Nos. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a state public utility commission's action relating to the enforcement of a previously approved Section 252 interconnection agreement entered into pursuant to the Telecommunications Act of 1996 (1996 Act) is a "determination under [Section 252]" and thus is reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. V 1999).

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

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

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On December 12, 2001, after oral argument in this case and *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, the Court granted certiorari on the three additional questions presented in the petitions in this case, which are also presented in *Mathias*, and directed the parties to address those questions in this case. This brief is submitted in response to the Court's directive. In addition, the United States refers the Court to its brief as intervenor in *Mathias*, which addresses some aspects of those questions more fully.

SUMMARY OF ARGUMENT

This Court has recognized that, "[w]ith regard to the matters addressed by the 1996 [Telecommunications] Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their public utility commissions, to choose to play a role in that regulation, but only as a part of a regime that explicitly provides for federal judicial review of their actions to ensure compliance with the new federal standards. Thus, whether a state commission is approving or rejecting a new interconnection agreement, or is interpreting or enforcing an agreement already in effect, this Court's observation in *Iowa Utilities Board* holds true: "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Ibid.*

I. In Section 252(e)(6) of the Telecommunications Act of 1996 (1996 Act), Congress provided that, in "any case in which a State commission makes a determination under this section [*i.e.*, Section 252]," review is available in federal district court to ascertain whether that determination complies with the 1996 Act. 47 U.S.C. 252(e)(6). A state commission "makes a determination under" Section 252 not only when it approves or rejects a new interconnection agreement, as the court of appeals acknowledged, but also when it construes and enforces an existing agreement that was negotiated or arbitrated in accordance with the procedures prescribed in Section 252. The state commission acts in both instances by authority of, and subject to, the requirements of Section 252. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991).

First, interconnection agreements are federal regulatory instruments that exist only by virtue of Sections 251 and 252. In order to advance its pro-competitive goals, Congress re-

quired incumbent carriers to enter into those agreements. See 47 U.S.C. 251(c), 252(b). Congress prescribed the subjects to be addressed by an agreement, and established standards (and directed the FCC to establish standards) concerning the contents of an agreement. See, *e.g.*, 47 U.S.C. 251(b), (c) and (d), 252(d). Congress also provided that, once an incumbent entered into an agreement with one competitor, other competitors could demand the same terms from the incumbent. 47 U.S.C. 252(i).

Second, state commissions have a regulatory role to play with respect to interconnection agreements only by virtue of Section 252. Congress could have assigned such regulation solely to the FCC. But Congress instead offered state commissions a regulatory role, expressly prescribing procedures to govern their mediation, arbitration, and review of agreements. See 47 U.S.C. 252(a), (b) and (e). Although Congress did not also expressly provide procedures to govern state commissions' interpretation and enforcement of existing agreements, Congress would have understood that those tasks are necessarily part of, or incident to, mediation, arbitration, and review. Thus, when Congress sought to single out state commission decisions "approving or rejecting an agreement," Congress did so in those explicit terms, see 47 U.S.C. 252(e)(4), rather than in the more expansive terms of Section 252(e)(6).

Third, in interpreting and enforcing an existing interconnection agreement, as in arbitrating and reviewing a new agreement, a state commission acts subject to the standards set forth in Section 252. At all stages of the process, the state commission must ascertain that the agreement's arbitrated provisions, as construed, satisfy Sections 251 and 252(d), and that its negotiated provisions, as construed, are non-discriminatory and consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A) and (B).

The court of appeals' contrary interpretation of Section 252(e)(6) would produce a bizarre regulatory scheme, under which identical issues of federal law could be resolved only in federal court, or only in state court, based solely on when those issues happened to arise. Such an approach would inject unwarranted uncertainty into dealings between competing carriers and, in some instances, could encourage carriers either to raise issues prematurely in order to assure federal court review or to raise issues belatedly in order to assure state court review. Nothing in the text or history of Section 252(e)(6), or any other provision of the 1996 Act, suggests, much less compels, such an inherently problematic result.

