No. 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.,
Respondents.

UNITED STATES OF AMERICA, *Petitioner*,
v.
PUBLIC SERVICE COMMISSION OF MARYLAND, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL WOMEN'S LAW CENTER, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION, IN SUPPORT OF PETITIONERS VERIZON MARYLAND, INC. AND UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Page

Page

CONSTITUTION AND STATUTES

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of efforts to eliminate sex-based discrimination and secure equal rights. Major goals of NOW Legal Defense include ensuring full compliance with federal civil rights laws, including by state government entities, and preserving the legislative authority of Congress to prevent discrimination in the context of federal programs. In support of these goals, NOW Legal Defense has frequently appeared as counsel and as *amicus* before this Court. *See, e.g., Board of Trustees of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001); *United States* v. *Morrison*, 529 U.S. 598 (2000); *Reno* v. *Condon*, 528 U.S. 141 (2000). NOW Legal Defense has also established a Project on Federalism to further these goals. Respondents' efforts in this case to narrow the circumstances in which courts will find (a) that a state waived its sovereign immunity and (b) that an *Ex parte Young* suit is available are harmful to NOW Legal Defense's interests given the increasing importance of Eleventh Amendment waiver and the *Ex parte Young* doctrine in civil rights litigation and enforcement of federal rights.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation' s civil rights laws. In defense of those principles, the ACLU has brought numerous lawsuits during its 82 year history

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[1] All parties in this matter have consented to the filing of this *Amici Curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *Amici* and their counsel has made any monetary contribution to the preparation of this brief.

in federal court against state officials seeking to ensure their compliance with federal law. The ACLU has also appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The decision below does not arise in a classic civil rights context. It nonetheless rests on a series of legal assumptions that, unless reversed, will jeopardize the ability of private litigants to enforce their civil and constitutional rights against state officials in federal court. The ACLU and its members therefore have a significant interest in the proper outcome of this case.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans in this country.

The National Senior Citizens Law Center (the "Center") advocates nationwide to promote the independence and well-being of low-income elderly individuals, as well as persons with disabilities, with particular emphasis on women and racial and ethnic minorities. The Center's project on enforcing federal rights also provides information, training and technical assistance to non-profit public interest organizations on issues of sovereign immunity.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American

life. Since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws. NWLC has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

People For the American Way Foundation ("People For") is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has over 300,000 members nationwide. People For has been actively involved in litigation in this Court and elsewhere to protect civil and constitutional rights, including where state officials have been defendants. Although the underlying telecommunications issues in this case do not directly relate to People For's activities, the attempt by respondents severely to limit this Court' s precedents concerning the liability of states and state officials in federal court directly threatens the ability to protect civil and constitutional rights against infringements by states and state officials. People For accordingly joins in this brief.

SUMMARY OF ARGUMENT

1. By participating in the regulatory scheme set forth in the Telecommunications Act of 1996, Maryland has accepted a grant of regulatory authority it would not otherwise possess. Because that acceptance was clearly conditioned on federal court review, the state has expressed its unequivocal consent to be sued in federal court. The suggestion that there can be no such waiver by conduct, no matter how manifest, is inconsistent with precedent, logic and law.[2] *College Savings Bank* v.

[2] In addition to responding to the decision of the Fourth Circuit and the arguments made by Respondents in their October 26, 2001 brief ("Resp. Br.") in these cases, *Amici* respond to arguments made by the Petitioners in *Mathias v.*

Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), explicitly recognized that a state could objectively manifest its waiver of sovereign immunity by participating in a federal-state cooperative scheme expressly conditioned upon such waiver. This principle not only makes sense as a basic principle of assent long recognized in contract law, but is also critical to the implementation of cooperative federalism programs. Those who would create an additional barrier to the implementation of such programs would have the Court force the hand of Congress to the total preemption of the very fields that they wish to occupy. The suggestion that Congress may not condition benefits it confers pursuant to its Commerce Clause powers on a state's waiver of sovereign immunity is similarly contrary to precedent, logic, and law. The source of Congress' power to grant the benefit at issue simply has no relevance to the question of whether the state, in accepting that benefit, agreed to waive its sovereign immunity.

2. The doctrine of *Ex parte Young* ensures that state officials conform their acts to federal law. It also guarantees federal court interpretation and enforcement of federal law and fosters uniformity in the application of federal law, ensuring this Court's ultimate ability to decide issues of federal law. Over the past century the Court has developed the *Young* doctrine so that the doctrine represents a balance between the objectives of federal supremacy and state sovereign immunity. Respondents would muddy this long-standing doctrine with ill-advised new preconditions. They would upset the delicate balance *Young* represents by superimposing a standardless new balancing test to weigh federal against state interests. They would subvert nearly 100 years of *Young* jurisprudence by requiring Congress specifically to authorize *Young* suits under each statutory or regulatory scheme. They would also import from the common law doctrines of immunity a new and ill-fitting requirement that

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Worldcom Technologies, Inc., No. 00-878, a case heard in tandem with these cases that raises the same Eleventh Amendment issues.

