No. 12-815

In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,

Petitioner,

v.

ELIZABETH S. JACOBS, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is, instead, "remedial."

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

CTIA—The Wireless Association® is an international nonprofit membership organization representing all sectors of the wireless

[1] This brief is filed with the written consent of all parties through individual letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

communications industry. CTIA advocates on behalf of wireless carriers and its other members in all spheres of government, and supports numerous cross-sector industry initiatives, coordinating efforts to educate government agencies and the public about wireless industry issues.[2]

CTIA has previously filed briefs with this Court in a range of cases presenting issues of importance to the wireless industry. *See, e.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

CTIA also appears regularly before the lower courts and regulatory agencies, and frequently seeks federal judicial review of state agency actions that violate federal law. *See, e.g.*, Compl., *CTIA-The Wireless Ass'n v. Telecomms. Regulatory Bd. of P.R.*, No. 12-cv-01104 (D.P.R. Feb. 15, 2012), ECF No. 1 (seeking declaratory judgment that the Puerto Rico Registry Act violates the Supremacy Clause and is preempted by the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*); Compl., *CTIA-The Wireless Ass'n v. Echols*, No. 13-cv-00399 (N.D. Ga. Feb. 5, 2013), ECF No. 1 (seeking declaratory judgment that Utility Rule adopted by Georgia Public Service Commission was preempted by the Communications

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[2] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA-The Wireless Association®.

Act, 47 U.S.C. § 332(c)(3)(A)); *CTIA-The Wireless Ass'n v. City and County of San Francisco, Cal.*, 494 F. App'x 752, 753 (9th Cir. 2012) (unpublished) (affirming preliminary injunction, in CTIA's favor, against the enforcement of a city ordinance on First Amendment grounds).

CTIA and its members are concerned that the Eighth Circuit's decision, if sustained, would substantially impede their ability to enforce the uniform protections and operation of federal law in the complex federal statutory and regulatory regime that governs the telecommunications sector.

STATEMENT

A. Statutory and Regulatory Framework

1. The statutory framework in the communications industry contemplates a hybrid federal-state regime under which the ability to resolve issues of federal law in federal court provides an important backstop for regulated companies.

Congress enacted the 1996 Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructure[d] local telephone markets" by transforming the "long standing regime of state-sanctioned monopolies" into a competitive national market. *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 371 (1999). As a result, the Telecommunications

Act "opened the door to competing local exchange carriers" and "inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly." *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 568 (7th Cir. 1999).

In transforming the telecommunications sector from one operated by localized public monopolies to one governed by free market forces and nationwide private competition, Congress substantially reshaped the relative roles of state and federal regulators. Prior to the Telecommunications Act, telephone service was governed by "a system of dual state and federal regulation," with the FCC exercising plenary authority over interstate services, while the States retained jurisdiction over intrastate services. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

"[B]y extending the Communications Act into local competition," the 1996 Act "removed a significant area from the States' exclusive control." *AT&T*, 525 U.S. at 381 n.8. Any "continuing exercise of authority" by the States "form[ed] part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment." *Bellsouth Telecomms., Inc., v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007). To that end, Congress in the 1996 Act, "[f]or the first time," undertook "to reorganize markets," even though "that meant swallowing the traditional federal reluctance

to intrude into local telephone markets." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

2. a. Under the 1996 Act's "hybrid jurisdictional scheme," intercarrier compensation is subject to a federal regime under which state agencies set rates and access charges in accord with federal directives. *Verizon Commc'ns*, 535 U.S. at 489. The Act also invites state utility commissions to implement federal statutory provisions governing competitive access to local telephone markets. *See* 47 U.S.C. § 252(e). If the state agency declines to take on those federal regulatory functions, the FCC will assume responsibility for them. *Id.* § 252(e)(5).[3]

State regulatory commissions—or, when state agencies decline this role, the FCC—are charged with implementing various federal requirements governing local service, including, for example, (1) not prohibiting or impeding the resale of telecommunications services by competitors, (2) providing competitors fair access to rights-of-way, and (3) arranging reciprocal compensation for competitors' telecommunications traffic in accordance with federal law. 47 U.S.C. §§ 252(c), 252(e).

A party dissatisfied with a state regulator's determination may "bring an action in an appropriate Federal district court" to review the action and to

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[3] *See, e.g.,* Mem. Op. and Order, *In re Starpower Commc'ns, LLC*, 15 FCC Rcd. 11277 (Jun. 14, 2000) (No. 00-52) (FCC assumed the relinquished jurisdiction of the Virginia State Corporation Commission after the state agency declined to exercise jurisdiction over certain petitions concerning reciprocal compensation).

ensure its conformity with the governing federal law. 47 U.S.C. § 252(e)(6). Cooperative federalism principles thus permeate the telecommunications regulatory regime, under which States voluntarily implement federal mandates within areas otherwise subject to state jurisdiction. *Id*. § 252(b).

b. With respect to regulation of the wireless industry, the Telecommunications Act further circumscribed the role of state regulators. For the wireless sector, Congress specifically concluded that broad federal preemption was necessary to establish a uniform, federal regulatory framework intended "[t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure* ***." H.R. Rep. No. 111, 103d Congress, 1st Sess. 211, 260 (May 25, 1993) (emphasis added).

