No. 00-101

In the Supreme Court of the United States

JOHN G. STRAND, ET AL., PETITIONERS

v.

GTE NORTH INC., 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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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbent carriers' network elements. Acting outside the arbitration and approval process prescribed by the Telecommunications Act, the Michigan Public Service Commission (MPSC) initiated proceedings to set generic tariffs to be charged by incumbent carriers for the provision of network elements to potential competitors. The questions presented in this case are:

1. Whether the federal district court has subject-matter jurisdiction to review claims by an incumbent local exchange carrier that the MPSC's generic tariffing process circumvents the procedures for interconnection established in the Telecommunications Act and is therefore preempted by federal law.

2. Whether the commissioners of the MPSC are amenable to suit for prospective injunctive relief from the generic tariffing order under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

3. Whether the Johnson Act, 28 U.S.C. 1342, bars federal review of statutory preemption claims based on the Telecommunications Act.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 209 F.3d 909.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2000. The petition for a writ of certiorari was filed on July 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996, 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). 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, 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 services 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, in order 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), 251(c)(6).

The Telecommunications Act requires incumbents to negotiate in good faith with new entrants on agreements 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

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[1] All citations to provisions of the Telecommunications Act are to Supp. IV 1998.

provides for binding arbitration of such interconnection agreements if the parties are unable to resolve all outstanding issues through negotiations. 47 U.S.C. 252(e)(5).

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 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(d)(1),

252(d)(2), 252(c). The state commissions are also bound by FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(e)(2)(B). Arbitrated agreements are subject to review by the state commission to determine whether the agreement meets the requirements set forth in the Act. 47 U.S.C. 252(e)(1), 252(e)(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 Telecommunications Act provides that any party "aggrieved" by a determination of a state public utility commission approving or interpreting an interconnection agreement may file suit in federal district court for a determination "whether the agreement * * * 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 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. AT&T Communications of Michigan, Inc. (AT&T) and Sprint, potential new entrants into local telephone markets in Michigan, sought to negotiate interconnection agreements with GTE North, the incumbent local exchange carrier. The parties' negotiations were unsuccessful. AT&T and Sprint petitioned the Michigan Public Service Commission (MPSC) for arbitration pursuant to Section 252(b) of the Telecommunications Act. Pet. App. 4a-5a.[2]

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[2] Before a final agreement was arbitrated, GTE filed a complaint against the commissioners of the MPSC in federal district court alleging that an interlocutory order issued by the MPSC concerning GTE's interconnection obligations violated the Telecommunications Act. The district court dismissed GTE's complaint, holding that it lacked subject-matter jurisdiction to

While arbitration was continuing, the MPSC initiated a new proceeding, outside the arbitration and approval process prescribed in the Telecommunications Act, to set generic prices to be charged by GTE and other incumbents for the provision of network elements and other services to *any* new entrants. On February 25, 1998, the MPSC entered a final order in that proceeding setting prices for network elements and other services.

GTE filed a complaint for declaratory and injunctive relief in federal district court, challenging the MPSC's order as, *inter alia*, violating the procedures for interconnection set forth in the Telecommunications Act. More specifically, GTE contended that the MPSC's order required GTE and other incumbents to offer network elements to *all* new entrants at predetermined rates, even though Sections 251 and 252 of the Act require new entrants to negotiate individual terms of access with incumbents. See 47 U.S.C. 252(c)(2)-(3).

The district court held that it lacked jurisdiction over GTE's claims. Pet. App. 24a-30a. The court reasoned that Section 252(e)(6), which vests the district courts with jurisdiction to review orders of state public utility commissions approving or interpreting interconnection agreements, provides no basis for review where a state commission has not issued such an order.