Young suits be brought only with respect to actions outside the scope of the state official's valid authority. None of these proposed embellishments represents an improvement; none serves the interests *Young* was intended to protect; and none is more faithful to the delicate Constitutional balancing act than is the *Young* doctrine. The Court should reject them.

ARGUMENT

I. BY ACCEPTING A GRANT OF REGULATORY AUTHORITY THAT IT WOULD NOT OTHERWISE POSSESS, MARYLAND HAS UNEQUIVOCALLY EXPRESSED ITS CONSENT TO SUIT

A. Maryland Objectively Manifested An Intent to Waive its Sovereign Immunity

Congress may condition the grant of a federal benefit on a state's waiver of its sovereign immunity. When a state accepts that benefit, it accepts the conditions associated with the benefit and unmistakably manifests its intent to waive its sovereign immunity. Despite this long-standing principle, essential to federal and state cooperation, the Petitioners in *Mathias* urge this Court to find that a state may not demonstrate its consent to suit through such conduct, but rather must otherwise clearly state that consent. (Brief for the Petitioners in *Mathias v. Worldcom Technologies, Inc.*, No. 00-878 ("*Mathias* Pet. Br."), at 32-40.)[3] That is not the law, even after *College Savings*.

Congress may, consistent with the Constitution, impose conditions on the states in exchange for receipt of federal benefits. Thus, pursuant to the Spending Power, Congress may

[3] Specifically, the *Mathias* Petitioners claim that "a State must independently speak with the same clarity in waiving its sovereign immunity as is required of Congress in the asking" (*Mathias* Pet. Br. at 32), and that "the Court has categorically rejected constructive or implied waivers by conduct." *Id.* at 33.

condition the receipt of federal funds on the states' agreement to "tak[e] certain actions that Congress could not require them to take." *College Savings*, 527 U.S. at 686. *See also South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) ("Incident to [the Spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'") (citation omitted); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("[w]here the recipient of federal funds is a State . . . the conditions attached to the funds by Congress may influence a State's legislative choices") (citations omitted); *Pennhurst State Sch. Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*") ("Congress may fix the terms on which it shall disburse federal money to the States") (citations omitted).

Similarly, "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the power to "offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. at 67 (1992); *see Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981) (holding that Congress could give states choice between participating in administration of federal Surface Mining Act or being pre-empted entirely from the field).

Among the conditions that Congress may permissibly impose on the grant of a federal benefit is that a state waive its sovereign immunity in exchange for receipt of that benefit. *See Alden* v. *Maine*, 527 U.S. 706, 755 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits."); *College Savings*, 527 U.S. at 686 (citing *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)).

When a state accepts a federal benefit to which Congress has attached conditions, the state expresses its consent to be bound by those conditions. Thus, where Congress has conditioned a grant of federal funds on a state's taking certain actions, the state's "acceptance of those funds entails an agreement to the actions." *College Savings*, 527 U.S. at 686 (citing *Dole*, 483 U.S. 203). And where a state accepts a federal benefit conditioned on its waiver of sovereign immunity in either the spending or the regulatory context, it objectively manifests its intent to waive its immunity by participating in the federal scheme. See, e.*g.*, *Petty*, 359 U.S. at 281 (Congress conditioned approval of interstate compact on waiver of state sovereign immunity). So long as Congress makes clear its intent to condition the benefit on states' waiver of their sovereign immunity, states may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst I*, 451 U.S. at 17. A state that chooses to accept the benefit has clearly and knowingly waived its sovereign immunity. No additional statement is required.

This principle is illustrated in *Petty*. There, the federal government approved an interstate compact that created a bi-state bridge commission, inserting a proviso that the commission was amenable to suit in federal court. *See Petty*, 359 U.S. at 281-82. In subsequent tort litigation brought by a private plaintiff, the Court held that the states manifested their consent to suit by accepting and acting under the compact with the proviso. It noted: "if there be doubt as to the meaning of the sue-and-be sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States." *Id.* at 282. In other words, the states' conduct in accepting the congressional benefit conditioned on their consent to suit in federal court objectively manifested their waiver of sovereign immunity.

The suggestion that a state's acceptance of a benefit from Congress conditioned on a waiver of sovereign immunity

is not sufficient to effectuate that waiver is contrary not only to precedent but also to logic and basic principles of law. Black-letter contract law makes no distinction between forms of acceptance — written, oral, or by conduct — so long as the offeree's expression constitutes an objective manifestation of assent. *See* Restatement (Second) Contracts § 19, cmt. a (1979) ("Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise."); *id.* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."); *id.* § 30(2) ("Unless otherwise indicated by the language of the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.") That the state's waiver is demonstrated by its conduct does not render its waiver "constructive" or unintentional.[4]

Courts routinely make reference to the language and learning of contract law in the waiver context. *See, e.g. Litman* v. *George Mason University*, 186 F.3d 544, 552 (4th Cir. 1999) (referencing such principles in holding that states waived their sovereign immunity when they received federal funds pursuant to Title IX; decided after *College Savings*).

