Nos. 00-653 and 00-744

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

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

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

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 (1996 Act), 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. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state public utility commission's voluntary acceptance of Congress's offer to exercise regulatory authority pursuant to the scheme set forth in the 1996 Act constitutes a waiver of immunity from suit in federal court, where the Act clearly provides for review in federal court of a state commission's actions.

2. Whether, in the alternative, the commissioners of a state public utility commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking prospective injunctive relief from orders by the state commission alleged to violate federal law.

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OPINIONS BELOW

The opinion of the court of appeals (PSCW Pet. App. 1a-48a; ICC Pet. App. 1a-54a) is reported at 222 F.3d 323.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2000. The petition for a writ of certiorari in No. 00-653 was filed on October 23, 2000 (a Monday). On October 18, 2000 , Justice Stevens extended the time within which to file a petition for a writ of certiorari in No. 00-744 to and including November 5, 2000, and the petition was filed on November 6, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (1996 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). This case concerns the provisions of the 1996 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., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telecommunications 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, without rights of access to the incumbent's 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.

Accordingly, Congress, in Section 251 of the 1996 Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with those of incumbents, 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

[1] All citations of the 1996 Act are of Supp. IV 1998.

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). 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) and (c)(6).

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c). The Act provides for binding arbitration in the event that the parties cannot conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(e)(5).

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 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 (FCC) will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, 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. A negotiated agreement is subject to review by the state commission (or, if the state com-

mission chooses not to engage in such review, by the FCC) to determine whether the agreement discriminates against non-party carriers 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 negotiation and proceed to arbitration, the state public utility commission (or the FCC) will resolve any open issue, including the rates, terms, and conditions under which the new competitor will enter the local market, as well as prices that both the incumbent and the new entrant will pay one another 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). An arbitrated agreement is 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) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission approving or rejecting an interconnection agreement may file suit in federal district court for a determination of "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 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. The Illinois Commerce Commission (ICC) and the Public Service Commission of Wisconsin (PSCW) have

voluntarily exercised regulatory authority under the 1996 Act. Both state commissions have arbitrated unresolved issues in interconnection agreements between incumbent carriers and new entrants, approved final interconnection agreements, and interpreted and enforced the provisions of existing interconnection agreements.

Carriers "aggrieved" by actions of the ICC or the PSCW, in exercising their authority under the 1996 Act with respect to interconnection agreements, filed suits in federal district court pursuant to Section 252(e)(6). The suits contended that the state commissions acted contrary to the Act in approving, interpreting, and enforcing interconnection agreements (or, in one instance, in rejecting a statement of generally applicable terms or conditions, see 47 U.S.C. 252(f)). Each suit named as defendants both the relevant commission and its individual commissioners.

In each case, the state commission and its commissioners moved to dismiss on Eleventh Amendment immunity grounds. The United States and the FCC intervened to defend the constitutionality of the 1996 Act.

a. In the Illinois cases, the district court denied the motion to dismiss of the ICC and its commissioners on two independent grounds. ICC Pet. App. 74a-104a.

The district court first held that the State had waived its sovereign immunity from suits in federal court challenging the ICC's exercise of authority under the 1996 Act. ICC Pet. App. 88a-92a. The court explained that Congress gave States a choice whether to participate in the federal regulatory scheme created by the Act. *Id.* at 90a. The court further explained that Congress placed the States on clear notice that, if they chose to participate in that federal regulatory scheme,

they would be subject to suit in federal court to assure that their actions conformed to federal law. *Id.* at 89a-90a. The court concluded that the State, through the ICC, had made that voluntary election. *Id.* at 90a, 92a.