Accordingly, for mobile services, the vast majority of state regulation is expressly preempted. For example, the statute preempts regulation of the terms of entry or rates charged by any mobile service, and allows only limited state regulation of some terms of commercial mobile services. 47 U.S.C. § 332(c)(3)(A). A State may petition the FCC for greater authority, but may only exercise whatever additional authority the FCC decision affords. *Id.* The statute, however, does preserve state authority over zoning and land use regulation with respect to the construction of facilities like cellular telephone towers. *Id.* § 332(c)(7). A party aggrieved by a zoning decision may seek relief in "any court of competent jurisdiction," state or federal. *Id.*

§ 332(c)(7)(B)(v). That is the sole aspect of state regulation of wireless operations for which Congress permitted recourse to state courts, and even then only at the choice of the aggrieved party.

B. Factual And Procedural History

1. This case concerns the regulatory treatment of "Voice over Internet Protocol" ("VoIP") calls. At issue is whether Sprint, as an originator of VoIP traffic, had to pay "access charges" to Windstream (formerly Iowa Telecom), a traditional telephone company that connects the Sprint caller to the dialed party. *See* Pet. 7.

Because the Telecommunications Act "regulates telecommunications carriers, but not information-service providers, as common carriers," *National Cable v. Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005), if VoIP calls are deemed an "information service," then they are not subject to regulation by a state utility commission, *see* 47 U.S.C. § 153(24). The rules governing intercarrier compensation for VoIP calls have been unclear. If VoIP calls were considered a "telecommunications service" and treated like other traditional telephone traffic for intercarrier compensation, then the state regulator (subject to federal law limitations) could decide whether intrastate access charges were appropriate. *See* 47 U.S.C. § 152(b); Pet. App. 3a-4a.

After this dispute arose, the FCC established a federal regime for all VoIP traffic exchanged over the Public Switched Telephone Network. *See In the Matter of Connect America Fund*, 26 FCC Rcd. 17663, 17667-17672 (Nov. 18, 2011) (order establishing a

prospective federal regime that includes all VoIP traffic exchanged over the Public Switched Telephone Network). But the FCC specifically did not address intercarrier compensation obligations for VoIP traffic for periods prior to the new regime. *Id*. at 18003, n.1874. And the FCC has not yet decided whether VoIP is an information service or a telecommunications service. *See In the Matter of Numbering Policies for Modern Commc's*, 28 FCC Rcd. 5842, 5846 n.12, 5880 n.240 (Apr. 18, 2013). Nevertheless, relevant rules and orders indicate that the FCC would treat Sprint's VoIP service as an information service. Pet. Br. 5.

2. In January 2010, Sprint filed a complaint before the Iowa Utilities Board seeking a determination that, under the terms of Windstream's tariff, it could properly dispute the access charges and withhold payment for the VoIP traffic. Pet. App. 64a. Sprint sought an answer only to the question whether the state tariff allowed such remedies, and expressly argued that the state agency lacked authority to determine the underlying federal question of whether the VoIP traffic at issue was subject to access charges or not. Pet. 10; JA4a-5a, (Compl. at ¶¶ 15, 16). When Windstream's answer withdrew the threat to stop service that had prompted Sprint to take state administrative action, Sprint withdrew its complaint. Pet. App. 65a-66a.

The Iowa Utilities Board ("Board") nevertheless went ahead and issued a 50-page decision in which it asserted authority to decide the federal-law question of whether VoIP calls are subject to access charges, and then decided that, as a matter of federal law,

Sprint owed such charges. Pet. App. 60a-145a. After the Board denied Sprint's application for reconsideration, Pet. App. 28a-59a, Sprint paid all disputed amounts. Pet. Br. 7.

3. Sprint subsequently filed suit in federal district court seeking a declaratory judgment that the Board's ruling that intrastate access charges applied to VoIP calls "conflicts with federal law because *** VoIP is an information service, and federal law preempts state regulation of information services." JA6a (Compl. at ¶ 21). Sprint also sought injunctive relief and a declaration that the Board's order "violates federal law and thus is invalid to the extent that it purports to determine whether Sprint has an obligation to pay intrastate access charges for VoIP traffic." JA9a (prayer for relief).

Sprint later filed a protective action in state court, seeking to ensure the possibility of judicial review in the event the federal court abstained after the time to file the state action had expired. Pet. Br. 7-8. Sprint immediately moved to stay the state case pending resolution of the federal action. Pet. Br. 8. No decision was made on that stay motion.

In the meantime, the district court issued a decision abstaining from exercising jurisdiction over Sprint's case. Pet. App. at 11a-27a. The district court broadly ruled that "Sprint's state court action *** is properly characterized as an appeal from the [Board]'s orders," and that appellate review of state administrative action is "an uninterruptible process under the *Younger* doctrine." Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The Eighth Circuit rejected Sprint's argument

that *Younger* abstention is unwarranted when a federal challenge is brought to the actions of a state administrative agency, even where the state agency is exercising congressionally conferred power under a "pervasive federal regulatory scheme." Pet. App. 7a. The Eighth Circuit adhered to its prior precedent that had permitted *Younger* abstention in remedial proceedings, and concluded that, because the Board's order "attempts to enforce liabilities based on present facts and existing laws *** it constitutes a judicial proceeding that is entitled to *Younger* abstention." Pet. App. 9a.

