No. 99-1878

In the Supreme Court of the United States

JOHN G. STRAND, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

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QUESTION PRESENTED

Whether the commissioners of the Michigan Public Service Commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking review of an interconnection agreement approved by the Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 202 F.3d 862.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. A petition for rehearing was denied on February 16, 2000 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on May 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (Telecommunications 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* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999); Pet. App. 5a. This case concerns the provisions of the Telecommunications Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States 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, 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*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 2d Sess. 48-50 (1996).

a. In considering how to encourage competition in 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 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, a prospective competitor could not gradually enter the market, through partial duplication of local exchange facilities, without rights of access to the existing network; 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.

Accordingly, Congress, in Section 251 of the Telecommunications Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, incumbents are required to "interconnect" their networks with those of new entrants, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] 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 permitted to buy an incumbent's retail services "at wholesale rates" and to resell those serv-

[1] All citations to provisions of the Telecommunications Act, as codified in Title 47, are to Supp. III 1997.

ices to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The Telecommunications Act requires incumbents to negotiate in good faith with new entrants regarding interconnection, access to facilities, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for arbitration of such "interconnection agreements" if the parties are unable to resolve all outstanding issues through negotiation. 47 U.S.C. 252(b).

b. The Telecommunications 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 regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission will perform that role. 47 U.S.C. 252(e)(5).

The extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. Negotiated agreements are subject to review by the state commission (or the FCC if the state commission chooses not to act) to determine whether they discriminate against non-party carriers and are consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the agreement is submitted to arbitration, the state public utility commission (or the FCC) will resolve any open issue, including the rates, terms, and conditions under which new competitors will enter the local market, as well as the prices that both the incumbent and new providers will pay one another for transport and termination of calls. The Act sets forth standards for state commissions to follow in setting such rates and requires state commissions to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." 47 U.S.C. 252(c)-(d)(2). The state commissions are also bound by FCC regulations implementing the Act. 47 U.S.C. 252(e)(2)(B). Arbitrated agreements are subject to review by the state commission. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not take action on an arbitrated agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The Telecommunication Act provides that any party "aggrieved" by a determination of a state public utility commission may file suit in federal district court for a determination of "whether the agreement or statement meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the state commission has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. Climax Telephone Company, a potential new entrant into the local telephone market in Battle Creek and Kalamazoo, Michigan, sought to negotiate an interconnection agreement with Ameritech Michigan, the incumbent local exchange carrier. The parties' negotiations were unsuccessful. Climax

petitioned the Michigan Public Service Commission (MPSC) for arbitration pursuant to Section 252(b) of the Telecommunications Act. The MPSC appointed a panel to arbitrate the matter and subsequently approved the resulting agreement. Pet. App. 3a-4a, 18a-33a.

Ameritech sought review of the interconnection agreement in the United States District Court for the Western District of Michigan pursuant to Section 252(e)(6) of the Telecommunications Act. Ameritech named as defendants Climax and the three MPSC commissioners. The commissioners moved to dismiss the action against them on Tenth and Eleventh Amendment grounds.

The district court denied the motion. Pet. App. 12a-16a. The court held that the MPSC had impliedly waived its immunity to suit under the Eleventh Amendment by choosing to arbitrate and approve interconnection agreements under the Telecommunications Act. *Id.* at 14a. The court also held that the Act did not violate the Tenth Amendment because state commissions could elect not to exercise regulatory authority over interconnection agreements. *Ibid.*

3. The commissioners took an interlocutory appeal. The United States and the FCC intervened to defend the constitutionality of the Telecommunications Act. The Sixth Circuit affirmed. Pet. App. 1a-11a.

First, the court of appeals held that the commissioners are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because "Ameritech is seeking injunctive relief against an ongoing violation of federal law." Pet. App. 10a; see also *id.* at 8a-9a. The court observed that the MPSC "not only

approved the interconnection agreement, it is responsible for ongoing enforcement of the agreement." *Id.* at 8a. Having concluded that the action against the commissioners could proceed under *Ex parte Young*, the court had no need to consider the alternative ground on which the district court rejected the commissioners' claim of sovereign immunity, *i.e.*, that the MPSC had impliedly waived its sovereign immunity by choosing to arbitrate and approve interconnection agreements.