Alternatively, the district court held that the individual commissioners of the ICC are subject to suit under the exception to the doctrine of sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officials to enjoin ongoing violations of federal law. ICC Pet. App. 92a-102a. The court rejected the argument that "the *Ex parte Young* doctrine does not apply * * * because the type of relief sought by the plaintiffs is retrospective"; the court concluded that the relief sought against the commissioners, "an injunction or declaration requiring [them] to follow the [1996] Act in making their regulatory decisions," is "undeniably prospective." *Id.* at 93a-95a. The court also rejected the argument that *Ex parte Young* applies only to violations of the Constitution, not to violations of federal statutes, explaining that *Ex parte Young*'s purpose of "promot-[ing] the vindication of federal rights" is served in both instances. *Id.* at 95a. The court further held that neither *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), nor *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), precludes the application of the *Ex parte Young* exception in the circumstances of this case. ICC Pet. App. 94a-102a.

The Seventh Circuit affirmed on the ground that a state commission waives immunity from suit by electing to exercise regulatory authority under the 1996 Act. ICC Pet. App. 55a-73a. Shortly after the Seventh Circuit issued that decision, however, this Court issued decisions in three cases involving Eleventh Amendment

issues.[2] In light of those decisions, the Seventh Circuit granted rehearing. *Id.* at 5a-6a.

b. In the Wisconsin cases, the district court granted the motion to dismiss on immunity grounds of the PSCW and its commissioners. PSCW Pet. App. 49a-76a (first decision); *id.* at 77a-94a (second decision).

In its first decision, the district court concluded that the Eleventh Amendment barred suit against the PSCW and its commissioners. PSCW Pet. App. 49a-76a. The court rejected the argument that the PSCW had waived its immunity to suit by choosing to exercise federal regulatory authority. While agreeing that the 1996 Act provides clear notice to state commissions that acceptance of new regulatory authority offered by the 1996 Act would subject them to suit in federal court, *id.* at 60a-61a, the court held that state participation in the new scheme was not "voluntary" because "staying out of the interconnection process cannot be said to be a realistic option for a state commission," *id.* at 67a.

The district court also rejected the argument that review of the PSCW's determinations was permitted under the *Ex parte Young* exception. While acknowledging that suits against state officials seeking prospective injunctive relief are typically available under *Ex parte Young*, the court held that such review was barred in this context based on its understanding of *Seminole Tribe*. PSCW Pet. App. 68a-73a. Before dismissing the case, however, the court requested further briefing on whether the PSCW was an indispensable

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[2] See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999); *Alden* v. *Maine*, 527 U.S. 706 (1999).

party to suit under Rule 19(b) of the Federal Rules of Civil Procedure. *Id.* at 75a.

While the Wisconsin cases remained pending in district court, the Seventh Circuit issued its initial decision in the Illinois case and then granted rehearing in that case. See pp. 7-8, *supra.*

In the meantime, the district court in the Wisconsin cases held that, in light of *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Seventh Circuit's decision in the Illinois case was no longer good law. PSCW Pet. App. 86a. The court stated that, although *College Savings Bank* preserved some implied waivers of sovereign immunity, the circumstances in which such waivers would be recognized were limited. *Id.* at 87a. The court also reiterated its conclusion that review under *Ex parte Young* was unavailable. *Id.* at 82a-84a. Having concluded that suit against the PSCW and its commissioners was barred by the Eleventh Amendment, the court held that the PSCW was an indispensable party within the meaning of Rule 19. *Id.* at 89a-93a. Accordingly, the court dismissed the case in its entirety.

3. In a decision addressing the appeals in the Wisconsin cases and the rehearing petitions in the Illinois cases, the Seventh Circuit held that the Eleventh Amendment does not preclude suits against a state public service commission or its members challenging its exercise of authority under the 1996 Act. PSCW Pet. App. 1a-48a. The court held that, "by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Eleventh Amendment immunity from suit in federal court." *Id.* at 47a-48a. In the alternative, the court held that review of decisions

by state commissions was also available in an action against the individual commissioners under *Ex parte Young*, "[b]ecause the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief." *Id.* at 48a. Having found that the Eleventh Amendment posed no bar to suit against state commissions or commissioners, the Seventh Circuit had no occasion to address the question of whether the commissions or commissioners are indispensable parties to suit.