SUMMARY OF ARGUMENT

Congress expressly conferred jurisdiction on federal courts to review state regulatory decisions applying the 1996 Telecommunications Act. When telecommunications companies invoke that jurisdiction, federal courts have an obligation to exercise that assigned authority. Providing companies the very access to federal courts that Congress intended plays a critical role in ensuring state regulators' compliance with the federal requirements set forth in the Telecommunications Act, and thereby promotes the effective operation of the prevailing federal-law regime now governing telecommunications.

The Eighth Circuit's expansion of *Younger* abstention and, in particular, its failure to recognize that where *Ex Parte Young* jurisdiction is proper, *Younger* abstention is not, departs from settled precedent. The ruling also upends the calibrated

balance between state and federal roles that the Telecommunications Act prescribes. Where, a "state commission *qua* federal regulator[] *** has accepted congressionally conferred power to decide matters of federal law in the first instance," federal review of the state agency's order poses no dishonor to "the dignity of the State." *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 651 (2002) (Souter, J., concurring).

Indeed, in no case, to CTIA's knowledge—and the Eighth Circuit cited none—has this Court applied the abstention doctrine to force a federal court to surrender pre-existing federal jurisdiction over a state agency's interpretation of federal law as part of a federal regulatory scheme. With good reason. As this Court recognized in upholding federal jurisdiction in *Verizon Maryland*, the comity and federalism interests underpinning "Our Federalism" are at their nadir when state agencies are applying federal law in the voluntary performance of a federal regulatory role that is circumscribed by federal statute.

Under this Court's precedent, the unique comity and federalism interests needed to justify a rare surrender of jurisdiction require a substantial and distinct state interest of such independent force as to override the powerful federal interest in having questions of federal law decided by the federal courts. To abdicate jurisdiction over a first-filed federal case presenting such substantial and controlling questions of federal law simply because a later-filed state action is pending would allow the abstention exception to swallow wholesale the jurisdictional rule. Because

there is no paramount State interest to defer to when the state agency is carrying out its subsidiary role in a *federal* regulatory scheme, abstention was improper.

Finally, the proper balance between federal and state interests under the Telecommunications Act cannot be maintained if any appeal of final state agency action by any party would oust the federal court's jurisdiction over a federal-question case designed specifically to police whether a state agency complied with federal law. As Congress intended, CTIA and its members rely on unimpeded access to federal courts to ensure that the Telecommunications Act is properly implemented by the 50 different state regulators who participate in the cooperative federalist scheme. Federal judicial review helps to secure uniformity and consistency of regulatory approach in a national program, and yields the predictability and stability in the law that permits their cost-effective participation in a national market for wireless services.

ARGUMENT

I. THE FEDERAL COURTS' EXERCISE OF THE JURISDICTION THAT CONGRESS CONFERRED ENSURES THE COHERENT OPERATION OF A COMPLEX FEDERAL REGULATORY SCHEME.

A. Federal Judicial Review Provides Critical Oversight Of State Agencies' Compliance With The Telecommunications Act.

Federal judicial review is critical to the successful operation of the federal legal regime set in place by the 1996 Telecommunications Act. Given both the subsidiary role that state regulators assume under federal law and the "fact that a federal program administered by 50 independent state agencies [would be] surpassing strange," *AT&T*, 525 U.S. at 378 n.6, this Court has expressed "no doubt, *** that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel," *id.*

This Court's precedent accordingly has unequivocally endorsed not just the availability, but also the paramount importance to Congress's statutory scheme, of federal court review of federal-law questions raised by the actions of state agencies implementing the Telecommunications Act. In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court unanimously agreed that "federal courts have jurisdiction under [28 U.S.C.] § 1331 to entertain

such a suit" seeking relief from a state regulator's action on the ground that it is preempted by the Telecommunications Act, 535 U.S. at 642; *compare* JA6a (Complaint at ¶ 21).

Like this case, *Verizon Maryland* originated as a private dispute between two carriers regarding payment terms. 535 U.S. at 639. "Verizon informed WorldCom that it would no longer pay reciprocal compensation for telephone calls made by Verizon's customers to the local access numbers of Internet Service Providers" because, in its view, such calls were not "local traffic" within the meaning of the carriers' Interconnection Agreement. *Id.* (footnote omitted). WorldCom then filed a complaint with the state regulator, which twice ruled that payment was required. *Id.*

Following that adverse ruling, Verizon went to federal court, where it sought federal declaratory and injunctive relief on the ground that the state agency's mandated payments violated the Telecommunications Act and an FCC ruling. *Verizon Maryland*, 535 U.S. at 640. The Court held that federal question jurisdiction was proper because "resolution of Verizon's claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from ordering payment of reciprocal compensation, and there is no suggestion that Verizon's claim is 'immaterial' or 'wholly insubstantial and frivolous.'" *Id.* at 643 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). The Court held, as well, that the Eleventh Amendment posed no bar to recovery because Verizon could "proceed against the individual

commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908)." 535 U.S. at 645-646.