Contrary to the contention of the Petitioners in *Mathias* and the Respondents here, *College Savings* does not support the proposition that a state's participation in a federal regulatory scheme conditioned on a waiver of sovereign immunity is

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[4] Of course, contract law recognizes limited circumstances in which one may not infer from a party's acceptance of an agreement consent to all the terms of that agreement. For instance, where the contract language is ambiguous, the non-drafting party may be said not to have consented to the ambiguously-worded obligations in the contract. *See* E.A. Farnsworth, *Farnsworth on Contracts* § 3.27 (2d ed. 1998); Restatement (Second) Contracts § 33. That circumstance is not present here. Since Congress must clearly express its intent to subject states to suit in connection with their participation in the federal regulatory scheme, *see Pennhurst I*, 451 U.S. at 17, there is no concern that a state will be unaware of its obligation to waive its sovereign immunity.

insufficient to show its consent to suit. While *College Savings* found that a state does not "constructively waive" its sovereign immunity merely by engaging in "otherwise permissible activity" which happens to be subject to federal regulation, *College Savings*, 527 U.S. at 687, it explicitly reaffirmed the principle that a state can manifest its acceptance of waiver through conduct, particularly when that course of conduct would not have been available to the state absent the grant of federal benefits. *Id.* at 686.

The *Mathias* Petitioners now urge the Court to expand *College Savings* to embrace the radical new proposition that unless the state's waiver is specifically authorized — by "clear statement of intent" and not by conduct, no matter how manifest — then the waiver is merely "constructive" and therefore invalid. (*Mathias* Pet. Br. at 29.) There is nothing "constructive" or "implied" where a state's conduct objectively manifests its intent to waive sovereign immunity. The Court should reject such an unjustified extension of *College Savings*. *College Savings* itself rejected this very position by acknowledging the continuing vitality of both *Petty* and *Dole*. *See College Savings*, 527 U.S. at 686-87; *see also Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring) (noting that consent to removal of action from state to federal court constitutes waiver of sovereign immunity "[i]f the States know or have reason to expect that removal will constitute a waiver").

If adopted, this proposed extension of *College Savings* — requiring a clear statement of consent to waive sovereign immunity above and beyond a state's agreement to participate in a legislative scheme or accept a federal benefit so conditioned — would hinder Congress' efforts to engage in cooperative programs with, or provide benefits to, the states. Such a requirement would discourage Congress from seeking to cooperate with the states because there would be uncertainty as to whether a legislative scheme will in fact be able to carry out

the federal objectives it was drafted to address. In addition, such a requirement would create additional hurdles for the implementation of a cooperative scheme, as it would require a state, before receiving the benefits of a federal scheme, to take actions in addition to its participation in the federal scheme.

This Court has repeatedly acknowledged the benefits and constitutionality of programs of "cooperative federalism," in which the federal and state governments operate as partners, "animated by a shared objective." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (national pollutant discharge elimination system). *See also New York*, 505 U.S. at 167-68 (low-level radioactive waste policy); *FERC* v. *Mississippi*, 456 U.S. 742, 765-66 & n.29 (1982) (public utility regulatory policies); *Hodel*, 452 U.S. at 288-89 (surface mining control and reclamation). Such programs address national issues while at the same time preserving the maximum degree of state autonomy. The irony of the states' position is that cooperative legislation (such as the Telecommunications Act) that gives states the opportunity to participate as deputy regulators is designed precisely to avoid the even greater affront of pre-empting the states from the legislated field. *See FERC*, 456 U.S. at 766 n.29 ("Certainly, it is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role."). The proposed extension of *College Savings* perversely would destroy Congress's incentive to work with the states, driving Congress to dislodge the states from anything but an interstitial regulatory role in the very fields that the states might wish to occupy.[5]

In sum, consistent with well known and clearly defined principles of law, a state may express its waiver of sovereign immunity by conduct that objectively manifests consent to suit

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[5] While these considerations would not be sufficient to enable Congress to apply *unconstitutional* legislation to the states, there is no contention here that the Telecommunications Act is unconstitutional.

in federal court, such as the acceptance of a grant of federal funds or regulatory authority that the state would not otherwise possess.

B. Maryland's Ability to Consent to Suit Does Not Depend on the Source of Congress's Authority

Respondents make the unprecedented assertion that "Congress lacks the constitutional authority to condition grants under the Commerce Clause." (Resp. Br. at 28.) The Fourth Circuit's finding that Maryland did not waive its sovereign immunity in accepting Congress's invitation to participate as a regulator in a field preempted by Congress is based on the same faulty assumption. *See Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 293-94 (4th Cir. 2001) (finding argument that Congress preempted telecommunications field irrelevant to waiver inquiry because "Congress may not subject States to suit in federal court merely by partially or fully preempting the regulation of a field under its commerce power."). This position is unsupported in law, and the Court should reject such a radical alteration of its waiver jurisprudence.

