# SUPREME COURT OF THE UNITED STATES

Nos. 00–1531 and 00–1711

VERIZON MARYLAND INC., PETITIONER
00–1531 *v.*
PUBLIC SERVICE COMMISSION OF
MARYLAND ET AL.

UNITED STATES, PETITIONER
00–1711 *v.*
PUBLIC SERVICE COMMISSION OF
MARYLAND ET AL.

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

[May 20, 2002]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion, Part III of which rests on a ground all of us can agree upon:[1] on the assumption of an Eleventh Amendment[2] bar, relief is available under the doctrine of *Ex parte Young*, 209 U. S. 123 (1908). Although that assumption apparently has been made from the start of the litigation, I think it is open to some doubt

[1] In so doing, I set aside for the moment my continuing conviction that the interpretation of the Eleventh Amendment that a majority of this Court has embraced is fundamentally mistaken. See *Alden* v. *Maine,* 527 U. S. 706, 760 (1999) (dissenting opinion); *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 100 (1996) (dissenting opinion).

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amdt. 11.

and so write separately to question whether these cases even implicate the Eleventh Amendment.

While the State of Maryland is the named defendant, it is only a nominal one. Verizon Maryland Inc., the private party "suing" it, does not seek money damages, or the sort of declaratory or injunctive relief that could be had against a private litigant.[3] Nor does Verizon seek an order enjoining the State from enforcing purely state-law rate orders of dubious constitutionality, the relief requested in *Ex parte Young* itself, 209 U. S., at 129–131. Instead, Verizon claims that the Maryland Public Service Commission has wrongly decided a question of federal law[4] under a decisional power conferred by the Telecommunications

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[3] Compare, *e.g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U. S. 356, 360 (2001) (money damages from the State as employer under Title I of the Americans with Disabilities Act of 1990); *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62, 66 (2000) (money damages from the State as employer under the Age Discrimination in Employment Act of 1967); *Alden* v. *Maine*, *supra,* at 712 (money damages from the State as employer under the Fair Labor Standards Act of 1938 in state court); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank,* 527 U. S. 627, 633 (1999) (money damages and injunctive and declaratory relief against a State for patent infringement); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U. S. 666, 671 (1999) (same for trademark violations); *Seminole Tribe*, *supra*, at 47 (suit to compel State to negotiate in good faith); *Hans* v. *Louisiana,* 134 U. S. 1 (1890) (money damages for failure to honor state securities). In *Seminole Tribe*, a majority of this Court observed "that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment," 517 U. S., at 58, but this was said in the context of a suit for injunctive relief (to enforce a duty to negotiate) as opposed to money damages. My point is that conventional relief of both sorts (and declaratory relief) is different in kind from the judicial review of agency action sought in these cases.

[4] Whether the interpretation of a reciprocal-compensation provision in a privately negotiated interconnection agreement presents a federal issue is a different question which neither the Court nor I address at the present.

Act of 1996 (Act), a power that no person may wield. Verizon accordingly seeks 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,[5] whose jurisdiction to entertain the claim of error the Court today has affirmed. If the District Court should see things Verizon's way and reverse the state commission *qua* federal regulator, what dishonor would be done to the dignity of the State, which has accepted congressionally conferred power to decide matters of federal law in the first instance?

One answer might be that even naming the state commission as a defendant in a suit for declaratory and injunctive relief in federal court is an unconstitutional indignity. But I do not see how this could be right. At least where the suit does not seek to bar a state authority from applying and enforcing state law, a request for declaratory or injunctive relief is simply a formality for obtaining a process of review. Cf. 4 K. Davis, Administrative Law Treatise 206 (2d ed. 1983) ("[T]he suit for injunction and declaratory judgment in a district court under 28 U. S. C. §1331 . . . is now always available to reach reviewable [federal] administrative action in absence of a specific statute making some other remedy exclusive"). And as for the nominal position of a State as defendant, "[i]t must be regarded as a settled doctrine of this court . . . 'that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record.'" *In re Ayers*, 123 U. S. 443, 487 (1887) (alteration in original) (quoting *Poindexter* v. *Greenhow,* 114 U. S. 270, 287 (1885)). If the applicability