Justice Kennedy joined the opinion. *Verizon Maryland*, 535 U.S. at 648-649 (Kennedy, J. concurring). He recognized that the Court's "*Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law," and then concluded that federal judicial review was appropriate because Verizon's complaint, raising a preemption challenge to state action "parallels the very suit permitted by *Ex parte Young* itself." *Id.* at 649 (Kennedy, J., concurring).

Justices Souter, Ginsburg and Breyer agreed, noting that Verizon sought "not a simple order of relief running against the state commission," "but a different adjudication of a federal question by means of appellate review in Federal District Court." *Verizon Maryland,* 535 U.S. at 650-651 (Souter, J. concurring). There were thus even stronger grounds for federal jurisdiction than there were in *Ex Parte Young*. *Id.* at 651 (footnote omitted).

As Justice Souter explained, the carrier's federal law challenge was made to a "state commission *qua* federal regulator," and reversal of the state agency's order would thus pose no dishonor to "the dignity of the State, which has accepted congressionally conferred power to decide matters of federal law in the first instance." *Verizon Maryland*, 535 U.S. at 651 (Souter, J., concurring). Indeed, state agencies that are exercising federal power and implementing federal law, when acting pursuant to their regulatory

authority under the Telecommunications Act, are acting as "deputized federal regulators," whose functions "are confined to the role the Act delineates." *Pacific Bell v. PAC-West Telecomms., Inc.*, 325 F.3d 1114, 1126 n.10 (9th Cir. 2003) (internal quotation marks and citations omitted); *see also MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). State sovereign interests are thus not implicated when the state agency acts in a *federal* regulatory capacity and is addressing questions of federal law as an administrator of a federal scheme.

B. Federal Courts Routinely Review State Regulatory Action For Compliance With The Telecommunications Act.

Since the passage of the Telecommunications Act, federal courts have regularly been called upon to review the actions of state agencies exercising congressionally conferred power in their role as deputized federal regulators. *See, e.g.*, *Talk America v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011) (federal law challenge to Michigan Public Service Commission's order that AT&T provide entrance facilities at cost-based rates); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 709 (6th Cir. 2012) (state agency's authority to set "'fair, just and reasonable'" rates for network services was preempted); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611 (7th Cir. 2008) (upholding injunction against state agency's directive that Illinois Bell sell certain network services on an unbundled basis as "contrary to the FCC's interpretation and application of federal

law"); *Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 684 F.3d 721 (8th Cir. 2012) (state agency order requiring an incumbent local exchange carrier to submit price list for review and approval preempted by Telecommunications Act); *Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03 C 0127, 2003 WL 21031964 (N.D. Ill. May 6, 2003) (overturning state agency's decision because agency exceeded its jurisdiction by interpreting Illinois Bell's federal access tariff); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd* 530 F.3d 676 (8th Cir. 2008) (holding that state agency's order adopting arbitrated interconnection agreement was preempted by FCC regulations); *Southwestern Bell Tel., L.P. v. Moline*, 333 F. Supp. 2d 1073 (D. Kan. 2004) (preliminarily enjoining enforcement of state agency's rule).[4]

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[4] Providers also bring federal appeals challenging local zoning boards' denials of requests to build wireless towers, when such rulings do not satisfy the Act's federal standards. *See, e.g.*, *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Cir. 2012) (reversing denial of application to build wireless tower as unsupported by substantial evidence); *T-Mobile Ne. LLC v. City Council of Newport News, Va.*, 674 F.3d 380 (4th Cir. 2012) (same); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299 (10th Cir. 2008) (same); *PrimeCo Pers. Commc'ns, Ltd. v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) (same); *Sprint PCS Assets LLC v. City of La Cañada Flintridge*, 448 F.3d 1067 (9th Cir. 2006) (same). In those cases, because federal interests are balanced against the sometimes competing local interests implicated in zoning choices, Congress has explicitly recognized the concurrent jurisdiction of state and federal courts, and given the losing party the choice of forum. *See* 47 U.S.C. § 332(c)(7)(B)(v).

CTIA, its members, and their affiliates appear regularly before state regulatory bodies, with hundreds upon hundreds of cases pending before state utility commissions every year. Most of these cases never make it to federal court, but when they do, federal judicial review matters. The availability of federal judicial review assures authoritative and uniform resolution of precisely those most complex federal questions when necessary to maintain the balance Congress struck. In so doing, it facilitates the uniform implementation of a national policy of competition, unfettered access to local markets, and federally balanced regulation.

Notably, experience shows that carriers have been circumspect in invoking the federal forum. When cases involve primarily state-law questions, and there are no competing federal interests, CTIA members or their non-wireless affiliates often seek review of essentially local matters decided by state agencies in state courts, which are "wholly separate court system[s] designed primarily to concern [themselves] with local law." *Palmore v. United States,* 411 U.S. 389, 407-408 (1973). *See also, e.g.*, *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 921 N.E.2d 1147 (Ill. App. Ct. 2009) (Illinois Bell appealed decision of the Illinois Commerce Commission determining that it had violated the Illinois Public Utilities Act); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 810 N.E.2d 1179 (Ind. Ct. App. 2004) (Indiana Bell sought judicial review of state agency's denial of request to keep information submitted in response to local competition survey confidential); *AT&T v.*

Pennsylvania Pub. Util. Comm'n, 737 A.2d 201 (Pa. 1999) (carriers sought review of order of state agency denying reimbursement of costs for relocating fiber optic cables); *Alhambra-Grantfork Tel. Co. v. Illinois Commerce Comm'n*, 832 N.E.2d 869 (Ill. App. Ct. 2005) (appeal of agency order cancelling wireless termination tariff).