Before reaching the Eleventh Amendment issues, the Seventh Circuit held, as a threshold matter, that federal courts have jurisdiction under Section 252(e)(6) to review determinations by state public utility commissions. PSCW Pet. App. 25a-27a. Rejecting petitioners' arguments that the 1996 Act does not provide for suit against state commissions "but instead provides only for federal court review of the interconnection agreements themselves," the court explained that the text and structure of the Act made clear "that Congress contemplated suits against state defendants in federal court." *Id.* at 25a. Citing *Southwestern Bell Telephone Co.* v. *Public Utilities Commission*, 208 F.3d 475 (5th Cir. 2000), the court also held that Section 252(e)(6) confers jurisdiction on federal courts to review enforcement decisions by state commissions interpreting previously approved interconnection agreements, as well as decisions approving or rejecting such agreements in the first instance. PSCW Pet. App. 26a.

a. Turning to the Eleventh Amendment issues, the court of appeals held that the state public utility commissions waived their immunity in federal court from suits contending that their approval, rejection, interpretation, or enforcement of interconnection agreements violates federal law. The court reasoned that the

state commissions voluntarily accepted Congress's offer of federal regulatory authority under the 1996 Act—an offer that was clearly conditioned on the state commissions' agreement that they would be subject to suit in federal court arising from their exercise of that authority. PSCW Pet. App. 28a-40a.

First, the court of appeals considered whether Congress *could*, consistent with this Court's decisions, condition a grant of regulatory authority on a State's waiver of its Eleventh Amendment immunity. While recognizing that *College Savings Bank* overruled the "forced waiver" doctrine—under which a State was deemed to have waived its immunity merely by participating in activities governed by various federal statutes—the court noted that *College Savings Bank* "did not call into question other types of 'constructive' waivers obtained by Congress acting within its Article I powers." PSCW Pet. App. 30a. To the contrary, the court concluded that *College Savings Bank*, in citing two examples of waivers that Congress may still obtain from the States,[3] preserved Congress's authority to condition a "gratuity" to the States upon a waiver of immunity. *Id.* at 30a-31a.

Second, the court of appeals considered whether Congress *did*, with the requisite degree of clarity, condition the States' participation in the regulatory scheme established by the 1996 Act on a waiver of immunity. Rejecting petitioners' argument that Congress had to

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[3] The examples given in *College Savings Bank* concerned approval of an interstate compact conditioned upon a waiver of immunity, see *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and a grant of federal highway funds conditioned upon a higher state drinking age, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

mention the Eleventh Amendment explicitly in order to create a valid condition, the court explained that the structure of Section 252 "makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place." PSCW Pet. App. 33a. Thus, the court concluded, "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 34a.

Third, the court of appeals considered whether the States have, in fact, waived their Eleventh Amendment immunity under the 1996 Act. PSCW Pet. App. 34a. Citing the Tenth Circuit's recent decision in *MCI Telecommunications Corp.* v. *Public Service Commission*, 216 F.3d 929 (2000), petition for cert. pending, No. 00-593, the court held that "states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act." PSCW Pet. App. 35a.

In support of that conclusion, the court of appeals rejected petitioners' argument that the waiver obtained by the 1996 Act is "fundamentally different" from the waivers in the earlier cases discussed with approval in *College Savings Bank*. In response to petitioners' argument that those waivers were contained in enactments under Congress's Compact Power and Spending Power, while the 1996 Act rests upon Congress's Commerce Power, the court observed that the analysis

in *College Savings Bank* "did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers." PSCW Pet. App. 35a. The court explained that "the key in those cases was that Congress had the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take." *Id.* at 36a.[4]

The court of appeals determined that the state commissions' authority to regulate matters encompassed by the 1996 Act is a gratuity, because that authority is "derived from provisions of the Act and not from [the commissions'] own sovereign authority." PSCW Pet. App. 37a. The court observed that Congress "*could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government" and, in the 1996 Act, "Congress *did* take over some aspects" of local telecommunications regulation and "precluded all other regulation [of those aspects] except on its terms." *Id.* at 36a-37a. The court therefore concluded that, when state commissions engage in the regulation of local telecommunications in areas encompassed by the Act, they are not engaged in