II. State public utility commissions and their commissioners are not immune under the Eleventh Amendment from suits, such as this one, challenging their regulation of interconnection agreements as contrary to federal law. That is true for two independently sufficient reasons.

A. Congress conditioned the States' exercise of regulatory authority under the 1996 Act—authority that Congress was under no obligation to grant and a State is under no obligation to accept—on their waiver of Eleventh Amendment immunity from suits in federal court to review their exercise of that authority. This Court recently confirmed that Congress may condition a federal benefit to a State—including a grant of authority that the State otherwise could not exercise—on the State's waiver of immunity from suits involving that benefit. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999) (discussing *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). Congress did so here by giving the States the opportunity voluntarily to participate in an integrated regulatory regime involving both state authority over interconnection agreements and review in federal court of state exercises of such authority.

Accordingly, by choosing to exercise regulatory authority under the 1996 Act, a State waives its immunity from suits challenging the manner in which it exercises that authority.

Contrary to the court of appeals' conclusion, the 1996 Act clearly puts the States on notice of the condition attached to Congress's offer of federal regulatory authority. Section 252(e)(6) expressly provides for federal judicial "[r]eview of State commission actions." The ordinary mechanism for judicial review of the actions of a government agency—whether at the national level or the state level—is a suit that names the agency or its officials as defendants. Thus, when the FCC exercises regulatory authority under Section 252 in place of a State, its decisions are reviewable in a suit that names the FCC as a defendant. Section 252(e)(6) is most sensibly understood as providing that, in an analogous proceeding to review a state commission's exercise of regulatory authority under Section 252, the state commission is a defendant. Indeed, no other reading would fulfill Section 252(e)(6)'s promise that, "[i]n *any* case in which a State commission makes a determination under [Section 252]," review is available in federal court to "*any* party aggrieved by such determination," 47 U.S.C. 252(e)(6) (emphasis added), because there sometimes will be no party, other than the state commission, to defend its decision in federal court.

B. In any event, when an aggrieved carrier sues individual state commissioners to enjoin the enforcement of an order asserted to be contrary to the 1996 Act, the suit is not barred by the Eleventh Amendment for an independent reason. Under the exception to the States' Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), the federal courts may adjudicate suits against state officers in their official capacities to secure their prospective compliance with federal law. The *Ex parte Young* doctrine originated in cases, much like this one, in which regulated companies challenged, as contrary to controlling federal law,

the decisions of state officials, including state public utility commissions, imposing and enforcing rates and other obligations. This Court has repeatedly reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997).

There is no merit to the court of appeals' view that the *Ex parte Young* exception is unavailable in this case under the rationale of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). Unlike the statute in that case, the 1996 Act does not create its own "carefully crafted and intricate remedial scheme," *id.* at 73-74, for challenging state officials' actions. There is consequently no reason in this case, as there was in *Seminole Tribe*, to conclude that Congress intended to foreclose resort to a judicially crafted remedial scheme under *Ex parte Young*.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION UNDER 47 U.S.C. 252(E)(6) TO REVIEW DECISIONS BY STATE COMMISSIONS INTERPRETING AND ENFORCING PREVIOUSLY APPROVED INTERCONNECTION AGREEMENTS

Section 252(e)(6), titled "Review of State commission actions," authorizes federal court review in "any case in which a State commission makes a determination under this section," *i.e.*, Section 252. 47 U.S.C. 252(e)(6). Section 252(e)(6) states that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." *Ibid.* Section 252(e)(6) is properly understood as providing for federal judicial review of *all* state commission "determination[s]" with respect to interconnection agreements for compliance with the 1996 Act—not only those involving the approval or rejection of new agreements,

which the court of appeals recognized to be reviewable in district court (Verizon Pet. App. 39a), but also those involving the interpretation and enforcement of existing agreements. That conclusion follows ineluctably from the text, structure, and purpose of the 1996 Act.