But when federal questions are presented, CTIA and its members depend critically on their ability to "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Federal judicial review facilitates the "certainty and definition that come from nationwide uniformity of decision," *Glidden Co. v. Zdanok*, 370 U.S. 530, 560 (1962), and provides a stable environment that facilitates investment and growth. Because Article III courts are "devoted to matters of national concern," *Palmore*, 411 U.S. at 408, they are best-positioned to address questions with such far-reaching national implications. Businesses cannot fulfill the promise of the Telecommunications Act and build an increasingly competitive national communications market that can rapidly deploy and adopt new technologies if they have to navigate a crazy quilt of 50 different interpretations of intrinsically federal questions. *See* H.R. Rep. No. 459, at 1, 104th Congress, 2d Sess. (Jan. 31, 1996) (Conf. Rep.) (1996 Act intends a "national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

Americans by opening all telecommunications markets to competition"). Consumers, too, might pay the price as increased uncertainty and the costs of dealing with varying regulatory regimes across state lines could affect business decisions, slow down innovation, and, possibly, result in higher prices.

Under the cooperative federalist regime embodied in the Telecommunications Act, state agencies that assume the role of "deputized federal regulators" resolve localized issues subject to federal direction and oversight while applying federal-law standards. "With regard to the matters addressed by the 1996 Act," the Federal Government "unquestionably" "has taken the regulation of local telecommunications competition away from the States." *AT&T*, 525 U.S. at 378 n.6. The availability of federal judicial oversight ensures a consistency in federal regulatory focus and uniformity in federal legal standards that is indispensable to the consistent and stable functioning of the Telecommunications Act, especially because it is implemented through a hybrid jurisdictional scheme. *See id.*

In short, this Court's decision in *Verizon Maryland*, *supra*, demonstrates the indispensable role such federal judicial review plays in the effective functioning of the federal telecommunications regime. Nothing in this Court's precedent supports an abdication of this congressionally conferred responsibility to provide federal judicial oversight of federal regulatory issues.

II. ABSTENTION IS A NARROW EXCEPTION TO THE FEDERAL COURTS' VIRTUALLY UNFLAGGING OBLIGATION TO EXERCISE THE JURISDICTION THAT CONGRESS ASSIGNS.

A. Abstention Is Meant To Be A Rare Exception.

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). For that reason, "[t]he doctrine of abstention *** is an extraordinary and narrow exception" to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (internal quotations omitted).

Accordingly, this Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. ("NOPSI") v. Council of New Orleans,* 491 U.S. 350, 358 (1989). As explained in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), while "this Court will not take jurisdiction if it should not," it is "equally true, that it must take jurisdiction if it should," *id*. at 404. "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it," Justice Marshall's opinion emphasized, because "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id*.

For that reason, a federal court's "[a]bdication" of the duty to exercise jurisdiction on abstention grounds is justified only in "exceptional circumstances." *Colorado River*, 424 U.S. at 813.

B. Abstention Is Only Appropriate To Avoid Undue Interference With Paramount State Interests That Lie At The Core Of A Case.

Abstention is proper only in those rare circumstances where state law is so critical to the case's disposition and the state interest is so "paramount" that "principles of comity and federalism" override the traditional duty to exercise conferred jurisdiction. *Quackenbush*, 517 U.S. at 723 (emphasis added). Reflexive deference to any passing assertion of some state interest is inappropriate. "'Our Federalism,' *** does not mean *** deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Rather, the concept is premised on "sensitivity to the legitimate interests of *both* State and National Governments," *id*. (emphasis added), and it thus must be applied in a way that ensures the vindication and protection of federal rights and federal law.

Federalism, in other words, is a balance. The court of appeals here cut the federal half out of that balance, while overinflating the state interest in this pervasively federal scheme. After all, the district court below indisputably had federal question jurisdiction over Sprint's federal preemption claim, *Verizon Maryland,* 535 U.S. at 643; Pet. App. 4a. In

the telecommunications sphere, moreover, Congress has already struck the proper balance between state and federal interests, and it gave federal interests preeminent status. "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control." *AT&T*, 525 U.S. at 381 n.8. And States willingly subscribe to that balance when they choose to don a federal role and to help administer this federal program under federal standards.

This Court has identified three circumstances in which a federal court's abstention from exercising its congressionally assigned jurisdiction may be warranted. This case fits none of them.

1. **Pullman *Abstention Does Not Apply.***

In *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941), this Court held "that federal courts should abstain when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). *Pullman* abstention promotes fundamental principles of constitutional avoidance by preventing "the waste of a tentative decision" of constitutional law, which might be avoided by clarification of state law. *Pullman*, 312 U.S. at 500. The doctrine also protects against erroneous interpretations of state law, *id.* at 500-501, and promotes comity by recognizing the "'rightful independence of the state governments.'" *Id.* at 501 (citation omitted).