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[4] In rejecting the argument that waivers under the 1996 Act "cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power," the court of appeals explained that "[t]he state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms." PSCW Pet. App. 38a. Thus, the court noted, "[t]he only difference between the classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator." *Ibid.*

"otherwise permissible activity" as that term is used in *College Savings Bank*; the court explained that, "the states are not merely acting in an area regulated by Congress," but "are now voluntarily *regulating on behalf of Congress*." *Id.* at 37a, 40a. In such circumstances, the court concluded, Congress may offer such regulatory power to the States, attaching conditions to that offer if it sees fit, and "States are free to accept or reject the terms Congress has offered." *Id.* at 40a.[5]

b. As an "independent basis for decision," the court of appeals held that the Eleventh Amendment does not bar prospective injunctive relief against the individual members of the state commissions. PSCW Pet. App. 40a. The court agreed with decisions in the Sixth and Tenth Circuits holding that suits against state commissioners under the 1996 Act present a "straightforward" application of the *Ex parte Young* exception. *Id.* at 41a. The court concluded that, because the parties "seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law," the relief sought "is precisely the type contemplated by the *Ex parte Young* doctrine." *Id.* at 42a.

The court of appeals rejected petitioners' argument that *Seminole Tribe* "renders the *Ex parte Young* doctrine inapplicable" to suits against state commissioners under the 1996 Act. PSCW Pet. App. 42a. The court explained that "Congress has not limited the court's

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[5] The court of appeals noted that the one case before it involving a privately negotiated agreement had been dismissed, thereby obviating the need to decide "whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be 'deemed approved' under 47 U.S.C. § 252(e)(4)." PSCW Pet. App. 39a n.11.

remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act," as Congress did under the Indian Gaming Regulatory Act at issue in *Seminole Tribe*. *Id.* at 45a.

The court of appeals also concluded that allowing suit under *Ex parte Young* would not implicate "special sovereignty interests" in the manner identified as problematic in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). PSCW Pet. App. 45a-47a. Unlike the State's interest in real property in *Coeur d'Alene*, the court explained, "[i]n the wake of the 1996 Telecommunications Act," the States' interest in regulating matters encompassed by the Act "is derived solely from the regulatory role Congress has bestowed upon the states." *Id.* at 46a-47a

ARGUMENT

The Seventh Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, to the extent that other courts of appeals have considered the question presented in this case, they have reached the same answer as did the Seventh Circuit. See *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000) (finding no Eleventh Amendment bar on both waiver and *Ex parte Young* grounds), petition for cert. pending, No. 00-593; *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.) (basing decision solely on *Ex parte Young*), cert. denied, 121 S. Ct. 54 (2000). This Court's review is therefore not warranted.

1. The court of appeals correctly held that state public utility commissions waived their immunity from suit in federal court by voluntarily accepting Congress's offer to exercise regulatory authority under the new scheme established by the 1996 Act to promote com-

petition in local telecommunications markets. The Act provides that a regulatory body will exercise authority, subject to review in federal court, over agreements between incumbent carriers and new entrants pursuant to the Act (*i.e.*, agreements concerning interconnection, access to network elements, resale of services, etc.). See 47 U.S.C. 251, 252. If that responsibility is undertaken by the FCC, pursuant to 47 U.S.C. 252(e)(5), the FCC's actions are reviewable in the federal courts of appeals, as provided in the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998). If, in the alternative, a state commission accepts Congress's offer of regulatory authority under the Act, the state commission does so with full knowledge that the Act permits aggrieved parties to seek "[r]eview of State commission actions" in federal district court. 47 U.S.C. 252(e)(6). Thus, the Act clearly puts the state commissions on notice that, if they elect to participate in the federal regulatory scheme, they will do so subject to review of their actions in federal court.[6]