A. A state commission makes "a determination under [Section 252]"—which is thus reviewable in district court for compliance with the 1996 Act—whenever it construes and enforces an interconnection agreement. As the Court has recognized, when Congress uses the phrase "under" a given statute, it ordinarily means "by reason of the authority of" or "subject [or pursuant] to" that statute. *Ardestani*, 502 U.S. at 135. Both definitions are satisfied here.

1. A state commission acts by "authority of" Section 252 whenever it makes a determination with respect to an interconnection agreement. Such agreements are federal regulatory instruments—designed to implement Congress's policy of fostering local telecommunications competition—that exist only by virtue of Sections 251 and 252. Congress did not leave incumbent local exchange carriers any choice whether to enter into agreements with potential competitors. Rather, Congress required incumbents to negotiate those agreements in good faith. See 47 U.S.C. 251(c)(1). Congress provided for compulsory arbitration if the negotiations fail, see 47 U.S.C. 252(b); prescribed the subjects to be addressed by an agreement, see, *e.g.*, 47 U.S.C. 251(b) and (c); and established standards—and directed the FCC to establish standards—concerning the contents of an agreement, see, *e.g.*, 47 U.S.C. 251(d)(2), 252(d). In addition, Congress provided that, once an incumbent enters into an agreement with one competitor, other competitors can

demand the same terms from the incumbent. 47 U.S.C. 252(i).[1]

It is only by virtue of Section 252, moreover, that state commissions have a role to play with respect to interconnection agreements. Although Congress could have assigned the regulation of such agreements exclusively to the FCC, Congress instead gave state commissions the option to participate in that regulation. To that end, Congress expressly prescribed procedures to govern state commissions' mediation, arbitration, and review of new agreements. See 47 U.S.C. 252(a), (b) and (e). The mere fact that Congress did not also expressly provide procedures for state commissions to interpret and enforce existing agreements does not, as the court of appeals believed (Verizon Pet. App. 38a-39a), suggest that those activities are not also conducted by authority of Section 252. Congress would have understood that those activities are necessarily part of, or incident to, mediation, arbitration, and review. After all, Congress enacted Section 252(e)(6) against the backdrop of this Court's primary jurisdiction cases, which recognize the interrelationship between a government agency's initial approval of a regulatory instrument and its subsequent construction and enforcement of that instrument. See, *e.g.*, *United States* v.

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[1] The 1996 Act provides that carriers may enter into a negotiated interconnection agreement "without regard to" the requirements of Sections 251 and 252(d). 47 U.S.C. 252(a)(1). As a practical matter, however, negotiated agreements ordinarily incorporate those requirements because, if one party does not agree to such a requirement in negotiations, the other party can demand arbitration to impose the requirement. 47 U.S.C. 252(b)(1). Moreover, an incumbent has an incentive not to agree to terms more favorable than those required by Sections 251 and 252(d), because non-party carriers are entitled to demand the same terms from the incumbent. 47 U.S.C. 252(i).

Western Pac. R.R., 352 U.S. 59, 62-70 (1956); cf. *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992).[2]

2. When a state commission interprets and enforces an interconnection agreement, as when it arbitrates and approves one, it acts "subject to" the substantive standards set forth in Section 252. Just as a state commission cannot approve a negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement" or that "is not consistent with the public interest, convenience, and necessity," 47 U.S.C. 252(e)(2)(A)(i) and (ii), a state commission cannot enforce an existing agreement that, as construed, would have such adverse effects. And, just as a state commission cannot approve an arbitrated agreement that "does not meet the requirements" of Sections 251 and 252(d) and the FCC's regulations, 47 U.S.C. 252(e)(2)(B), a state commission cannot enforce an existing agreement that, as construed, would not meet those requirements.[3]

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[2] Moreover, a state commission's order construing a disputed provision of an existing agreement may readily be conceptualized as an order approving a new agreement (*i.e.*, the existing agreement as it is newly understood and clarified), thereby undermining the court of appeals' perception of a sharp distinction between state commission decisions at the initial approval stage and the subsequent enforcement stage.