None of those justifications has any application here. There is no federal constitutional question to

be avoided. The central legal questions involve federal law; there is no question of state law at all, let alone one in need of clarification. Finally, all the comity considerations point in favor of federal jurisdiction because the state regulatory agency is acting as a "deputized federal regulator" in a cooperative federal scheme governed exclusively by federal law. *Pacific Bell*, 325 F.3d at 1126 & n.10.

2. **Burford *Abstention Is Unwarranted.***

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court held that, "[w]here timely and adequate state-court review is available" federal courts should not exercise their equitable authority in a way that would "interfere with the proceedings or orders of state administrative agencies[]" when "there are difficult questions of *state law* bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or when federal review "would be disruptive of *state efforts to establish a coherent policy* with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361 (internal quotation marks and citation omitted) (emphases added).

That doctrine does not fit here either. The very structure of the Telecommunications Act leaves no state law questions at stake that need to be protected from "undue federal interference." *NOPSI*, 491 U.S. at 362. Petitioner, indeed, seeks federal adjudication of a federal preemption claim that involves *no* state law issues. Only the congressionally designed, national regulatory framework is at stake. As this Court explained in *Verizon Maryland*, it is federal policy, not state policy, that is transcendent in cases

like this, and the exercise of federal-court review would vindicate that interest. "[T]he principles underlying *Burford* are therefore not implicated." *NOPSI*, 491 U.S. at 362, 364.

3. **Younger *Abstention Is Inappropriate.***

The court of appeals relied primarily on the abstention doctrine applied by this Court in *Younger v. Harris*, 401 U.S. at 43-44. Under *Younger*, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Auth.*, 467 U.S. at 237-238 (citing *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432–437 (1982)).

That doctrine has no more relevance here than the other abstention principles. To begin with, as Sprint suggests, *Younger* is the wrong abstention doctrine to apply when challenging state administrative action. Pet. Br. 32-35. Instead, the *Burford* framework should be used to analyze the "potential for conflict with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (internal quotation marks and citation omitted). And *Burford* abstention by its terms does not apply here.

On top of that, *Younger* addressed the propriety of abstention when the equitable relief sought in federal court would restrain state *criminal* proceedings, 401 U.S. at 43-44, and was grounded "in view of the fundamental policy against federal interference with state criminal prosecutions," *id.* at 46. At its core, *Younger* abstention interdicts "federal judicial interference with a state's effort to bring the

violators of its laws to book." *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990) (vacated as moot in *Dillon v. Alleghany Corp.*, 499 U.S. 933 (1991)). To be sure, this Court has extended *Younger* to isolated categories of civil proceedings. But those exceptions prove the rule, because each of those civil contexts directly implicated the States' law-enforcement interests. *See Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 41 (1st Cir. 2012).

First, *Younger* abstention has been applied to "enforcement actions to which the state is a party." *Massachusetts Delivery*, 671 F.3d at 41; *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (*Younger* prevented federal court from enjoining state action enforcing nuisance statute barring exhibition of obscene films); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (*Younger* prevented federal court from enjoining state action seeking temporary custody of children); *Middlesex County Ethics Comm.*, 457 U.S. at 431-432 (*Younger* prevented federal court from enjoining state proceeding to discipline attorney); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (*Younger* applied to action "brought by the State in its sovereign capacity" to recover state welfare payments); *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986) (*Younger* applied to enforcement action brought by state agency against employer to vindicate state policy against gender discrimination).

Second, *Younger* abstention has been extended to "civil actions involving 'administration of a State's judicial system,' *** such as a court's contempt proceedings, *** and the ability to enforce a valid

state-court judgment." *Massachusetts Delivery Ass'n*, 671 F.3d at 41 (quoting *Juidice v. Vail*, 430 U.S. 327, 335 (1977)); *see also Juidice,* 430 U.S. at 336 (*Younger* applied to prevent federal court interference with contempt proceeding in civil case); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (*Younger* prevented federal court from enjoining state court enforcement of state appeals bond and lien provisions).

This case, of course, does not in any way involve or implicate state criminal proceedings. Nor is any state enforcement action at issue. Sprint is the plaintiff, not a government regulator. Beyond that, nothing in the case touches upon a State's fundamental interest in organizing its own internal judicial processes or political affairs. Quite the opposite, the regulatory scheme at stake is entirely federal. The only question is whether the Iowa Utilities Board's decision is preempted by federal law, a question that a federal court is best-positioned to resolve, and the resolution of which cannot "unduly interfere with the legitimate activities of the States," *Younger*, 401 U.S. at 44, because the State is acting as a regulator of *federal* law.

Indeed, not one of this Court's cases finding abstention to be warranted has ousted a federal court from reviewing the final action of a state agency exercising congressionally conferred power and acting "*qua* federal regulator." *Verizon Maryland*, 535 U.S. at 651 (Souter, J., concurring). There simply is no cognizable state interest on which to hinge abstention, let alone a paramount one capable of derailing Congress's calibrated and cooperative

federal scheme. The court of appeals' abandonment of its "strict duty" to exercise federal jurisdiction, *Quackenbush*, 517 U.S. at 716, was therefore unjustified.

