any navigable waters or any commerce between the States." 359 U.S. at 281. The Court construed that provision, read in light of a "sue-and-be-sued" provision in the compact itself, as "reserv[ing] the jurisdiction of

the federal courts to act in any matter arising under the compact," including tort suits against an agency of the two States that was formed pursuant to the compact. *Ibid.* The Court explained that "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.* at 281-282.

Three Terms ago, the Court reaffirmed its holding in *Petty* that the compacting States "had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Savings Bank*, 527 U.S. at 686. The Court described *Petty* as involving Congress's attachment of a condition to a grant of authority that the States would not otherwise have possessed, because the Constitution prohibits States from entering into compacts with one another without congressional approval. *Ibid.* Thus, the Court explained, Congress's approval of the grant of authority contained in the compact in *Petty* was a "gratuity" in the same sense as a grant of federal funds—a context in which it is well-established that Congress may condition a State's acceptance of the gratuity on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (holding that Congress could condition a grant of federal funds to the States upon the States' taking certain actions that Congress could not require them to take)).[16]

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[16] *College Savings Bank* confirms that a voluntary waiver, based on a State's acceptance of a federal gratuity that is conditioned on the State's consent to suit in federal court, is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964). See *College Savings Bank*, 527 U.S. at 675-687.

This case involves a condition attached to Congress's provision of a "gratuity"—a grant of authority that a State may choose to accept or reject—analogous to the condition attached to Congress's approval of the interstate compact in *Petty*. As this Court observed in *Iowa Utilities Board*, the 1996 Act transformed the regulation of local telecommunications, because "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." 525 U.S. at 379 n.6; see *AT&T Communications* v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) ("After passage of the 1996 Act, regulation of competition among providers of local phone service is no longer within the province of states' inherent authority."). Congress allowed the States, through their public utility commissions, to play a role in that regulation, but only pursuant to a regulatory regime that explicitly provides that exercises of that authority are subject to review in federal court to ensure that they comply with the new federal standards. Congress left the States free to decline that regulatory role, in which case the role would be performed by the FCC. See 47 U.S.C. 252(e)(5). Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the 1996 Act does not allow the States simply "to do their own thing," and, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

Three courts of appeals, applying the implied waiver doctrine recognized in *Petty* and *College Savings Bank*, have held that States, by electing to exercise regulatory authority under the 1996 Act, waive their immunity from suits in federal court challenging their

exercise of that authority. See *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d at 646-647; *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 341; *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001); but see *Bell Atlantic Maryland, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 290-294 (rejecting implied waiver argument).

2. Petitioners contend (Br. 30-33) that the 1996 Act does not contain a sufficiently clear statement that state commissions will be subject to suit in federal court if they choose to exercise regulatory authority under the Act. Petitioners are mistaken. Section 252(e)(6), read in context with other provisions of Section 252, puts state commissions on abundant notice that they, like the FCC, may be named as defendants in suits in federal court seeking review of their determinations under the Act. Cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 74 (2000) (analysis of whether Congress intended to abrogate States' sovereign immunity is to be based on the statutory text "[r]ead as a whole").

As noted above, Section 252(e)(6) is titled "[r]eview of State commission actions," and provides, in pertinent part, that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(6). Section 252(e)(6) does not state, in so many words, that such an action may be brought against the state commission. But that is the unmistakable implication of the statutory text. In *Petty*, the proviso that Congress attached to its approval of the interstate compact likewise did not expressly refer to suits against the bistate commission or to a waiver of the commission's sovereign immunity, see 359 U.S. at 277-

278, but the Court understood the proviso as addressing such a waiver, see *id.* at 281-282.

Indeed, Section 252(e)(6) must be read to authorize suits against state commissions in order to assure, as the statute provides, that federal judicial review is available to "*any* party aggrieved" and "[i]n *any* case in which a State commission makes a determination under this section." 47 U.S.C. 252(e)(6) (emphases added). There are some categories of cases seeking review of state commission determinations under Section 252 in which the *only* potential defendant is the state commission itself. For example, Section 252(e)(1) requires that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission," which "shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. 252(e)(1); see also 47 U.S.C. 252(e)(2) (providing separate standards for state commissions' review of negotiated agreements and arbitrated agreements). Congress surely contemplated situations in which a state commission rejects a negotiated agreement—an agreement that is satisfactory in all respects to the parties—on the ground, for example, that the agreement "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A)(ii). In such situations, both parties to the agreement would be "aggrieved by [the state commission's] determination," within the meaning of Section 252(e)(6), and thus would be entitled to seek review as plaintiffs in federal district court. The only possible defendant to that suit could be the state commission (especially if no other party had appeared in the state commission proceedings to urge rejection of the agreement). Similarly, where a state commission has rejected a Bell operating company's statement of

generally available terms under Section 252(f)(2), the only possible defendant in a suit by the Bell operating company under Section 252(e)(6) seeking review of that determination might well be the state commission.[17]