[3] The court of appeals suggested that a state commission does not act under Section 252 when it construes and enforces a negotiated agreement, because Section 252 authorizes state commissions to review such agreements as an initial matter only to assure that they are non-discriminatory and consistent with the public interest, convenience, and necessity. See Verizon Pet. App. 39a-40a. As explained in the text, however, whether a state commission is evaluating a negotiated agreement or an arbitrated one, the state commission has to decide whether the agreement, as construed, comports with the standards set forth in Section 252(e)(2). That is equally true at the initial approval stage and the subsequent enforcement stage. The mere fact that Section 252(e)(2) imposes different standards for negotiated and arbitrated agreements does not mean that the state commission is not acting in both

B. The conclusion that Section 252(e)(6) authorizes federal court review of state commission determinations construing and enforcing interconnection agreements finds support in a companion provision of the 1996 Act. Section 252(e)(4) provides, in pertinent part, that "[n]o State court shall have jurisdiction to review the action of a State commission *in approving or rejecting an agreement* under this section." 47 U.S.C. 252(e)(4) (emphasis added).

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

C. Only a construction of Section 252(e)(6) that permits federal court review of *all* state commission determinations involving interconnection agreements for compliance with federal law serves the purposes of the 1996 Act. Congress intended that Sections 251 and 252 be implemented expeditiously and uniformly in order to encourage the rapid development of competition in local telecommunications markets. See, *e.g.*, 47 U.S.C. 251(d)(1) (directing the FCC to

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instances "under" Section 252, *i.e.*, by "authority of" or "subject to" Section 252. It simply means that there may be fewer instances in which a negotiated agreement, as construed, will be found not to "meet[] the requirements of section[s] 251 and [252]." 47 U.S.C. 252(e)(6).

promulgate regulations within six months); 47 U.S.C. 252(e)(4) (providing for exclusive federal court review of state commission decisions approving or rejecting agreements).

Congress would have understood that issues of federal law (*i.e.*, compliance with Sections 251 and 252 and the FCC's regulations) would arise not only at the time that an interconnection agreement was negotiated or arbitrated, but also during the term of the agreement as disagreements arose about the meaning of a given provision and the state commission was called upon to resolve those disagreements. Indeed, state commission determinations that interpret and give effect to existing agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act. Congress could not have intended to foreclose federal court review of claims by an aggrieved carrier that a state commission has interpreted an existing agreement to negate rights or duties mandated by the 1996 Act or to create rights or duties contrary to that Act.[4]

The court of appeals' contrary approach would produce a curious, confusing, and easily manipulatable regulatory regime in which two different judicial systems were assigned

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[4] Clearly, then, Section 252(e)(6) provides for federal court review of claims that a state commission has deprived a carrier of rights conferred by the 1996 Act, such as the claim asserted by Verizon in this case under 47 U.S.C. 251(a), which recognizes the "binding" nature of negotiated agreements. See Verizon Reply Br. 12-13. Section 252(e)(6) may also be understood as providing for federal court review of claims that turn, in substantial part, on the construction of provisions of an arbitrated or negotiated agreement that are required by, or incorporate the terms of, the 1996 Act or the FCC's implementing regulations. The United States takes no position on Verizon's broader argument that virtually all questions arising in the interpretation of interconnection agreements are necessarily federal ones. See Verizon Reply Br. 13-14.

interrelated but mutually exclusive tasks of reviewing state commission decisions on identical issues. Such issues could be resolved only in federal court, or only in state court, based solely on the fortuity of when the issue arose—in federal court if it arose at the formation of the agreement, but in state court if it arose thereafter. A party could evade federal court review (except potentially by this Court) simply by waiting to raise an issue until an agreement was approved. The resulting potential for inconsistent decisions from the federal and state courts on the same or similar issues of federal law would significantly complicate and impede the interconnection process envisioned by the 1996 Act. There is no indication in the text or history of Section 252(e)(6) or any other provision of the Act that federal court review depends upon the timing of a claim rather than its substance, or that Congress would have intended such a manifestly irrational system.[5]

D. The FCC has confirmed that, when a state commission construes and enforces an existing interconnection agreement, the state commission acts under Section 252. See *In re Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,277 (2000).