4. NOPSI *Does Not Support The Ruling Below.*

The Eighth Circuit's reliance on this Court's decision in *NOPSI* is particularly inapposite. There, this Court held that *Burford* and *Younger* abstention should *not* be applied when, as here, the sole issue before the court was one of facial federal preemption of an agency's rate order. 491 U.S. at 362. The State's interest in local rate-setting was insufficient to create the exceptional circumstances that would allow a federal court to relinquish its strict duty of adjudicating a pure issue of federal law. *See id*.

As in *NOPSI*, this case does "not involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." 491 U.S. at 361 (internal quotation marks omitted). In *NOPSI*, the issue was whether "the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs." *Id.* Here, Sprint's primary claim is that the Iowa Utilities Board violated federal law by ordering it to pay access charges. The essential elements of Sprint's primary claim thus mirror the argument in *NOPSI* that the state regulator was prohibited by federal law from issuing the challenged payment ruling. *See id.* at 362.

Accordingly, as in *NOPSI*, there is no basis to surrender federal jurisdiction here because "federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem[.]" *NOPSI*, 491 U.S. at 362 (internal quotation marks and citation omitted).

To be sure, *NOPSI* acknowledged the State's "substantial, legitimate interest in regulating intrastate retail rates." 491 U.S. at 365. But that just makes this case an even stronger candidate for retention of federal jurisdiction because no such local interest is presented here. Instead, the only question is whether, as a matter of federal law, Sprint's VoIP service was subject to state regulation at all.

Ultimately, because the Court determined that the rate-making proceeding at issue in *NOPSI* was legislative and not judicial, the Court had no need to determine whether *Younger* could appropriately be extended to a broader range of judicial proceedings, where neither a State's enforcement interests nor internal governmental affairs are at issue. *Id.* at 372. But, importantly, *NOPSI* emphasized the strict limits on the "type of proceeding[s] to which *Younger* [abstention] applies." 491 U.S. at 367. This Court stressed that *Younger* had previously been extended beyond state criminal prosecutions only to civil enforcement actions and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 368. Nothing in the Court's decision supported extending *Younger* to the type of

routine agency action, centrally dependent on federal law, that was at issue in *NOPSI* and is at issue here.

In short, *NOPSI* makes clear that characterizing a proceeding as "judicial in nature," is a necessary but not sufficient condition for *Younger* abstention. The Eighth Circuit's critical error was in failing to recognize that *Younger* abstention requires more: a likelihood that the exercise of federal jurisdiction will intrude upon distinct and paramount State *sovereign* interests, either by interfering with enforcement interests aimed at stopping violations of important state laws or by challenging the State's internal governance choices. Under *Verizon Maryland*, no abstention-warranting threat to a State's interests is posed by the assertion of federal jurisdiction over federal-law issues raised in a state regulatory action, when the state agency was exercising congressionally conferred authority under the Telecommunications Act.

C. Sprint's Protective State Action Provides No Basis For Abstention.

Sprint's filing of a protective state action has nothing to do with the federal court's independent obligation to adjudicate Sprint's first-filed federal suit.

First, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan v. Carland*, 217 U.S. 268, 282 (1910). In fact, in *NOPSI*, this Court rejected both *Burford* and *Younger* abstention despite the filing of a protective state appeal. 491 U.S. at 364, 373. There, like

Sprint, the party challenging the agency action in federal court "[a]nticipat[ed] that the District Court might *** abstain," and filed a protective appeal in state court, in which the federal pre-emption claim was also presented. *NOPSI*, 491 U.S. at 357-358. The mere filing of this protective state case played no role in this Court's abstention analysis. Quite the opposite, this Court expressly considered and then declined to endorse the view that the state appeal should be viewed as an integrated part of an ongoing proceeding because—just like here—the challenged agency action was already final. *Id.* at 369 & n.4.

Second, and relatedly, the Eighth Circuit's reasoning contravenes this Court's repeated recognition that the mere pendency of a parallel state action does not, without more, warrant abstention. As this Court has explained, "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, New York v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977). Abstention has "never" meant that "a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n. v. Southern Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result). Rather, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign." *Quackenbush*, 517 U.S. at 723. The parallel presentation of a federal claim for review in a later-filed, protective state case, without more, does not create such a rare and paramount

state interest, let alone trigger the powerful structural comity and federalism concerns required to justify abstention.

Third, even if this Court were to conclude that the existence of a later-filed, protective state action by the same party who filed the federal suit carried some weight in the abstention balance, the Eighth Circuit's decision swept far too broadly, finding abstention warranted regardless of who initiated the state court action. The Eighth Circuit's decision is therefore doubly flawed because it encourages the filing of state appeals by an opposing party for the mere purpose of ousting properly sought and rightfully exercised federal jurisdiction. The court of appeals' decision thus creates incentives for procedural gamesmanship, encouraging parties with any potential grounds for state appeal, no matter how trivial, to file parallel state actions as a means of thwarting the federal judicial review that Congress intended.

Even worse, because Sprint's state case was filed after its federal court declaratory judgment action, a broad affirmance would allow opposing parties to go to state court *after* federal relief has attached and usurp the undisputed federal jurisdiction to review federal law challenges to the authority of state action. Such splintering of jurisdiction would open the door to 50 different interpretations of important federal questions, and be "surpassing strange," given the state agencies' subsidiary role in executing a federal regulatory regime. *AT&T*, 525 U.S. at 378, n.6. The Eighth Circuit's broad ruling thus is irreconcilable with the

guiding premise that abstention is proper only in "exceptional circumstances." *Colorado River*, 424 U.S. at 813.