Moreover, Section 252(e)(6) contemplates "judicial review of the Commission's [*i.e.*, the FCC's] actions," acting in the place of a state commission, in a proceeding in federal court against the FCC and the United States. All final orders of the FCC are reviewable, unless otherwise specifically provided, in the federal courts of appeals under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 28 U.S.C. 2342(1); 47 U.S.C. 402(a); see also *In re Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, 16 F.C.C.R. 6231 (2001) (para. 15). The Hobbs Act states that any proceeding thereunder to review an agency order "shall be against the United States." 28 U.S.C. 2344; see also Fed. R. App. P. 15(a) (requiring petitions for review of federal agency orders to "name the agency as a respondent," and noting that the United States, whether or not named, is a respondent if required by statute). It would have been anomalous for Congress to provide that, although an order issued by the FCC under Section 252 is reviewable in a proceeding against the FCC itself, an order issued by a state commission under Section 252 is reviewable in federal court only in a proceeding against

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[17] Petitioners acknowledge (Br. 18) that state commission decisions approving or rejecting interconnection agreements are reviewable in district court under Section 252(e)(6). But petitioners suggest no means by which such review could occur in cases, such as those identified in the text, where there is no party other than the state commission to defend the decision in district court.

private parties, if any exist, and not against the state commission. Thus, Section 252(e)(6) should be understood as providing for federal court review in a proceeding against whatever entity—the FCC or the state commission—issued the order approving, rejecting, construing, or enforcing an interconnection agreement.

3. Petitioners further contend (Br. 32-40) that the States cannot be deemed to have waived their Eleventh Amendment immunity with respect to judicial review proceedings under Section 252(e)(6) because the authority to regulate interconnection agreements is not a "gratuity" under this Court's decisions. Petitioners rely on the distinction that the Court drew in *College Savings Bank* between a requirement that a State waive its immunity in order to obtain a federal "gift or gratuity," such as the highway funds in *Dole* or the interstate compact in *Petty*, and a requirement that a State waive its immunity in order to engage in "otherwise permissible activity" in which private parties are free to engage, such as the interstate commercial activity in that case. 527 U.S. at 687. Petitioners suggest that, because the States exercised comprehensive regulatory authority over local telecommunications before the enactment of the 1996 Act, the regulation of interconnection agreement is such an "otherwise permissible activity," and thus that the States' participation in that activity cannot be conditioned on a waiver of immunity.

Petitioners overlook not only that Congress may preempt state regulatory authority over commercial activities that are within the federal commerce power but also that Congress did preempt such state regulatory authority here. As this Court made quite clear in *Iowa Utilities Board*, Congress has taken over significant aspects of local telecommunications regulation. See 525 U.S. at 379 n.6 ("With regard to the matters

addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States."); accord *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 342. The Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in areas encompassed by the Act *only* to the extent consistent with the Act and the implementing FCC regulations, and *only* by accepting a regulatory regime in which state commission decisions were made reviewable in federal court. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to federal standards. See *Federal Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742, 767 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Petitioners' contention (Br. 37-40) that they had no meaningful choice whether to accept Congress's invitation to exercise federal regulatory authority rests on a similarly flawed conception of the preemptive scope of the 1996 Act. Suggesting that a State would lose all ability to regulate local telecommunications if it declined to regulate under the Act, petitioners argue (Br. 39) that Illinois "should not have to choose between giving up the 'vital public service' performed by the ICC and 'consenting' to federal suit." Congress did not, however, put States to that choice. A State's decision not to exercise regulatory authority under Sections 251 and 252 does not divest the State of all regulatory authority over local telecommunications. Although Congress supplanted state regulation with respect to "matters addressed by the 1996 Act," *Iowa Utilities*