The Seventh Circuit's decision that States waive their Eleventh Amendment immunity by assuming a regulatory role under the 1996 Act is fully consistent with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). *College Savings Bank* does not suggest that Congress cannot condition a State's exercise of regulatory authority under a federal statute—authority that would otherwise be exercised by a federal agency, subject to review in federal court—on the State's amenability to federal court

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[6] Petitioners do not contend that the 1996 Act lacks sufficient clarity to put state public utility commissions on notice that their actions will be reviewed in federal court.

review of its exercise of that regulatory authority. To the contrary, *College Savings Bank* confirms that Congress's ability to impose conditions on a State's voluntary exercise of federal authority is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). See 527 U.S. at 675-687.[7]

College Savings Bank makes clear, as the Seventh Circuit and other courts of appeals have recognized,[8]

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[7] The *Parden* doctrine applied when a State took part, as would a private party, in federally regulated activity and thereby became subject to controlling federal law. Thus, under the *Parden* doctrine, States that engaged in enterprises governed by federal statutes—such as the Lanham Act or the Patent Act—might be thought to have consented voluntarily to suit under those statutes. As Justice Scalia suggested as early as his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 41-45 (1989) (Scalia, J., dissenting in part), *Parden* waivers accomplished the same result as a federal abrogation of state immunity for actions in a regulated area. Accordingly, once the Court overruled *Union Gas*, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and declared Congress without authority to abrogate state immunity under its Article I powers, the *Parden* doctrine lost vitality. As the Court explained in *College Savings Bank*, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." 527 U.S. at 683. Accordingly, because Congress could not abrogate a State's immunity for violations of the Lanham Act, neither would a State be held to have impliedly waived its immunity by engaging in conduct subject to that Act.

[8] See *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999) (finding waiver of immunity based on acceptance of federal funds), cert. granted on other grounds *sub nom. Alexander* v. *Sandoval*, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 556 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1220 (2000); *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281 (10th Cir. 1999) (same), cert. denied, 120 S. Ct. 1530 (2000).

that a State may impliedly waive its immunity in certain contexts. In particular, the Court reaffirmed its holding in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that "a bistate commission which had been created pursuant to an interstate compact * * * had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Sav. Bank*, 527 U.S. at 686. The Court explained that, in *Petty*, Congress was simply imposing a condition on a grant of authority that the State would not otherwise possess, because interstate compacts cannot be formed without congressional approval. *Ibid.* Thus, the Court observed, Congress's action in *Petty* was a "gratuity" in the same sense as a disbursement of federal funds, a context in which it is well established that Congress may condition state participation on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

As in *Petty* and *Dole*, this case involves a condition imposed on a "gratuity"—which a State may freely choose to accept or reject—analogous to the conditional grant of congressional approval of the interstate compact in *Petty*. As the Court noted in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), "[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." *Id.* at 379 n.6. Congress allowed the States, through their public utility commissions, to play a role in that regulation, but only if they agreed to be subject to federal judicial review to ensure compliance with the new federal standards. Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the 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." *Ibid.*[9]

Petitioners contend that state commissions cannot be deemed to have waived their Eleventh Amendment immunity, because the authority to regulate interconnection agreements cannot properly be viewed as a "gratuity" within the meaning of *College Savings Bank*. Unlike the "fundamentally consensual" waivers in *Petty* and *Dole*, petitioners argue (PSCW Pet. 17), the issue here is "whether a state's existing, un-preempted police power presence in local telecommunications competition could lead to the wavier of Eleventh Amendment immunity." Petitioners' characterization of the state commissions' regulatory role reflects a fundamental misunderstanding of changes wrought by the 1996 Act. As the court of appeals recognized (PSCW Pet. App. 36a), Congress could—and did—take over certain aspects of local telecommunications regulation from the States. Far from preserving the status quo, 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