III. AFFIRMANCE WOULD ALLOW THE ABSTENTION EXCEPTION TO SWALLOW THE FEDERAL JURISDICTIONAL RULE.

A. Comity And Federalism Interests Are At Their Nadir When State Agencies Have Chosen to Act As Deputized Federal Regulators.

Because the sole issue in this case is the propriety of the Iowa Utility Board's ruling on a federal statutory question, dramatically expanding the abstention doctrine to justify the district court's failure to adjudicate this case "would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368. That is because, "[w]hether an issue comes from a state-agency or a state-court decision, the federal court is reviewing the State's determination of a question of federal law," and in that circumstance, "it is neither prudent nor natural to see such review as impugning the dignity of the State or implicating the States' sovereign immunity in the federal system." *Verizon Maryland*, 535 U.S. at 653 (Souter, J., concurring).

Here, the Iowa Board was acting in the voluntarily assumed capacity of a federal regulator and, in that role, was asked to resolve a "run-of-the-

mill contract dispute," *Quackenbush*, 517 U.S. at 729, concerning the parties' rights under the tariff. When the Board reached out beyond the dispute presented by the parties to decide a substantive question of federal law under the Telecommunications Act, no "fundamental concerns of federalism" or state interests, *id.* at 734 (Kennedy, J., concurring), were implicated. Far from involving an "'essentially local'" problem, *NOPSI*, 491 U.S. at 362 (citation omitted), the issue presented for federal review was quintessentially federal and far-reaching. Indeed, in assessing the parties' obligations under the tariff, the Iowa Utilities Board was acting within the confines of congressionally conferred power under a *federal* regulatory regime, where exclusive state control had been supplanted by the Telecommunications Act.

Tellingly, where it was warranted and consistent with the federal scheme, Congress identified certain categories of local governance concerns that the Telecommunications Act itself would protect and preserve. In *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court held that 47 U.S.C. § 253, which authorizes the preemption of state and local laws prohibiting "any entity" from providing a "telecommunications service," was no bar to state statutes that prevented political subdivisions from providing telecommunications services. In applying the clear statement rule announced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court "invoke[d] [its] working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great

skepticism, and read in a way that preserves a State's chosen disposition of its own power," *Nixon*, 541 U.S. at 140.

Congress too, has protected State interests in the structure of the Act by allowing States to opt out of exercising certain federal functions if they so desire, *see* 47 U.S.C. § 252(e)(5), and authorizing state court review of local zoning board rulings, if requested by an aggrieved party, *see id.* § 332(c)(7)(B)(v).

But when a state agency is simply interpreting federal law in the course of fulfilling a subordinate role in a federally infused scheme, and the only issue is whether the state agency exceeded its authority under federal law, there is no paramount state interest to which to defer. *Verizon Maryland*, 535 U.S. at 649 (Kennedy, J., concurring). Rather, the task of the federal courts is to ensure that state regulatory action, even over purely intra-state traffic, complies with the mandates of the Telecommunications Act.

B. Affirmance Would Eviscerate The Congressionally Conferred Right To Federal Judicial Review.

Ultimately, condoning abstention would undermine the opportunity for federal review recognized in *Verizon Maryland*. It would also be entirely inconsistent with the underlying purposes of abstention doctrines, which are meant to serve the foundational interests of "Our Federalism," and not allow parties to destroy federal jurisdiction by procedural choices. The "virtually unflagging

obligation" to exercise federal jurisdiction, *Colorado River*, 424 U.S. at 817, should not be subject to such ready manipulation by private parties' litigation strategies. There would be "something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse." *Hicks v. Miranda*, 422 U.S. 332, 354 (1975) (Stewart, J., dissenting).

This Court has already recognized, in affirming the availability of *Ex Parte Young* relief in *Verizon Maryland*, that any sovereign interests that might warrant abstention are absent when state agencies are applying and deciding questions of federal law as part of their congressionally conferred role under the Telecommunications Act. *Verizon Maryland*, 535 U.S. at 646-647. Because abstention is unwarranted where no paramount state interests are threatened, it is singularly improper where, as here, federal jurisdiction lies under *Ex Parte Young* precisely because the case rises and falls on questions of federal law. *See Younger*, 401 U.S. at 45 (recognizing that abstention is inappropriate even in the criminal context when the requirements for an *Ex Parte Young* action are satisfied).

CTIA and its members depend upon the availability of federal judicial review to ensure that their business operations can be undertaken within a uniform, stable, and authoritative federal regulatory regime. They have a "serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (internal quotation marks and citations omitted). The risks of disuniformity and uncertainty

in the law that could arise in the face of 50 different state rulings on the same federal regulatory question could disrupt their ability to provide services and could chill investment in the deployment and adoption of new technologies. The Eighth Circuit's vision of abstention simply cannot coexist with a national regulatory framework that promotes competition by ending state control of local monopolies and by establishing a framework of federal rules meant to bind State regulators and to apply uniformly across State boundaries.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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