Relying on *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 71-72 (1996), Respondents argue that "[s]ince Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity . . . it follows the Congress may *not* make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause." (Resp. Br. at 30.) While *Seminole Tribe* indeed held that Congress does not have authority under its Commerce Clause powers to abrogate a state's sovereign immunity, it does not follow that Congress may not condition a gratuity it has the power to bestow under the Commerce Clause on a state's waiver of immunity. Such a leap of logic misapprehends the waiver

inquiry by inappropriately shifting the focus of the inquiry from the state's intention to Congress's power. As discussed *supra*, the determination of whether a state has waived its sovereign immunity turns on whether the state has manifested an intent to waive its immunity. A state may voluntarily waive its sovereign immunity regardless of whether it does so to obtain a benefit from Congress. *See College Savings*, 527 U.S. at 675 (noting that state's sovereign immunity is "a personal privilege which it may waive at pleasure") (citation omitted). If a state chooses to waive its immunity to obtain a benefit from Congress, that waiver is effective regardless of the source of Congress's power to grant the benefit. In other words, the sole question is whether the state intentionally and voluntarily waived its immunity; the source of Congress's power is simply irrelevant to that inquiry.

Respondents erroneously suggest that *College Savings* supports their radical proposition. (Resp. Br. at 29.) To the contrary, *College Savings* explicitly recognized that that a state may waive its sovereign immunity by accepting a gratuity or benefit bestowed by Congress pursuant to its Article I powers. *See College Savings*, 527 U.S. at 686-87. Thus, the Court reaffirmed its holding in *Petty* that Congress may condition its consent to an interstate compact, pursuant to its Article I Compact Clause powers, on the states' waiver of their sovereign immunity. *Id.* at 686. Similarly, the Court reaffirmed its holding in *Dole* that Congress may, in the exercise of its Article I Spending power, condition its grant of federal funds on a state's waiver of sovereign immunity. *Id.* These decisions do not rest on the assumption that Congress may validly abrogate a state's sovereign immunity pursuant to its Article I powers, but rather on the simple proposition that a state manifests its intent to waive its sovereign immunity when it accepts a congressional benefit so conditioned.

II. STATE OFFICIALS IN THE POSITION OF THE INDIVIDUAL COMMISSIONERS HERE ARE SUBJECT TO SUIT UNDER *EX PARTE YOUNG*

In a further effort to insulate themselves from judicial enforcement of their obligation to follow federal law, Respondents assert that they are not amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Respondents seek to inject new and extraneous considerations, supposedly grounded in the Eleventh Amendment, into the determination as to whether a *Young* suit can proceed. The Court should reject the invitation to alter the *Young* doctrine and limit the availability of *Young* suits. Such suits are indispensable to ensuring conformity with the supreme law of the land and to ensuring that federal courts, including the Supreme Court, have the opportunity to interpret and enforce federal law.

The doctrine of *Ex parte Young* provides that the Eleventh Amendment does not bar an action by a private party in federal court seeking prospective injunctive relief against state officials to bring their conduct in conformity with the Constitution or laws of the United States. *See Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 (1997); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). "Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court." *Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The *Young* doctrine is an established cornerstone of federal law — regarded by some commentators as one of the three most important decisions ever issued by the Supreme

Court[6] — and remains an essential part of our constitutional system. *See, e.g., Coeur d'Alene*, 521 U.S. at 269. The doctrine is grounded in the Supremacy Clause of the Constitution. It ensures that federal law is adhered to, "anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., Art. VI. The *Young* doctrine permits the federal courts to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) ("*Pennhurst II*") (quoting *Ex parte Young*, 209 U.S. at 160); *see also Alden*, 527 U.S. at 757 (*Young* provides "ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.") (citation omitted); *Green*, 474 U.S. at 68 (1985) ("[R]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). The availability of prospective relief of the sort awarded in *Ex parte Young* "gives life to the Supremacy Clause." *Id.*

The *Young* doctrine also vindicates "the importance of having federal courts open to enforce and interpret federal rights." *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring). The availability of a federal forum to determine federal rights is crucial to uniformity in the interpretation and application of federal law. *See id.* Federal courts are peculiarly competent to prevent ongoing violations of federal law.[7]

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[6] *See, e.g.*, Erwin Chemerinsky, *Federal Jurisdiction* § 7.5.1 (3rd ed. 1999) (citation omitted); 17 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 4231 & n.3 (1988) (*citing Marbury* v. *Madison*, *Martin* v. *Hunter's Lessee*, and *Ex parte Young*).

[7] Indeed, federal courts have a "responsibility . . . to vindicate . . . controlling federal law." *Coeur d'Alene*, 521 U.S. at 313 (Souter, J., dissenting). And federal courts have a "strict duty" (although not absolute) to exercise jurisdiction where jurisdiction obtains. *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citations omitted).

Imposing undue limitations on the availability of *Young* suits may foreclose the possibility that important questions of federal law will ever reach a federal court, including the Supreme Court.[8]

Although the *Young* doctrine "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law," *Puerto Rico Aqueduct*, 506 U.S. at 146, the limitations Respondents and the Fourth Circuit introduce would enable state officials to do just that. Because *Young* actions are often the only mechanism available, consistent with the Eleventh Amendment, to enforce conformity with federal law, each such limitation increases the number of circumstances in which state officials can effectively disregard federal law. Such a result would be repugnant to the Supremacy Clause and to our system of federalism.