Second, the court of appeals rejected the commissioners' argument that the action constituted a "'commandeering' of state resources" in violation of the Tenth Amendment. Pet. App. 9a. The court reasoned that Congress did not compel the State to regulate interconnection agreements under the Telecommunications Act. Rather, the State, through the MPSC, chose to do so. *Ibid.*

Third, the court of appeals held that the commissioners were proper parties to the action. Pet. App. 9a-10a. The commissioners had argued that the only proper parties to an action under Section 252(e)(6) are the signatories to the interconnection agreement. The court explained that "it is the [commission's] function, not the other party's, to enforce the agreement." *Id.* at 10a.

In a concurring and dissenting opinion, Judge Cole agreed with the majority's *Ex parte Young* ruling. He dissented from the majority's rulings on the remaining issues solely on the ground that those issues were not proper subjects of an interlocutory appeal. Pet. App. 11a.

ARGUMENT

The Sixth Circuit's holding that the *Ex parte Young* exception to the doctrine of sovereign immunity permits this action against the commissioners of the Michigan Public Service Commission is correct and does not conflict with the holdings of this Court or of any other circuit. Indeed, the only other court of appeals that has decided the issue expressly "adopt[ed] the Sixth Circuit's rationale" in this case. *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, No. 99-4203, 2000 WL 783382, at *9 (10th Cir. June 20, 2000).[2] This Court's review of this "straightforward *Ex parte Young* case" (Pet. App. 8a) is therefore not warranted.

1. This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude an action that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984) (*Pennhurst II*); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is

[2] In addition, the Tenth Circuit, like the district court below (see Pet. App. 14a-15a), held that the state commission had impliedly waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements pursuant to the Telecommunications Act. See *MCI Telecomm. Corp.*, 2000 WL 783382, at *8. In this case, the Sixth Circuit did not address that alternative ground for rejecting petitioners' sovereign immunity claim.

"necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105; accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).

The court of appeals correctly held that this action fits comfortably within the *Ex parte Young* exception because respondent Ameritech "is seeking injunctive relief against an ongoing violation of federal law." Pet. App. 10a. As noted above, the Telecommunications Act vests state public utility commissions with the authority to arbitrate and approve interconnection agreements in accordance with the requirements of federal law, specifically Sections 251 and 252 of the Act and the FCC regulations. Once approved, an interconnection agreement imposes ongoing obligations on the parties to comply with its terms; moreover, as several courts of appeals have recognized, state commissions possess continuing authority under the Act to enforce such agreements.[3] Congress provided for federal court review of state commission orders approving and enforcing interconnection agreements to ensure that those orders comport with federal law. 47 U.S.C. 252(e)(6).

Accordingly, in naming the MPSC commissioners as parties in this action under Section 252(e)(6) challenging their order approving the interconnection agreement, Ameritech is simply seeking to eliminate

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[3] See *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000); *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 804 (8th Cir. 1997), rev'd in part and aff'd in part on other grounds *sub nom. AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Illinois Bell Tel. Co.* v. *Worldcom Technologies, Inc.*, 179 F.3d 566, 570-571 (7th Cir. 1999).

prospectively its obligation to comply with an order that it contends is contrary to federal law. 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 (principal opinion) (observing that *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").[4] Cf. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999) (observing that "there is no doubt * * * that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel").

2. Petitioners contend that the *Ex parte Young* exception is unavailable in this case for several reasons. Petitioners are mistaken.

First, petitioners argue (Pet. App. 5-12) that *Ex parte Young* review is improper under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). But *Seminole Tribe* turned on the existence of a "carefully crafted and intricate remedial scheme," *id.* at 73-74, that, unlike the statutory scheme in this case, indicated that Congress did not intend more expansive remedies to be available under *Ex parte Young.*

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 201 Stat. 2467, that established a

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[4] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether state officials are amenable to suit under *Ex parte Young* 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).

framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only remedy for a State's failure to negotiate in good faith was an order directing the State to conclude a compact within 60 days; the only remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its proposed compact to a mediator; and the only 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 prescribe regulations. See *Seminole Tribe*, 517 U.S. at 74-75. The Court reasoned that "[b]y contrast with this quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the Telecommunications Act. In contrast to the statute in *Seminole Tribe*, the Telecommunications Act does not narrowly circumscribe the remedies available to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or re-

jected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is fully consistent with the remedy contemplated by Congress. It does not expand the remedies or the scope of judicial review available under the Act.[5]