The district court also held that it lacked general federal-question jurisdiction under 28 U.S.C. 1331 to hear GTE's claims. The court reasoned that Section 252(e)(6) provides the exclusive mechanism for obtaining review of state commission orders concerning rates

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review the MPSC's order because it was not an order approving or rejecting a final interconnection agreement. See *GTE North* v. *Strand*, No. 5:97-CV- 01, 1997 WL 811422 (W.D. Mich. June 2, 1997).

for the lease of network elements, divesting the district courts of the jurisdiction that they would otherwise have to review preemption claims. Citing *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977), the court concluded that "[w]here Congress has provided an adequate procedure to obtain review of an agency determination, alternative bases for jurisdiction are inapplicable." Pet App. 30a.[3]

3. GTE appealed the district court's decision dismissing the action for lack of jurisdiction. As alternate grounds for affirmance, the MPSC argued that the Eleventh Amendment bars suit against its commissioners in federal court; that federal abstention was warranted; that the Johnson Act, 28 U.S.C. 1342, poses an independent barrier to federal jurisdiction; and that its generic tariffing order was consistent with the Telecommunications Act on the merits. The United States and the FCC intervened to address the MPSC's Eleventh Amendment arguments and the question of subject-matter jurisdiction, arguing that the Eleventh Amendment posed no bar to suit against the MPSC's commissioners under *Ex parte Young*, 209 U.S. 123 (1908), and that the district court had federal-question jurisdiction under 28 U.S.C. 1331.[4]

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[3] Nonetheless, the district court also acknowledged that review under Section 252(e)(6) might not be "adequate" under *Califano* because it was contingent upon a final order by the MPSC approving an agreement that might never exist: "A determination on those issues will be made *if* they are incorporated into or give rise to a final agreement and are submitted to this Court pursuant to section 252[(e)](6)." Pet App. 30a (emphasis added).

[4] The United States and the FCC took no position on the MPSC's abstention arguments or on the merits. The government also explained in a footnote that the Johnson Act is no bar to federal review of statutory preemption claims.

The court of appeals reversed. Pet. App. 1a-23a.

First, the Sixth Circuit held that the district court had general federal-question jurisdiction under 28 U.S.C. 1331 to hear GTE's claims. Pet. App. 9a. The court concluded that Section 252(e)(6), in conferring jurisdiction on the district courts to review orders of state public utility commissions under the arbitration and approval process set forth in the Telecommunications Act, "plainly does not preclude review" of the MPSC's order, "which was entered in an independent state law proceeding unrelated to the AT&T-Sprint arbitration." *Ibid.* The court explained that Section 252(e)(6) does not provide for adequate, albeit deferred, review of the MPSC's order because "there is a chance, regardless of how small, that GTE's competitors may obtain service from GTE on the terms set forth in the [MPSC's] order without ever executing a final agreement." *Id.* at 14a. Given that possibility, and the absence of any evidence that Congress intended Section 252(e)(6) to divest district courts of jurisdiction that they would otherwise have to review preemption claims, the court held "that federal review is available under § 1331 to determine whether state commission orders violate federal law except in cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." *Id.* at 16a-17a. The court declined to express any opinion on the merits of GTE's claims.

Second, the Sixth Circuit rejected the MPSC's contention that the federal courts should abstain from ruling on the merits of GTE's claims. Pet. App. 17a-21a. The court concluded that GTE's preemption challenge to the MPSC's order did not satisfy the criteria for abstention under the doctrines articulated in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), *Younger*

v. *Harris*, 401 U.S. 37 (1971), and *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941). Pet. App. 18a-20a.

Third, the Sixth Circuit held that the Johnson Act, which precludes federal court review of state rate-making orders where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution," 28 U.S.C. 1342, had no application to this case. Pet. App. 20a. Here, the court explained, "jurisdiction over GTE's claims is based on alleged violations of its rights under the [Telecommunications Act]," and thus not on the Constitution alone. *Ibid.*

Finally, the Sixth Circuit recognized that the Eleventh Amendment posed no bar to suit against the commissioners of the MPSC under *Ex parte Young*. Pet. App. 21a. Noting that "*Young* limits GTE's recovery to prospective injunctive relief," the court explained that "waiting to decide this case until the Commission approves a final agreement incorporating the challenged terms may well deny GTE a timely and adequate remedy by precluding recovery for harm sustained while the order was in effect." *Ibid.*[5]

ARGUMENT

The Sixth Circuit's decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, to the extent that other courts of appeals have considered the issues presented in this case, they have reached the same conclusions as

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[5] In a footnote, the court of appeals observed that it had previously held that suit could proceed against the commissioners of the MPSC under *Ex parte Young*. Pet. App. 21a n.6 (citing *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir. 2000)). The MPSC has petitioned for a writ of certiorari in *Climax*. See *Strand* v. *Michigan Bell Tel.*, No. 99-1878.

did the Sixth Circuit. This Court's review is therefore not warranted.