A. *Ex Parte Young* Is A Two-Part Test, Not A Balancing Test

The availability of a *Young* action depends on a simple two-part test: a citizen of a state may seek redress in federal court against a state official, even if the State itself is immune from suit under the Eleventh Amendment, when: (1) the plaintiff alleges an ongoing violation of federal law, and (2) the relief sought is prospective rather than retrospective. *See, e.g.*, *Puerto Rico Aqueduct*, 506 U.S. at 146; *Pennhurst II*, 465 U.S. at 102-03. These two criteria — officers acting in violation of federal law, and the prayer for prospective relief to address an ongoing violation — constitute the *Young* analysis. *See Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment);

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[8] For example, if there were no effective mechanism for federal review of issues of federal law adjudicated by state regulatory authorities under the Telecommunications Act, this Court's ability to review and decide important issues of federal telecommunications law would be wholly dependent on what review mechanisms, if any, the states created.

see also id. at 298-299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test); *Green*, 474 U.S. at 68; *Pennhurst II*, 465 U.S. at 106; *Quern*, 440 U.S. at 346-49.

Rather than adhering to this well-established two-part analysis, the Fourth Circuit replaced it with an *ad hoc* balancing approach, weighing the federal interests served by allowing a *Young* suit to proceed to vindicate federal law against the alleged offenses to the dignity of the state officials named in such a suit. *See Bell Atlantic Maryland, Inc.*, 240 F.3d at 298.[9] The Court should reject this approach for several reasons. First, this balancing approach is inconsistent with the *Young* doctrine, which itself represents the appropriate balance between federal and state interests. Second, this approach is standardless and unwieldy. Third, this approach ignores the fundamental interest of citizens seeking to enforce federal rights. And fourth, this approach has no support in a century of *Young* jurisprudence.

First, this balancing approach ignores the fact that the *Young* doctrine itself embodies the appropriate "balance of federal and state interests." *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986). Although the principal opinion in *Coeur d'Alene* asserted that "recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," *Coeur d'Alene*, 521 U.S. at 278, that portion of the Court's reasoning was expressly rejected by seven of the Court's nine members, and is neither a correct statement of current law nor a tenable extension of it. As Justice O'Connor, writing for three members of the Court, noted:

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[9] Similarly, the Petitioners in *Mathias* seek to inject into this analysis an overriding complex of ill-defined elements — a "careful balancing" of unspecified "federal and state interests." (*Mathias* Pet. Br. at 41.)

> [T]he principal opinion reasons that federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns, including whether a state-forum is available to hear the dispute, what particular federal right the suit implicates, and whether special factors counsel hesitation. This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence. The parties have not briefed whether such a shift in the *Young* doctrine is warranted. In my view, it is not.

Id. at 291 (O'Connor, J., concurring) (citations omitted).

Justice Souter, writing for four other members of the Court, was even more explicit in rejecting a balancing test approach: "*Young*'s rule recognizing federal judicial power in suits against state officers to enjoin ongoing violations of federal law *itself strikes the requisite balance* between state and federal interests. Where these conditions are met, no additional 'balancing' is required or warranted." *Id.* at 304 n.6 (Souter, J., dissenting) (emphasis added). The balancing approach taken by the Fourth Circuit would undermine *Young*'s delicate equilibrium.

The central concern of the *Young* doctrine is to reconcile the need to enforce the supremacy of federal law with the principle of state sovereign immunity. The *Ex parte Young* Court and its successors weighed state and federal interests, and struck the appropriate balance, permitting suits to enjoin state officers from committing ongoing violations of federal law. As this Court recognized in *Pennhurst II*, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of federal rights." 465 U.S. at 105.

The *Young* doctrine was crafted to take into account the states' sovereign immunity concerns. Specifically, a *Young* suit is available only against a state officer engaging in conduct that violates federal law, but not against the state itself. *See Ex parte Young*, 209 U.S. at 159-160 (permitting suit to proceed against state officer because, *inter alia*, "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States"). In addition, the injunctive relief obtained in a *Young* action may be prospective only, and cannot take the form of a retrospective order to make compensation through payment of moneys from a state's treasury. *See Edelman* v. *Jordan*, 415 U.S. 651, 665-66 (1974). Nevertheless, it does afford prospective relief against the officers of a state, even where compliance with federal law may have substantial financial impact upon the state, so long as the effect is ancillary to compliance. *See id*. at 667-68. And since they are designed to enforce the supremacy of federal law, *Young* suits are available to address violations of federal but not state law. *See Pennhurst II*, 465 U.S. at 106. These limitations — prospective but not retroactive relief, injunctive but not compensatory remedies, and federal but not state law — harmonize the sometimes competing objectives of federal supremacy and state sovereign immunity.

Since the *Young* doctrine already allots the maximum weight to state sovereign immunity principles consistent with federal supremacy, any additional balancing would eviscerate *Young*'s central principles. Superimposing a new balancing test simply is not appropriate in this area of the law: the state official's action either is or is not in violation of federal law, and if it is, it is inappropriate for a federal court to weigh the respective federal and state interests in deciding whether or not it will grant relief. A contrary finding would undermine the supremacy of federal law. The accommodation of state interests comes in the limitation of that relief to prospective, injunctive remedies for ongoing violations of federal law.

In short, the *Young* doctrine already constitutes the appropriate balance between the supremacy of federal law and legitimate state interests. Any invitation to further "balancing" of undefined state and federal interests would place an unwarranted thumb on that finely calibrated scale.