Board, 525 U.S. at 379 n.6, Congress did not supplant state regulation of all aspects of local telecommunications. The local competition provisions of the 1996 Act are concerned principally with dealings between telecommunications carriers, rather than with relations between each carrier and its own customers, which has been a traditional focus of state regulation. Moreover, Congress expressly preserved the ability of States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 252(e)(3), 253(b), 261(b) and (c). The States thus retain considerable regulatory authority with respect to local telecommunications, whether or not they choose to participate in the federal scheme established by the 1996 Act.[18]

Nor is it relevant, as petitioners suggest (Br. 37), that a state commission may have been required by state law to accept Congress's invitation to regulate interconnection agreements. The relevant point is that Congress left it to the States to choose whether to exercise regulatory authority under the 1996 Act. It makes no difference for Eleventh Amendment purposes whether that choice was made by the state legislature or the state commission. In either circumstance, it is not "the unilateral action of Congress" (Br. 38) that has brought the state commission or its commissioners to federal court, but rather the unilateral decision by the

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[18] The fact that Congress did not supplant state regulation of local telecommunications in every possible respect does not undermine the waiver analysis. Under that analysis, the States are deemed to have waived their sovereign immunity only with respect to those matters as to which Congress *has* supplanted state regulation with federal regulation.

State to accept the full regulatory authority offered by Congress.[19]

Indeed, one State—the Commonwealth of Virginia—has declined to exercise authority under the 1996 Act. See *In re Petition of Cox Virginia Telecommunications, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 F.C.C.R. 2321, 2322 (para. 4) (Jan. 26, 2001) (noting Virginia State Corporation Commission's refusal to exercise authority under the 1996 Act on grounds that doing so may be deemed a waiver of sovereign immunity); see also *Starpower*, 15 F.C.C.R. at 11,277 (FCC exercises regulatory authority under 1996 Act in the default of the Virginia Commission). Such action confirms that Congress left the States free to choose whether to participate in the new federal regulatory scheme, and that a State choosing to participate would know that it is waiving its Eleventh Amendment immunity from federal judicial review of state commission orders under the Act. Petitioners and other state commissioners may not like the choice that Congress offered under the Act, because they would prefer instead a return to the era when virtually all local telecommunications regulation was the sole

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[19] Petitioners do not assert that Congress "coerced" them to regulate interconnection agreements in violation of the Tenth Amendment. See *Printz* v. *United States*, 521 U.S. 898 (1997). The lone court of appeals that has addressed that issue rejected a Tenth Amendment challenge to the 1996 Act, emphasizing that the state commission in that case "could have chosen not to participate," but instead arbitrated and reviewed the interconnection agreement at issue. See *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), cert. denied, 531 U.S. 816 (2000).

domain of the States. See Pet. Br. 39 ("[u]tilities regulation is a long-standing function of state government in Illinois"). There can be no doubt, however, that Congress has offered the States a real choice, albeit a choice that carries with it burdens as well as benefits, and that the FCC will exercise regulatory authority under the 1996 Act if the States decline to do so. See 47 U.S.C. 252(e)(5).

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for competing carriers to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions to be incorporated into such agreements. Thus, to the extent that Congress has preempted state regulation of interconnection agreements, such state regulation is not "otherwise permissible activity" under *College Savings Bank*. Instead, the invitation to participate in such regulation is a form of "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act while rejecting the federal judicial review that is a critical part of the regulatory scheme.

B. State Commissioners Are Subject To Suit In Their Official Capacities Under The Doctrine Of *Ex Parte Young* To Secure Their Prospective Compliance With The 1996 Act

There is a second, independent reason why this action may, consistent with the Eleventh Amendment, proceed against petitioners in federal court. This is a suit against state officials, in their official capacities, to secure their prospective compliance with the 1996 Act. It thus comes within the *Ex parte Young* exception to the Eleventh Amendment.

1. This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not apply to suits that seek to enjoin individual state officials in their official capacities from enforcing state law that is contrary to federal law or otherwise from engaging in conduct that federal law prohibits. *Ex parte Young*, 209 U.S. 123 (1908); see *Board of Trustees* v. *Garrett*, 121 S. Ct. 955, 968 n.9 (2001) (noting that the Americans With Disabilities Act is enforceable against States "by private individuals in actions for injunctive relief under *Ex parte Young*"); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984). As the Court has observed, the *Ex parte Young* exception is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst* 465 U.S. at 105 (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).