1. The Sixth Circuit correctly held that the district court had subject-matter jurisdiction under 28 U.S.C. 1331 to consider GTE's claims that the MPSC's generic tariffing order violates, and is thus preempted by, the Telecommunications Act. This Court has long recognized that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

Contrary to petitioners' contention, Section 252(e)(6) of the Telecommunications Act, which vests the district courts with jurisdiction to review orders of state public utility commissions approving or interpreting interconnection agreements, does not provide the exclusive means by which *any* claim related to the Act may be heard in federal court. Nothing in the text of Section 252(e)(6) purports to divest federal courts of the jurisdiction that they would otherwise have to address statutory preemption claims. And, as the court of appeals recognized, to construe Section 252(e)(6) as petitioners urge "would have enormous negative implications: if only certain actions (final orders approving interconnection agreements) by state commissions are reviewable in federal court [under Section 252(e)(6)], and if, as the district court held, § 252(e)(6) is the exclusive basis for judicial review of state commission actions that in any way relate to interconnection agreements, state commissions may insulate regulatory requirements that violate the [Telecommunications

Act] from federal, and possibly even state, court review." Pet. App. 16a.

Petitioners criticize (Pet. 18) the Sixth Circuit's decision as permitting aggrieved parties to "bypass the specific method that Congress has provided for" in Section 252(e)(6). But the Sixth Circuit correctly observed that Section 252(e)(6) does not provide for adequate review of the actions taken by the MPSC in this case, "because there is a chance, regardless of how small, that GTE's competitors may obtain service from GTE on the terms set forth in the [MPSC's] order *without ever executing* a final agreement." Pet. App. 14a. Thus, the court of appeals properly refused to construe Section 252(e)(6)—the very provision of the Telecommunications Act that is designed to ensure that review in federal court is generally available of state commission actions alleged to violate federal law—to strip the federal courts of jurisdiction to review actions of state commissions taken outside the interconnection process specified in the Act. 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").[6]

2. The Sixth Circuit's holding that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit against the MPSC commissioners is also correct and in accord with the decisions of the only

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[6] Petitioners also criticize (Pet. 20) the court of appeals' rejection of "the suggestion that state court review of GTE's claims is adequate." But the availability of state court review is irrelevant to the question whether Section 252(e)(6) divests the district courts of jurisdiction to address preemption claims based on the Telecommunications Act. That question turns solely on congressional intent.

other courts of appeals that have addressed the issue. See *MCI Telecomm. Corp.* v. *Illinois Bell Tel. Co.*, Nos. 98-2127 et al., 2000 WL 1010863, at *18-*21 (7th Cir. July 24, 2000); *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939-940 (10th Cir. 2000).[7]

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, 149-168 (1908); see also *Pennhurst State Sch. & 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 "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 concluded that this action, which seeks only "prospective injunctive relief" (Pet. App. 21a) against the MPSC commissioners, fits comfortably within the *Ex parte Young* exception. In naming the MPSC commissioners as parties in this action challenging their generic tariffing order, GTE is simply seeking to eliminate prospectively its obligation

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[7] In addition, the Seventh and Tenth Circuits held that the state commissions had waived their sovereign immunity by electing to exercise their regulatory authority over interconnection agreements pursuant to the Telecommunications Act. See *MCI Telecomm. Corp.* v. *Illinois Bell Tel. Co.*, Nos. 98-2127 et al., 2000 WL 1010863, at *13-*18; *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 216 F.3d at 935-939.