Second, any suggestion that courts should balance unspecified federal and state interests on a case by case basis before allowing a *Young* suit to proceed would cloud a clear rule with a series of unspecified factors. Currently, as noted above, *Young* suits are available against a state official whenever a plaintiff (1) alleges that the official violated federal law, and (2) seeks prospective, injunctive relief. The Fourth Circuit's approach, if upheld, would gut the *Ex parte Young* doctrine and transform it into a mere principle of equitable discretion. Because this new approach offers no standards for determining which additional federal and state "interests" should be balanced and what weight to assign to those interests, it offers little, if any, guidance to lower federal courts. Understandably, this Court has never used such a free-form "balancing" test in determining whether to apply the *Young* doctrine.

Third, the balancing approach ignores the interests of private persons in ensuring the protection of their federal rights. Two terms ago, in *Garrett*, the Court affirmed the crucial role that *Ex parte Young* actions play within the federal system in ensuring that private persons enjoy all of the benefits and protections of federal law. *See Bd. of Trustees of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001); *id.* at 376 (Kennedy, J., concurring). In finding the Eleventh Amendment barred a private claim under the ADA against a state instrumentality for money damages, the Court relied in part upon the fact that other avenues, including *Ex parte Young* suits, remained for the enforcement of the statute against the states. As the Court explained:

> Our . . . holding that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. *Those standards can be enforced* by the United States in actions for money damages, as well as *by private individuals in actions for injunctive relief under Ex parte Young.*

Id. at 374 n.9 (emphasis added). Were this not the case, there would be no mechanism to ensure state compliance with the supreme law of the land. The *Ex parte Young* mechanism is indispensable to the federal system because it is the only guarantee to private individuals that their state governments — otherwise immune from suit — will act in conformity with federal laws enacted for their protection.

Fourth, recognizing that *Young* harmonizes federal supremacy with state sovereign immunity, no majority of this Court has ever read *Young* to require the balancing of additional "interests" or considerations other than those built into the doctrine. In support of an *ad hoc*, case by case balancing approach, the Fourth Circuit apparently relied on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *See Bell Atlantic Maryland*, 240 F.3d at 295. Nothing in *Seminole Tribe*, however, supports such a balancing of federal and state interests. Rather, *Seminole Tribe* merely addressed whether the *federal* scheme at issue was inconsistent with an *Ex parte Young* action. And, as explained *infra* at 22-27, *Seminole Tribe* is inapposite here.

Similarly, the few cases cited by the Petitioners in *Mathias* in support of the same argument do not support the proposition that state interests should be balanced against

federal interests when the *Young* doctrine is otherwise found to apply. Rather, the cited cases have employed the clear-cut rule that *Young* suits are available whenever the plaintiff seeks prospective injunctive relief against an ongoing violation of federal law.

In *Papasan*, the Court noted that the line between suits permitted under *Young* and those forbidden by the Eleventh Amendment is often an indistinct one, but is demarcated by the respective remedies sought and the question of whether a federal or only a state law violation is alleged. *See Papasan*, 478 U.S. at 278. Where only compensatory damages are sought, or where only state law violations are at stake, *Young*-type relief is unnecessary to "vindicate the federal interest in assuring the supremacy of that law." *Id.* (quotation marks omitted). In other words, the balancing of interests is already embodied in the two-part test.

The *Mathias* Petitioners similarly misconstrue *Pennhurst II*. There, citizens living in a state facility for the mentally retarded challenged the conditions of their confinement, seeking *Ex parte Young* relief to restrain violations of *state* law. The Court denied the relief sought, but not because the state interests outweighed federal interests on some standardless judicial balancing scale. Rather, the Court denied *Young* relief because to grant it against state officials on the basis of state law "does not vindicate the supreme authority of federal law." *Pennhurst II*, 465 U.S. at 107. If *Young* had been extended to this situation, then the sovereign immunity of the states, guaranteed by the Eleventh Amendment, would have been nullified. *Id.* at 106. The "need to reconcile competing interests" in that case was not the need to balance state and federal interests, then, but the need to give effect to two *federal* constitutional principles.

As another example, in *Edelman*, plaintiffs claimed that defendant state officials administered federal-state programs of

aid to the aged, blind, and disabled in a manner inconsistent with federal law. *See Edelman*, 415 U.S. at 653-55. The "equitable restitution" sought would have required the "payment of state funds . . . as a form of compensation" to those who had wrongfully been denied benefits in the past. *Id.* at 668. The Court found that this claim for "equitable" relief was actually the functional equivalent of a suit for money damages against the state for past conduct. *Id.* Crucially, the Court did not engage in any additional balancing of state and federal interests, instead devoting its *Young* inquiry to a determination of whether the relief sought in that case lay on the (permissible) *Young* or the (prohibited) Eleventh Amendment side of the dividing line between injunctive and compensatory relief. Once the Court found that the relief was merely a compensatory damages claim re-characterized as one for equitable relief, its *Young* inquiry was over.

No additional "balancing" of interests was required in these cases because the *Young* doctrine itself represents a balance between the objectives of federal supremacy and state sovereign immunity.