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[9] The question whether the Eleventh Amendment protects States from suit under the 1996 Act was not at issue in *Iowa Utilities Board*. Nor is that question presented in the five pending petitions for a writ of certiorari arising from the Eighth Circuit's decision on remand in *Iowa Utilities Board*. Those petitions instead involve the rules promulgated by the FCC to implement the substantive requirements of Section 251(c). See *Verizon Communications, Inc.* v. *FCC* (No. 00-511); *WorldCom, Inc.* v. *Verizon Communications, Inc.* (No. 00-555); *FCC* v. *Iowa Utils. Bd.* (No. 00-587); *AT&T* v. *Iowa Utils. Bd.* (No. 00-590); *General Communications, Inc.* v. *Iowa Utils. Bd.* (No. 00-602).

implementing FCC regulations. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. 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 provisions of federal law. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).[10]

Based upon their flawed conception of state commissions' regulatory authority after the 1996 Act, petitioners also assert that this case implicates a circuit split. But the principal cases that petitioners rely upon to support that assertion (see PSCW Pet. 18) stand only for the unexceptional proposition that a State's "mere presence" in a federally regulated area cannot be construed as a waiver of immunity. See *Burnette* v. *Carothers*, 192 F.3d 52, 60 (2d Cir. 1999) (State did not impliedly waive its sovereign immunity by engaging in activity subject to federal environmental statutes), cert. denied, No. 00-610 (Dec. 11, 2000); *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (State

[10] To be sure, while Congress has "taken the regulation of local telecommunications competition away from the States" with respect to "matters addressed by the 1996 Act," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, Congress has not taken over the regulation of all aspects of local telecommunications. And Congress preserved the ability of the 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), 261(b) and (c). Contrary to petitioners' assertions (see, *e.g.*, PSCW Pet. 15, ICC Pet. 16-18), however, the fact that Congress did not supplant state regulation in every possible respect does not undermine the court of appeals' waiver analysis; the court held that the States waived their sovereign immunity from suit in federal court only with respect to those matters as to which Congress *has* supplanted state regulation.

did not impliedly waive its sovereign immunity by engaging in activity subject to federal copyright and trademark statutes). Those cases do not involve the 1996 Act or the regulation of local telecommunication markets. Nor do those cases address the question whether a State waives its immunity when it exercises substantial *new* regulatory authority conferred by Congress with conditions clearly attached.[11]

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 incumbents and new entrants 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 in such agreements. Thus, the regulation of interconnection agreements, as creatures of federal law, is not an "otherwise permissible activity" under *College Savings Bank*. Instead, such regulation is akin

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[11] Petitioners' reliance on *GTE North, Inc.* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), is equally unavailing. Although the Sixth Circuit stated in a footnote in *GTE North* that the 1996 Act "cannot legitimately be construed as a valid waiver of sovereign immunity," *Id.* at 922 n.6, the court's mention of waiver was dicta. The Sixth Circuit recognized that the case could proceed against the state commissioners on *Ex parte Young* grounds. *Id.* at 922 & n.6. No waiver theory was briefed or argued in that case because the district court's jurisdiction over the preemption claim there was based solely on 28 U.S.C. 1331, not on Section 252(e)(6).

to a "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 simultaneously rejecting the federal judicial review that is a critical part of the regulatory scheme.[12]

2. The Seventh Circuit's explicitly "independent basis for decision" (PSCW Pet. App. 40a)—that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit for prospective relief against the commissioners of the PSCW and the ICC—is also correct and in accord with the decisions of the only courts of appeals that have addressed the issue. See *MCI Telecomms.*, 216 F.3d at 939; *Michigan Bell*, 202 F.3d at 867. Indeed, this Court has denied petitions for certiorari in two cases raising the precise arguments against *Ex parte Young* review that petitioners present here. See *Strand* v. *Michigan Bell Tel.*, 121 S. Ct. 54 (2000) (No. 99-1878); *Strand* v. *Verizon North Inc.*, 121 S. Ct. 380 (2000) (No. 00-101). No different result is warranted in this case.