Contrary to petitioners' contention (Pet. 9-10), when Congress provided in the Telecommunications Act for judicial review of "State commission actions," 47 U.S.C. 252(e)(6), Congress did not implicitly preclude the exercise of jurisdiction over state commissioners under *Ex parte Young*. Nothing in *Seminole Tribe* requires a contrary conclusion. There, in ascertaining whether Congress intended to subject state officials to jurisdiction under *Ex parte Young*, the Court observed that IGRA repeatedly referred to the "State" rather than to a state official and that the duty imposed by the Act "to 'negotiate * * * in good faith to enter into' a compact with another sovereign * * * is not of the sort likely to be performed by an individual state executive officer or even a group of officers." 517 U.S. at 75 n.17. In contrast, this case involves regulatory agency actions

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[5] *Ex parte Young* would not, as petitioners suggest (Pet. 9), permit a litigant to secure judicial review under Section 252(e)(6) before a state commission has approved or rejected an interconnection agreement. Section 252(e)(6) provides for judicial review solely to determine "whether the agreement * * * meets the requirements of section 251 of this title and this section." Accordingly, before an interconnection agreement has been approved, there would be no basis for judicial review under Section 252(e)(6). *Ex parte Young* provides only a basis for jurisdiction over the commissioners, not a cause of action under the Telecommunications Act.

of the sort typically performed by one official or a small group of officials. It is commonplace in judicial review of agency actions to name agency officials as defendants.

Second, petitioners assert (Pet. 12-13) that subjecting them to suit under *Ex parte Young* would permit the federal courts to "control the exercise of the discretion of an officer." *Ex parte Young*, 209 U.S. at 158. Petitioners' argument rests on an incorrect premise. State public utility commissions have no discretion to impose obligations in interconnection agreements that are contrary to federal law. See 47 U.S.C. 252(c)(1) and (e)(2). Accordingly, where a federal court enjoins state commissioners from enforcing a provision of an interconnection agreement on the ground that the provision violates federal law, the commissioners are "simply [being] prohibited from doing an act which [they] ha[ve] no legal right to do." *Ex parte Young*, 209 U.S. at 159; see *Fond du Lac Band of Chippewa Indians* v. *Carlson*, 68 F.3d 253, 256 (8th Cir. 1995) (discretionary act exception to *Ex parte Young* is inapplicable where suit is brought to prevent future violations of treaty rights).

Finally, petitioners contend (Pet. 14-16) that *Ex parte Young* is inapplicable because the MPSC's arbitration and approval of the interconnection agreement occurred in the past. The relevant question under *Ex parte Young* is not, however, whether the state officials' action that the plaintiff is challenging occurred in the past. The question instead is whether the plaintiff is seeking prospective relief from the ongoing impact of the state officials' action on its federal rights. Indeed, the Fourth Circuit recently rejected an argument, similar to petitioners' here,

that *Ex parte Young* did not permit an action to enjoin a past decision of a state regulatory commission that had continuing effects on the plaintiff railroads. See *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 536, 542, cert. denied, 525 U.S. 821 (1998). "If we were to accept this argument," the court explained, "no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined had already been decided upon by a state official. But, of course, plaintiffs have no way to know that they must sue to enjoin an official's action until after the official has decided to take that action." *Ibid.*; cf. *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (recognizing the propriety of injunctive relief under *Ex parte Young* to require state officials to provide remedial education programs to eliminate the vestiges of past racial discrimination).

As the court of appeals concluded in this case (Pet. App. 9a), Ameritech is alleging "an ongoing violation of federal law." The interconnection agreement arbitrated and approved by the MPSC remains in force, imposing continuing obligations on the parties that Ameritech contends are contrary to the requirements of the Telecommunications Act. And the MPSC retains the authority to enforce the agreement against Ameritech. See note 3, *supra* (citing cases recognizing such authority). It is thus incorrect for petitioners to characterize this case (Pet. 16) as involving only "an alleged past wrong" as opposed to an alleged "continuing wrong" cognizable under *Ex parte Young*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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