B. Respondents Misread *Seminole Tribe* To Require Congressional Authorization Before An *Ex Parte Young* Action Can Proceed

Respondents assert that an *Ex parte Young* action is unavailable in this case because "[t]he Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by" *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 75 (1996). (Resp. Br. at 41.) Contrary to Respondents' contention, the law has never required that Congress authorize an *Ex parte Young* action. Rather, *Ex parte Young* is a *judicially*-crafted doctrine that provides a prospective injunctive remedy under any circumstance in which its two-part test is satisfied.

Seminole Tribe did not change this analysis and introduce a requirement of Congressional authorization before an *Ex parte Young* suit can proceed. Rather, *Seminole Tribe* merely concerned the question of whether Congress specifically *precluded* the availability of an *Ex parte Young* action in connection with a statutorily-created right. In *Seminole Tribe*, the Indian Gaming Regulatory Act ("IGRA") established a regime of statutorily-mandated good-faith negotiations between an Indian tribe and a State to cause the parties to enter into a compact authorizing the tribe to operate gaming facilities. Section 2710(d)(3) of the Act imposed upon the States an obligation to negotiate with a tribe in good faith. In the event of the parties' failure to reach an agreement, Section 2710(d)(7) provided that a tribe could bring a cause of action to force the parties to reach an agreement. However, as the Court observed, this sole remedy available under the Act was strictly limited. Thus, under Section 2710(d)(7):

> where a court finds that the State has failed to negotiate in good faith, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue.

Seminole Tribe, 517 U.S. at 74-75.

Rather than adhere to the strictly limited mechanism specifically provided in Section 2710(d)(7), the plaintiff Indian tribe attempted to enforce the IGRA's good-faith bargaining provision in Section 2710(d)(3) outside of the statutory procedure, via an action under *Ex parte Young*. The Court found that Congress had so limited and defined the good-faith bargaining right it provided in the IGRA with the procedural means for the right's effectuation that Congress manifested a clear purpose to preclude the availability of an *Ex parte Young* action not subject to those limitations. *See id.* As the Court noted, "[i]f § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous: it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." *Id.* at 75. Thus, rather than standing for the proposition that Congress must authorize an *Ex parte Young* action, *Seminole Tribe* stands for the converse proposition – that Congress may preclude such an action as it did in the IGRA. This makes sense: given the important role *Ex parte Young* plays in the federal system, the presumption is that an *Ex parte Young* action is available unless Congress provides to the contrary.

Apparently, the source of Respondents' theory that Congressional authorization is required is language in a footnote in *Seminole Tribe* that states: "Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act." *Id.* at 75 n.17 (emphasis in original). To the extent Respondents rely on this statement, they necessarily take it out of context. The Court noted this point not to impose a requirement of Congressional authorization, but to explain that, where — as in the case of the IGRA — Congress otherwise clearly manifested an intent to preclude *Ex parte Young* actions, Congress could negate its apparent intent by specifically authorizing the availability of

such actions. Thus, in its proper context, this language only reaffirms the principle that, by its objective and unequivocal manifestations, Congress may preclude the availability of an *Ex parte Young* action based upon specific statutory rights. Accordingly, Respondents misstate *Seminole Tribe* in suggesting that it requires that Congress authorize an *Ex parte Young* action.

Respondents also erroneously suggest that the mere presence of a remedial mechanism in a federal statute demonstrates a Congressional intent to preclude the availability of *Ex parte Young* relief. (*See* Resp. Br. at 39.) *Seminole Tribe*, however, does not stand for the broad proposition that the mere fact that a statute includes a remedial provision or scheme — as numerous statues do — requires Congress to authorize the availability of a separate *Ex parte Young* action. Instead, it stands for the more limited proposition that an *Ex parte Young* action may be precluded by a statute that provides "a detailed remedial scheme for the enforcement against a State of a statutorily created right," particularly where "the intricate procedures . . . show that Congress intended not only to define, but also to limit significantly, the duty imposed" by the statute. *Seminole Tribe*, 517 U.S. at 74. *Seminole Tribe*'s holding was based upon the fact that Congress clearly expressed its intent to preclude *Ex parte Young* suits under the specific structure and language of the IGRA. Only where Congress provides an explicitly limited remedial scheme such as that at issue in *Seminole Tribe* would there be any reason to question the availability of an *Ex parte Young* action without Congressional authorization.

In the present case, Section 252 of the Telecommunications Act does not provide a limited remedial scheme remotely comparable to that under the IGRA. Indeed, Section 252(e)(6) — which provides that any person "aggrieved" by the determination of a state commission "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," 47 U.S.C.§ 252(e)(6), and which the plaintiffs seek to enforce — contains no remedial limitations at all.[10] In such a case, an *Ex parte Young* action would not constitute an end-run around a carefully limited remedial scheme, let alone one designed to define the scope of the underlying federal right or to preclude potential remedies. Rather, it would be entirely consistent with the statute it seeks to enforce. No inference can be drawn from the structure of legislation such as the Telecommunications Act to suggest that Congress meant to preclude an action under *Ex parte Young*.