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[12] Petitioners' argument (PSCW Pet. 19-23) that state commissions have no meaningful "choice" under the Act, but instead are "coerced" to regulate in violation of the Tenth Amendment, is not suitable for this Court's review. None of the courts below addressed that question. Cf. *Michigan Bell*, 202 F.3d at 866 (holding that the 1996 Act does not "compel" actions by state commissions in violation of the Tenth Amendment). In any event, as the foregoing discussion illustrates, state commissions do have a meaningful "opt-out" option under the Act. Indeed, at least one state commission has declined to exercise regulatory authority in this context. See *In re Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52 (FCC June 14, 2000).

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 Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 102 (1984); *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 (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).[13]

The court of appeals correctly held that the suits consolidated here "fit squarely within the traditional framework of *Ex parte Young*." PSCW Pet. App. 42a. In naming the commissioners of the PSCW and the ICC as parties in suits seeking review of those commissions' determinations under Section 252(e)(6), the parties are seeking "to have the commissioners conform their future actions, including their continuing enforcement

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[13] Contrary to petitioners' assertions (ICC Pet. 23-27), the *Ex parte Young* exception is not limited to suits alleging *constitutional* violations. The exception applies equally where the state official's conduct is alleged to violate a federal statute. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 & n.6 (1978); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (presupposing same). Indeed, if petitioners' assertion were correct, *Seminole Tribe* and *Coeur d'Alene Tribe*, neither of which alleged any federal constitutional violation, could have been disposed of on much simpler grounds.

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.) (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").[14]

Petitioners argue principally (PSCW Pet. 27-29) that the *Ex parte Young* exception is improper in this case under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).[15] But *Seminole Tribe* involved what the Court described as a "carefully crafted and intricate remedial scheme" that made only a "modest set of sanctions" available to aggrieved parties in federal court. *Id.* at 73-75. Here, in contrast, Congress did not similarly restrict the remedies available in federal court to parties aggrieved by actions of state commissions under the 1996 Act.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No.

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[14] 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).

[15] Petitioners also assert (PSCW Pet. 27, ICC Pet. 28-29) that the *Ex parte Young* exception is unavailable in this case, because the plaintiff carriers are not seeking prospective relief against the commissioners. The court of appeals correctly rejected the premise of petitioners' argument. As the court noted, "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. 42a.

100-497, 102 Stat. 2467, that established a framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only judicial 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 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 prescribe regulations. *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, "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 the 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.[16]

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[16] As noted in the text, the Court's focus in *Seminole Tribe* was on the "carefully crafted and intricate" statutory scheme governing the remedies available once the dispute reached federal court. The Court concluded that, because Congress had specified only a "modest set of sanctions" to be imposed by the court, Congress did not intend that additional remedies be available under *Ex parte Young*. See 517 U.S. at 74-76. That reasoning does not apply where, as under the 1996 Act, Congress has not restricted the remedies available in federal court. It is thus irrelevant whether the regulatory process, which precedes the judicial process provided for under the Act, might itself be characterized as "carefully crafted and intricate."

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the 1996 Act. In contrast to the statute in *Seminole Tribe*, the 1996 Act does not narrowly circumscribe the remedies available in federal court 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 rejected 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 thus fully consistent with the remedy contemplated by Congress. It does not expand the remedies or scope of judicial review available under the Act.

Finally, petitioners contend (PSCW Pet. 30) that the *Ex parte Young* exception is inapplicable because "state court review remains available to compel correction of an erroneous state commission action." To the extent review is sought for decisions by state commissions "approving or rejecting an agreement," however, state courts are expressly divested of jurisdiction under the Act. 47 U.S.C. 252(e)(4). Moreover, even in those circumstances where state court review is not expressly precluded—as where a state commission interprets or enforces provisions in an existing interconnection agreement—the availability of such review does not affect the applicability of *Ex parte Young*. Indeed, the premise of *Ex parte Young* is that, regardless of possible remedies in state court, "[r]emedies designed to end a continuing violation of federal law are

necessary to vindicate the federal interest in assuring the supremacy of the law." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). Thus, the court of appeals correctly held here that *Ex parte Young* provides an independent basis for suit against individual state public utility commissioners to obtain review of their actions under the 1996 Act.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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