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[5]Judicial review of FCC determinations under the Act is committed directly to the Courts of Appeal. 28 U. S. C. §2342(1); 47 U. S. C. §402(a) (1994 ed.).

of the Eleventh Amendment pivots on the formalism that a State is found on the wrong side of the "v." in the case name of a regulatory appeal, constitutional immunity becomes nothing more than an accident of captioning practice in utility cases reviewed by courts. For that matter, the formal and nominal position of a governmental body in these circumstances is not even the universal practice. While the regulatory commission is generally a nominal defendant when a party appeals in the federal system,[6] this is not the uniform practice among the States, several of which caption utility cases on judicial review in terms of the appealing utility.[7]

The only credible response, which Maryland to its credit advances, is that the State has a strong interest in any case where its adjudication of a federal question is challenged.[8] See Supplemental Brief for Respondents 21–24.

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[6] See 5 U. S. C. §§702–703; Fed. Rule App. Proc. 15(a)(2)(B).

[7] See, *e.g.*, *In re Hawaiian Electric Co.*, 81 Haw. 459, 918 P. 2d 561 (1996); *In re Petition of Interstate Power Co.*, 416 N. W. 2d 800 (Minn. Ct. App. 1987); *Appeal of Campaign for Ratepayers Rights*, 145 N. H. 671, 766 A. 2d 702 (2001); *In re Petition for Declaratory Ruling of Northwestern Public Service Co.*, 560 N. W. 2d 925 (S. D. 1997); *In re Citizens Utilities Co.*, 171 Vt. 447, 769 A. 2d 19 (2000).

[8] The Fourth Circuit obliquely questioned the strength of the State's interest, noting that "under Maryland law, it is not necessary for the State commission, much less the individual commissioners, to be a party to an appeal for State-court review of its determinations." *Bell Atlantic Md., Inc.* v. *MCI Worldcom, Inc.,* 240 F. 3d 279, 295 (2001). But while the Maryland statute which the Fourth Circuit cited, Md. Pub. Util. Cos. Code Ann. §3–204(d) (1998), does provide that "[t]he Commission may," not must, "be a party to an appeal," the Maryland courts have specified that the Public Service Commission is one of certain agencies "'the functions of which are so identified with the execution of some definite public policy as the representative of the State, that their participation in litigation affecting their decisions is regarded by the Legislature as essential to the adequate protection of the State's interests.'" *Calvert County Planning Comm'n* v. *Howlin Realty Management, Inc.*, 364 Md. 301, 315, 772 A. 2d 1209, 1216–1217

An adverse ruling in one appeal can no doubt affect the state commission's ruling in future cases. But this is true any time a state court decides a federal question and a successful appeal is made to this Court, and no one thinks that the Eleventh Amendment applies in that instance. See *Cohens* v. *Virginia,* 6 Wheat. 264, 412 (1821) (a writ of error from a state-court decision is not a "suit" under the Eleventh Amendment); *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U. S. 18, 31 (1990) ("The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts") (unanimous Court); cf. U. S. Const., Art. VI ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land").[9] Whether 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 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.

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(App. 2001) (quoting *Zoning Appeals Board* v. *McKinney*, 174 Md. 551, 561, 199 A. 540, 545 (App. 1938)).

[9] A possible ground for distinction is that the Supreme Court reviews state-court decisions while a Federal District Court initially reviews state-commission decisions under the Act. The argument would be that the Constitution requires any controversy in which a State's dignitary interests are implicated to be decided by this Court, and no other federal court, as a sign of respect for the State's sovereignty. See *Farquhar* v. *Georgia* (C. C. D. Ga. 1791) (Iredell, J.), reprinted in 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 148–154 (M. Marcus ed. 1994) ("It may also fairly be presumed that the several States thought it important to stipulate that so awful [and] important a Trial [to which a State is party] should not be cognizable in any Court but the Supreme"). But this position has long been rejected and is inconsistent with the doctrine of congressional abrogation, which presumes that States may be sued in federal District Court in the first instance when Congress properly so provides, see *Seminole Tribe*, 517 U. S., at 55.