Respondents attempt to escape this result by asserting that "the federal court relief available under Section 252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit." (Resp. Br. at 39.) In support of this assertion, Respondents claim that the federal court review mechanism under the Telecommunications Act "does not contemplate injunctive relief." (*Id.* at 38.) Even if Respondents were correct, they point to no material distinction between the injunctive relief sought here – an order enjoining the Commissioners from enforcing determinations inconsistent with federal law – and the relief that would be afforded by direct federal court review. Thus, unlike the remedies under the IGRA, it cannot be said that the remedies contemplated by Section 252(e)(6) are "significantly more limited" than those available under *Ex parte Young*. *Seminole Tribe*, 517 U.S. at 75-76. And unlike the case with the IGRA, the injunctive relief available under *Ex parte Young* would further, not undermine, Congress's remedial purpose under the Telecommunications Act. Accordingly, there is no basis for Respondents' assertion

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[10] As this Court has held, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 70-71 (1992).

that statutory authorization of federal court review precludes *Ex parte Young* actions.

C. *Ex Parte Young* Applies Whether or Not The State Official's Action Is Authorized by the State

Respondents erroneously claim that a "critical limitation on the *Ex parte Young* doctrine is that a State officer must have exceeded his authority in order to be subjected to an *Ex parte Young* suit." (Resp. Br. at 41.) Quite the opposite: an *Ex parte Young* suit is available only to challenge acts by a state officer in his or her official capacity. When those acts violate federal law, the *Ex parte Young* doctrine itself postulates that the officer "is stripped of his official or representative character," *Ex parte Young*, 209 U.S. at 160, so as to enable a suit to proceed outside of the strictures of the Eleventh Amendment. An *ultra vires* requirement has never been part of, and is in fact inconsistent with, *Ex parte Young*, and there are no valid grounds for so extending the law.

In *Ex parte Young* itself, a suit was allowed to proceed against a state official despite the fact that his act was not *ultra vires*. The official's uncontested authority from the State of Minnesota was insufficient to insulate him from suit in federal court. Rather, where an official's act, even though consistent with state law, comes into conflict with federal law, *Ex parte Young* establishes a fiction that the official "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* The basis for this fiction is that "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* After *Ex parte Young*, this Court has consistently permitted suits against state officials acting within the scope of their authority. *See, e.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000);

Hodel, 452 U.S. 264 (1981); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 n.6 (1978).

Respondents' proposed *ultra vires* requirement is unsupported in law. They cite *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), (Resp. Br. at 41), a decision that did not even mention *Ex parte Young*. *Larson* nonetheless acknowledged the principle embodied in *Ex parte Young* that acts within a state official's authority that contravene supreme federal law are deemed to be "beyond the officer's powers." *Id.* at 690. The alleged injury in *Larson*, a common law tort based on interpretation of a contract for the sale of surplus coal, had no basis in either the United States Constitution or any federal law. *Larson*, 337 U.S. at 693-94 (plaintiff's argument "fundamentally rests" on claim that "the commission of a tort cannot be authorized by the sovereign"); *see also Florida Dep't State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 693 (1982) (conduct complained of in *Larson* "constituted at most a tortious deprivation of property"). Since the acts in *Larson* were not alleged to constitute violations of the U.S. Constitution or federal law, the legal fiction of *Ex parte Young* — deeming acts in violation of the Constitution and federal law to be *ultra vires* for the purposes of Eleventh Amendment immunity — was not implicated. Thus, *Larson* did not introduce any limitations on *Ex parte Young* actions, but rather merely rejected the plaintiff's invitation to recognize a new exception to the implied sovereign immunity of the federal government for violations of non-federal rights.

Here, in contrast to *Larson*, the underlying action alleges that state officials violated a federal statute, the Telecommunications Act. *Larson* does not undermine Petitioners' right to seek redress in federal court in this case. Nor can *Larson* be used — fifty years later — to support Respondents' extraordinary new proposition, that the act complained of must be *ultra vires*.

Respondents' *ultra vires* argument also conflates distinct legal concepts: common law defenses of immunity and *Young*'s threshold jurisdictional requirement of a violation of federal law. Immunity defenses are available under certain circumstances to shield government officers sued in their personal capacities from liability for violations of federal law committed under a valid grant of authority. *Ex parte Young*, by contrast, authorizes suits against officers in their official capacities regardless of whether the officers' acts are authorized, so long as the suit seeks prospective relief for a violation of federal law.[11] To confuse the two is to clothe common law defenses, born of policy considerations and political compromises, with the mantle of a state's sovereign immunity. Such an expansion of the immunity defenses is unprecedented and unwise.

[11] In the context of 28 U.S.C. Section 1983, the Court has held that the Eleventh Amendment is not implicated solely by the fact that the action was taken within the official's authority. *See Hafer* v. *Melo*, 502 U.S. 21, 31 (1991) (the Eleventh Amendment does not immunize state officials from personal liability under Section 1983 "solely by virtue of the 'official' nature of their acts").

CONCLUSION

For the foregoing reasons, *Amici Curiae* NOW Legal Defense, the ACLU, National Asian Pacific American Legal Consortium, National Senior Citizens Law Center, National Women's Law Center, and People for the American Way respectfully urge that this Court reverse the decision below.

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