There, the FCC was called upon to interpret Section 252(e)(5), which provides that, "[i]f a State commission fails to act to carry out its responsibility under this section [*i.e.*, Section 252] in any proceeding or other matter under this

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

section," the FCC will assume that responsibility. The Virginia State Corporation Commission (unlike the MPSC in this case) declined to resolve a dispute between carriers over the construction of their interconnection agreement. The FCC assumed regulatory authority over the dispute, pursuant to Section 252(e)(5), on the ground that the state commission had declined to "'carry out its responsibility' under section 252." 15 F.C.C.R. at 11,280 (para. 6). The FCC thus determined that a state commission's "responsibility under section 252" includes not only mediating, arbitrating, and reviewing new interconnection agreements, but also "interpret[ing] and enforc[ing] existing interconnection agreements." *Ibid.*[6]

Thus, even if any ambiguity were to exist with respect to whether Section 252(e)(6) provides for federal court review of a state commission determination construing and enforcing an existing agreement, *Starpower* would resolve that ambiguity. The FCC's interpretation of Section 252(e)(5)'s reference to a state commission's "responsibility under [Section 252]" is reasonable and entitled to substantial deference in interpreting Section 252(e)(6)'s analogous reference to a state commission's "determination under

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[6] The court of appeals attempted to distinguish *Starpower* on the ground that Section 252(e)(5) refers to a state commission's "responsibility under [Section 252]" whereas Section 252(e)(6) refers to a state commission's "determination under [Section 252]." See Verizon Pet. App. 39a n.6. The difference in terminology, to the extent it has any significance, is a consequence of the fact that Section 252(e)(5) is concerned with the activities of state commissions, whereas Section 252(e)(6) is concerned with the products of those activities. That difference does not detract from the relevance of *Starpower* to the question here. *Starpower* makes clear that a state commission exercises "responsibility under" Section 252 when it construes and enforces an agreement. It follows that the state commission's resulting order is a "determination under" Section 252.

[Section 252]." See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).[7]

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

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

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

1. This Court has recognized that, as a condition for a grant of authority to a State, Congress may require the State to waive its immunity from suit with respect to the grant of authority. See *Petty*, 359 U.S. at 281-282. That is what Congress did in the 1996 Act. Congress gave States the option of participating in the federal regulatory scheme established by the Act. Congress conditioned such participation, however, on the States' acceptance of a regulatory

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[7] The FCC has authority to make rules carrying the force of law in this area, see 47 U.S.C. 251(d)(1), and promulgated the interpretation at issue in a preemption proceeding mandated by Congress, see 47 U.S.C. 252(e)(5). Cf. *United States* v. *Mead Corp.*, 533 U.S. 218 (2001).

regime that specifically made their determinations under the Act subject to review in federal court. Accordingly, when Maryland accepted Congress's invitation to regulate under the Act, Maryland waived the MPSC's immunity from suits such as this one.

In *Petty*, Congress consented to a compact between two States to engage in the construction of bridges and the operation of ferries across navigable waters of the United States. In so doing, Congress attached a condition that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of * * * any court * * * of the United States over or in regard to any navigable waters or any commerce between the States." 359 U.S. at 281. The Court construed that provision, read in light of a "sue-and-be-sued" provision in the compact itself, as "reserv[ing] the jurisdiction of the federal courts to act in any matter arising under the compact," including tort suits against an agency of the two States that was formed pursuant to the compact. *Ibid.* The Court explained that "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.* at 281-282.