As the Seventh Circuit has observed, suits such as this one, which seek to enjoin state commissioners from enforcing orders asserted to be contrary to the 1996

Act, "fit squarely within the traditional framework of *Ex parte Young*." *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 345. In naming petitioners, all of the commissioners of the ICC, in their official capacities as parties in a suit seeking review of the ICC's determinations under the 1996 Act, Ameritech was seeking "to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Ibid.* That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (opinion of Kennedy, J.) (*Ex parte Young* and its progeny teach "that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[20] Thus, every court of appeals that has addressed the question, with the exception of the Fourth Circuit, has held that *Ex parte Young* permits federal court review of state commission determinations for consistency with the 1996 Act. See, *e.g.*, *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.) (characterizing such a suit as "a straightforward *Ex parte Young* case"), cert. denied, 531 U.S. 816 (2000); see also *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d at 647-649; *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d at 345; *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d at

[20] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether an action may proceed against state officials under the *Ex parte Young* exception is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

939-940; but see *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 294-298 (rejecting *Ex parte Young* argument).[21]

2. Petitioners initially contend (Br. 42) that state commissioners "cannot be said to *violate* federal law," for purposes of the *Ex parte Young* exception, when they construe or enforce an interconnection agreement in a manner contrary to the 1996 Act. According to petitioners, so long as state officials act "within their jurisdiction" (*ibid.*) under state law, they cannot be subject to suit in federal court under *Ex parte Young*.

The rule suggested by petitioners would turn *Ex parte Young* on its head. Indeed, the *Ex parte Young* exception applies *only* to suits challenging acts by state officials in their "official capacities," and thus ordinarily to acts ostensibly within the scope of their authority under state law. *Ex parte Young* proceeds, however, on the principle (or legal fiction) that state officials act outside their authority under state law, and thus are not the State for Eleventh Amendment purposes, when they exercise that authority contrary to federal law. See *Ex parte Young*, 209 U.S. at 159-160 (a state officer is "stripped of his official or representative character"

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[21] In holding that the *Ex parte Young* exception does not apply to suits contending that a state commission's determination with respect to an interconnection agreement violates the 1996 Act, the Fourth Circuit undertook an extensive inquiry into the merits of the plaintiff's challenge and ultimately concluded that the plaintiff could not "allege an ongoing violation of federal law." *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 297. The Fourth Circuit erred in conflating the threshold inquiry into the applicability of the *Ex parte Young* exception with the inquiry on the merits. The applicability of *Ex parte Young* does not depend on whether the challenge to the state officials' action will ultimately be successful.

when he acts contrary to "the supreme authority of the United States"); see also *Papasan* v. *Allain*, 478 U.S. 265, 276 (1986) (*Ex parte Young* is "based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity").[22]

Nothing in this Court's decision in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), on which petitioners rely, casts doubt on the availability of an *Ex parte Young* action in the circumstances here. *Larson* involved a suit against an officer of the United States, in his official capacity, to challenge an allegedly tortious act of his agency. The Court declined to hold that the United States' sovereign immunity does not bar such suits on a theory that federal officers necessarily act outside the scope of their federal authority when they commit common-law torts. See *id.* at 692-695. But the Court nonetheless acknowledged the principle of *Ex parte Young* that treats state officials as acting outside their state authority when they violate supreme federal law. See *id.* at 690-691. That principle derives from the Supremacy Clause of the Constitution. See, *e.g.*, *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of

[22] The *Ex parte Young* exception applies where a state official's conduct is alleged to violate either the Constitution or a federal statute or regulation. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n.6 (1978); accord *Garrett*, 121 S. Ct. at 968 n.9; *Edelman* v. *Jordan*, 415 U.S. 651, 665-671 (1974); cf. *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988) (federal regulation may preempt state regulation).

federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Neither the Supremacy Clause nor any other federal constitutional or statutory restraint on the federal officer's conduct was implicated in *Larson*.

3. Petitioners next contend (Br. 45-48) that the *Ex parte Young* exception is unavailable in this case under the rationale of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). This case is unlike *Seminole Tribe* in all relevant respects. The 1996 Act does not create its own "carefully crafted and intricate remedial scheme," *id.* at 73-74, under which parties may challenge the determinations of state commissions with regard to interconnection agreements. There is consequently no reason in this case, as there was in *Seminole Tribe*, to foreclose the use of a judicially crafted remedial scheme under *Ex parte Young*.