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 (opinion of Kennedy, J.) (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").[8]

In support of their contention that the *Ex parte Young* exception is inapplicable here, petitioners rely (Pet. 10-12, 16) on this Court's refusal in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 74 (1996), to allow an action under *Ex parte Young* where "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." Suggesting that the Telecommunications Act, like the Indian Gaming Regulatory Act in *Seminole Tribe*, creates a limited remedial scheme, petitioners argue (Pet. 16) that "there is no basis to infer that Congress intended to subject the individual state commissioners to the full range of remedial powers of a federal court under *Ex parte Young*." Petitioners are merely dressing their previous jurisdictional argument in Eleventh Amendment garb. Because petitioners' Eleventh Amendment argument depends on the same erroneous premise—that Section 252(e)(6) provides an exclusive avenue for federal court review of claims that an action of a state public utility commission violates the Telecommunications Act—it

[8] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether *Ex parte Young* relief is available against state officials 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).

fails for the same reasons as does petitioners' jurisdictional argument.[9]

Indeed, the gravamen of GTE's preemption claim in this case is that the MPSC's generic tariffing order circumvents the procedures established in the Telecommunications Act for imposing interconnection obligations. Accordingly, an *Ex parte Young* suit in the present context seeks to protect, rather than to frustrate, the remedial scheme that Congress established in the Act. The concern that animated the Court in *Seminole Tribe* is thus totally absent here: An *Ex parte Young* action is not being used to circumvent the remedial scheme that Congress crafted, but rather to seek adherence to the procedures set forth in the Telecommunications Act.

3. The Sixth Circuit also correctly determined that the Johnson Act does not bar review in federal court of the MPSC's order. The Johnson Act, by its terms, precludes such review of state ratemaking orders only where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 U.S.C. 1342(1). Although statutory preemption claims depend, in part, on the Supremacy Clause of the Constitution, they also depend on the

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[9] Moreover, as the Seventh and Tenth Circuits have recognized, where review of a state commission's order is appropriately sought under Section 252(e)(6), *Seminole Tribe* is no impediment to subjecting the members of the commission to suit under *Ex parte Young*. See *MCI Telecomm. Corp.* v. *Illinois Bell Tel. Co.*, Nos. 98-2127 et al., 2000 WL 1010863, at *19 ("Section 252 of the [Telecommunications] Act does not create a 'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations."); *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 216 F.3d at 939-940.

existence of a federal statute that trumps state law by operation of the Supremacy Clause. As the Sixth Circuit and two other courts of appeals have therefore recognized, because statutory preemption claims do not rest *solely* on the Constitution, the Johnson Act does not bar federal review of such claims. See Pet. App. 20a; *Freehold Cogeneration Assocs.* v. *Board of Regulatory Comm'rs*, 44 F.3d 1178, 1186 (3d Cir.), cert. denied, 516 U.S. 815 (1995); *Arkansas Power & Light Co.* v. *Missouri Pub. Serv. Comm'n*, 829 F.2d 1444, 1449 (8th Cir. 1987).

In an attempt to suggest a conflict among the circuits on this issue, petitioners point (Pet. 24-26) to two cases describing preemption claims as "constitutional." But petitioners' observation that statutory preemption claims are based, in part, on the Supremacy Clause ignores the fact that such claims are also based, in part, on a federal statute that supplants the state law. Such claims are therefore not "based solely on * * * repugnance of the order to the Federal Constitution" within the meaning of the Johnson Act, 28 U.S.C. 1342. Indeed, petitioners concede (Pet. 26) that the principal case on which they rely—*International Brotherhood of Electrical Workers, Local Union No. 1245* v. *Public Services Comm'n*, 614 F.2d 206 (9th Cir. 1980)—concluded that the Johnson Act bars federal jurisdiction only when the claim "rests exclusively on repugnance to the Federal Constitution." Petitioners also rely on an unreviewed district court decision—*J&A Realty* v. *City of Asbury Park*, 763 F. Supp. 85 (D.N.J. 1991)—that involved a pure constitutional claim, not a statutory preemption claim. Thus, petitioners have shown no conflict of decisions whatsoever and err in asserting (Pet. 28) that, "in at least two circuits," the existence of

a statutory preemption claim is insufficient to avoid the Johnson Act's jurisdictional bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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