Three Terms ago, the Court reaffirmed *Petty*'s holding that the compacting States "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 described *Petty* as involving Congress's attachment of a condition to a grant of authority that the States would not otherwise have possessed, because the Constitution prohibits States from entering into compacts with each other without congressional approval. *Ibid.* Thus, the Court explained, Congress's approval of the grant of authority contained in the compact was a "gift" or "gratuity" in the same sense as a grant of federal funds—a context in which it is well established that Congress may impose

conditions on States that it could not otherwise demand, such as a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).[8]

This case involves a condition attached to a congressional grant of authority to States analogous to the condition attached to the congressional approval of the compact in *Petty*. As this Court observed in *Iowa Utilities Board*, the 1996 Act transformed the regulation of local telecommunications, because "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." 525 U.S. at 379 n.6. Congress allowed the States to play a role in that regulation, but only pursuant to a regime that explicitly provided that exercises of that authority would be subject to review in federal court to ensure compliance with the new federal standards. Congress left the States free to decline that regulatory role, in which case the role would be performed by the FCC. See 47 U.S.C. 252(e)(5).[9]

2. The court of appeals concluded (Verizon Pet. App. 16a-21a) that Congress did not provide with sufficient clarity that state commissions are subject to suit in federal court if

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

[9] Virginia has declined to exercise authority under the 1996 Act. See *In re Petition of Cox Virginia Telecommunications, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 16 F.C.C.R. 2321, 2322 (para. 4) (Jan. 26, 2001) (noting Virginia Commission's refusal to exercise authority under the 1996 Act on grounds that doing so may be deemed a waiver of immunity); see also *Starpower*, 15 F.C.C.R. at 11,277. Such action confirms that Congress left States entirely free to choose whether to participate in the new federal regulatory scheme.

they choose to exercise regulatory authority under the 1996 Act. To the contrary, Section 252(e)(6), read in context, puts state commissions on abundant notice that they, like the FCC, may be named as defendants in suits in federal court seeking review of their determinations under the Act. Although Section 252(e)(6) does not state, in so many words, that federal court "[r]eview of State commission action" may occur in a suit against the state commission, that is the unmistakable implication of the statutory text. Cf. *Petty*, 359 U.S. at 281-282 (recognizing that proviso, which did not expressly refer to suits against the bi-state commission or to a waiver of immunity, addressed such a waiver).

The ordinary means of seeking judicial review of a government agency's decision, in the federal system as in most state systems, is a suit that names the agency (or its administrator) as a defendant. See, *e.g.*, Verizon Pet. App. 22a n.4. Section 252(e)(6) contemplates "judicial review of the Commission's [*i.e.*, the FCC's] actions," when it acts in the place of a state commission, in a proceeding in federal court against the FCC and the United States. All final orders of the FCC are reviewable, unless otherwise specified, in the federal courts of appeals under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (1994 & Supp. V 1999). See 28 U.S.C. 2342(1); 47 U.S.C. 402(a). The FCC and the United States are parties to such suits. See 28 U.S.C. 2344; Fed. R. App. P. 15(a). Section 252(e)(6) cannot reasonably be understood as providing that, while orders issued by the FCC under Section 252(e)(5) are reviewable in a proceeding against the FCC itself, analogous orders issued by a state commission are reviewable only in a proceeding against private parties, if any, and not against the state commission.[10]

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[10] In its earlier brief in this case, MPSC acknowledged that Section 252(e)(6) clearly contemplates suits against state commissions: MPSC Br.

Moreover, Section 252(e)(6) must be read to authorize suits against state commissions in order to assure, as its text provides, that federal judicial review is available to "*any* party aggrieved" and "[i]n *any* case in which a State commission makes a determination under this section." 47 U.S.C. 252(e)(6) (emphases added). There are some categories of cases seeking review of state commission determinations under Section 252 in which the *only* potential defendant may be the state commission. For example, Section 252(e)(1) requires that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission," which "shall approve or reject the agreement." 47 U.S.C. 252(e)(1). If the state commission rejects a negotiated agreement, both parties thereto may be "aggrieved by [its] determination," within the meaning of Section 252(e)(6), and thus would be entitled to seek review as plaintiffs in district court.