In *Seminole Tribe*, the Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, that established a framework for Tribes to negotiate gaming compacts with States. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith with a Tribe was an order directing the State and the Tribe to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then promulgate regulations governing gaming on the Indian lands at issue. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that, "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal

courts to provide against States, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* at 75. The Court therefore held that Tribes could not seek to enforce their IGRA rights in suits against state officials under *Ex parte Young*, because such suits would enable the Tribes to obtain more expansive sanctions than the limited statutory remedies that Congress provided as part and parcel of the limited statutory rights conferred in IGRA. *Id.* at 74-76; cf. *Brown* v. *GSA*, 425 U.S. 820, 829-835 (1976) (Title VII's "careful blend" of remedies for discrimination in federal employment precludes more general federal statutory remedies).

There is no reason similarly to conclude that the availability of judicial review of state commission orders under *Ex parte Young* is at all inconsistent with the 1996 Act. Congress, while making clear that such orders are reviewable in federal court, see 47 U.S.C. 252(e)(6), did not prescribe any particular mechanisms to govern such review. Nor did Congress circumscribe the remedies available in a federal court proceeding challenging a state commission order under the Act. Congress thereby indicated that all of the remedies ordinarily available in federal court when state officials act in a manner contrary to federal law are available when state commissions issue orders contrary to the Act and the FCC's implementing regulations. There is no statutory basis whatsoever for precluding the normal operation of the *Ex parte Young* doctrine in this case.[23]

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[23] It is instructive to contrast the specificity with which Congress addressed the administrative stage of proceedings under the

4. Finally, petitioners assert (Br. 47-48) that allowing *Ex parte Young* review of state commissioners' decisions with respect to interconnection agreements is "an affront to the sovereignty of the State." Br. 47-48 (quoting the Fourth Circuit's decision in *Bell Atlantic MD, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d at 298). The mere fact that state interests are implicated by an *Ex parte Young* action—which necessarily challenges the official acts of a State through its officials—is not the sort of "affront" that is sufficient to preclude such actions. See *Coeur d'Alene Tribe*, 521 U.S. at 269-270 (observing that *Ex parte Young* itself, like subsequent cases applying its "fictional distinction between the official and the State," "implicated substantial state interests"); *id.* at 278 (opinion of Kennedy, J.) ("Of course, the State's interests are almost always implicated to a certain extent in *Young* actions."). It is no more an "affront" than is the Supremacy Clause itself.[24]

1996 Act with the generality with which Congress addressed the judicial review stage. Compare 47 U.S.C. 252(a), (b), and (e)(1)-(2) with 47 U.S.C. 252(e)(6). It is irrelevant to the *Seminole Tribe* analysis whether the *administrative* scheme that precedes judicial review under the 1996 Act might be characterized as "carefully crafted and intricate," 517 U.S. at 73-74. The *Seminole Tribe* analysis is concerned with whether Congress has prescribed a scheme for *judicial review* that is so "intricate," and its remedies so circumscribed, as to compel the conclusion that Congress would not have intended judicial review also to be available under *Ex parte Young*. No such conclusion can be drawn from the 1996 Act.

[24] The commissioners of the ICC have long been accustomed to *Ex parte Young*-type suits challenging their actions as contrary to federal law. See, *e.g.*, *Natural Gas Pipeline Co. of Am.* v. *Slattery*, 302 U.S. 300 (1937); *City of Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577 (1931); *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926).

Nor do petitioners offer any reason to conclude that this case, as opposed to the many other cases in which review of state officials' acts under *Ex parte Young* has been recognized to be available, presents any distinct "affront" to state sovereignty.[25] Indeed, given that Congress expressly gave States the option not to regulate interconnection agreements under the 1996 Act, and to leave such regulation to the FCC instead, see 47 U.S.C. 252(e)(5), the States may readily avoid any "affront" occasioned by *Ex parte Young* review of state commission orders of the sort at issue here.

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[25] Last Term, for example, the Court acknowledged that a private party may sue under *Ex parte Young* to enjoin state officials from violating the requirements of Title I of the Americans With Disabilities Act of 1990, 104 Stat. 330, 42 U.S.C. 12111 *et seq.*, which, among other things, requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant [for employment] or an employee," 42 U.S.C. 12112(b)(5)(A). See *Garrett*, 121 S. Ct. at 968 n.9. An injunction mandating compliance with that requirement by state officials could have a significantly greater impact on the State's conduct of its affairs than an injunction barring state commissioners from enforcing an order construing an interconnection agreement in a manner inconsistent with the 1996 Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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