3. The court of appeals also suggested (Verizon Pet. App. 19a & n.3) that Congress could not require States to waive sovereign immunity as a condition for exercising regulatory authority under the 1996 Act, because the authority to regulate local telecommunications is not a "gift," but is an activity in which States traditionally have engaged. See *College Sav. Bank*, 527 U.S. at 687 (distinguishing a State's waiver of immunity in order to obtain a federal "gift or gratuity," such as the highway funds in *Dole* or the compact in *Petty*, from a State's waiver of immunity in order to engage in "otherwise permissible activity," such as the commercial activity in that case). But the court of appeals' view ignores the funda-

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39 ("Congress clearly intended for §252(e)(6) actions to proceed against State commissions."); *id.* at 40 (stating that the statutory text "overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the ***State commission***").

mental change in telecommunications regulation wrought by the 1996 Act. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

The 1996 Act imposed a new federal regulatory scheme on local telecommunications markets. The States were permitted to regulate in areas encompassed by the Act *only* to the extent consistent with the Act, and *only* by accepting a regulatory regime in which state commission decisions are reviewable in federal court. The Act reflects the general principle that Congress may preempt the States entirely from regulating in an area of federal concern and alternatively may condition the States' regulation in that area on adherence to federal standards. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 767 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Thus, to the extent that Congress has preempted state regulation of interconnection agreements, such state regulation is not what *College Savings Bank* described as "otherwise permissible activity." Instead, the invitation to participate in such regulation is a form of benefit—a grant of authority that States would not otherwise possess—that Congress may offer with conditions attached. States are free to accept or reject the regulatory role that Congress has offered them. But States cannot choose to participate in the regulatory scheme established by the Act while rejecting the federal judicial review that is a critical part of that scheme.

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

1. The Eleventh Amendment does not bar suits to enjoin state officials from enforcing state law that is contrary to federal law or otherwise from engaging in conduct that federal law prohibits. See *Ex parte Young*, 209 U.S. at 149-158; see also, *e.g.*, *Board of Trustees* v. *Garrett*, 531 U.S. 356, 374 (2001); *Coeur d'Alene*, 521 U.S. at 269 (acknowledging

"the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* doctrine 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 State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).

As the Seventh Circuit has observed, suits such as this one, which seek to enjoin state commissioners from enforcing orders asserted to be contrary to the 1996 Act, "fit squarely within the traditional framework of *Ex parte Young*." *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 345 (2000), cert. denied, 531 U.S. 1132 (2001). In naming the MPSC commissioners as parties in a suit challenging one of their determinations as contrary to the 1996 Act, Verizon was seeking "to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Ibid.* That is the precise circumstance in which the *Ex parte Young* doctrine is appropriately employed. See *Coeur d'Alene*, 521 U.S. at 276-277 (opinion of Kennedy, J.) (*Ex parte Young* and its progeny teach that "where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[11]

2. The court of appeals, invoking the rationale of *Seminole Tribe*, held that the *Ex parte Young* doctrine is unavailable in this case. Verizon Pet. App. 23a-30a. This

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[11] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether an *Ex parte Young* suit may proceed 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).

case is unlike *Seminole Tribe* in all relevant respects. The 1996 Act does not create its own "carefully crafted and intricate remedial scheme," 517 U.S. at 73-74, to challenge the actions of state commissioners with regard to interconnection agreements. There is consequently no reason in this case, as there was in *Seminole Tribe*, to conclude that Congress intended to foreclose the use of the judicially crafted remedial scheme in *Ex parte Young*.

In *Seminole Tribe*, the Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, that established a framework for Tribes to negotiate gaming compacts with States. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith with a Tribe was an order directing the State and the Tribe to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then promulgate regulations governing gaming on the Indian lands at issue. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that, "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal courts to provide against States, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that Tribes could not enforce their IGRA rights in *Ex parte Young* suits against state officials, because such suits would enable Tribes to obtain more expansive sanctions than those provided by Congress in IGRA. *Id.* at 74-76.

There is no reason similarly to conclude that judicial review of state commission orders under *Ex parte Young* is inconsistent with the 1996 Act. Congress, while making

clear that such orders are reviewable in federal court, see 47 U.S.C. 252(e)(6), did not prescribe any particular mechanisms to govern such review. Nor did Congress circumscribe the remedies available in a federal court proceeding challenging such an order. Congress thereby indicated that all of the remedies ordinarily available in federal court when state officials act in a manner contrary to federal law are available when a state commission issues an order contrary to the Act. There is no statutory basis whatsoever for precluding the normal operation of the *Ex parte Young* doctrine in this case.[12]

3. The court of appeals also stated (Verizon Pet. App. 29a) that allowing an *Ex parte Young* suit in this context would be "an affront to the sovereignty of the State." The mere fact that state interests are implicated by an *Ex parte Young* action—which necessarily challenges the official acts of a State through its officers—is not the sort of "affront" that precludes its application. See *Coeur d'Alene*, 521 U.S. at 269-270 (observing that *Ex parte Young*, like subsequent cases applying its rule, "implicated substantial state interests"); *id.* at 278 (opinion of Kennedy, J.) ("Of course, the State's interests are almost always implicated to a certain extent in *Young* actions."). It is no more an "affront" than is the Supremacy Clause itself.[13]

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[12] It is irrelevant to the *Seminole Tribe* analysis whether the *administrative* scheme that precedes judicial review under the 1996 Act might itself be characterized as "carefully crafted and intricate," 517 U.S. at 73-74. The *Seminole Tribe* analysis is concerned with whether Congress has prescribed a scheme for *judicial review* that is so "intricate," and its remedies so circumscribed, as to compel the conclusion that Congress would not have intended judicial review also to be available under *Ex parte Young*. No such conclusion can be drawn from the 1996 Act.

[13] If anything, an *Ex parte Young* suit may present less "affront" to state sovereignty in the present context than in many other contexts. Because Congress expressly gave States the option not to regulate

Indeed, *Ex parte Young* arose out of a suit, much like this one, against state officials, including state public utility commissioners, to enjoin enforcement of allegedly unconstitutional rates and tariffs. See 209 U.S. at 129-134 (statement of the case). *Ex parte Young* relied, in turn, on earlier suits against state commissioners, among others, to challenge rates and other requirements imposed on regulated businesses. *Id.* at 153-154 (citing *Smyth* v. *Ames*, 169 U.S. 466 (1898), and *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894)). Many subsequent cases under *Ex parte Young* involved similar circumstances. See, *e.g.*, *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935) (suit against MPSC commissioners); *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 230-231 (1908). This case thus falls within the heartland of *Ex parte Young* cases.[14]

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interconnection agreements under the 1996 Act, and to leave such regulation to the FCC instead, see 47 U.S.C. 252(e)(5), the States may readily avoid any "affront" occasioned by *Ex parte Young* review here.

[14] In holding that the *Ex parte Young* exception was inapplicable to suits such as this one, the court of appeals, after an examination of the merits of Verizon's challenge, concluded that Verizon could not "allege an ongoing violation of federal law." Verizon Pet. App. 27a. The court of appeals erred in conflating the threshold inquiry into the availability of an *Ex parte Young* cause of action with the ultimate inquiry on the merits. The applicability of *Ex parte Young* does not depend on whether the challenge to the state officials' action will ultimately be successful.

CONCLUSION

For the foregoing reasons, as well as those stated in the United States' earlier briefs in this case and *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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