

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SOUTH CENTRAL BELL TELEPHONE COMPANY, ET
AL., Petitioners v. ALABAMA, ET AL.

CASE NO: 97-2045 C.2

PLACE: Washington, D.C.

DATE: Tuesday, January 19, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SOUTH CENTRAL BELL TELEPHONE :

4 COMPANY, ET AL., :

5 Petitioners :

6 v. : No. 97-2045

7 ALABAMA, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, January 19, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:00 a.m.

14 APPEARANCES:

15 MARK L. EVANS, ESQ., Washington, D.C.; on behalf of the
16 Petitioners.

17 CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf of
18 the Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MARK L. EVANS, ESQ.	
On behalf of the Petitioners	3
CHARLES J. COOPER, ESQ.	
On behalf of the Respondents	13
REBUTTAL ARGUMENT OF	
MARK L. EVANS, ESQ.	
On behalf of the Petitioners	36

1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 97-2045, South Central Bell Telephone Company
5 v. Alabama.

6 Mr. Evans.

7 ORAL ARGUMENT OF MARK L. EVANS

8 ON BEHALF OF THE PETITIONERS

9 MR. EVANS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 After this Court granted certiorari in this
12 case, respondents adopted a surprising strategy. In their
13 brief on the merits, they refused to address the two
14 issues on which the Court granted review and instead
15 offered up lengthy arguments on issues that the Court had
16 not agreed to review and, in fact, arguments that
17 respondents had not made or mentioned in their brief in
18 opposition.

19 And then in yet another surprise about 2 weeks
20 ago, respondents later withdrew one of those three
21 arguments in their -- in their merits brief.

22 Barring another surprise today, therefore, what
23 we are left with are two arguments, neither of which can
24 succeed unless the Court is prepared to overrule a very
25 large number of its Eleventh Amendment and Commerce Clause

1 precedents.

2 To bring the case rather briefly back to where
3 it started, the Court granted certiorari to consider two
4 questions: one involving Alabama's use of res judicata as
5 a bar against a constitutional challenge to an Alabama
6 State tax brought by taxpayers who were complete strangers
7 to the prior judgment that was asserted as a bar, and the
8 second involving the lawfulness of Alabama's franchise tax
9 under this Court's Commerce Clause precedents.

10 Now, although respondents put up a defense on
11 both of these issues in their brief in opposition, they
12 obviously chose not to do so again in their merits brief.
13 And I think I can understand why. It's because both
14 issues are controlled by this Court's recent and
15 frequently unanimous precedents. The due process in our
16 case is a near -- in our -- in our judgment is a near
17 clone of Richards against Jefferson County, which was
18 decided less than 3 years ago by a unanimous Court in
19 another case that came from Alabama. And the Commerce
20 Clause question is controlled by Fulton against Faulkner
21 and in another recent Commerce Clause decisions of this
22 Court that have condemned facially discriminatory taxes
23 and that have narrowed the complementary tax doctrine.

24 I don't think I will belabor these points
25 because they are not contested at this point, but as we

1 explained in our brief, the Alabama franchise tax is
2 unlawfully discriminatory because it taxes Alabama
3 corporations based on the par value of their capital
4 stock, a figure that they are utterly free to set and
5 adjust as they wish without any effect on their business
6 operations. But it taxes out-of-State corporations based
7 on the capital actually employed in the State, in other
8 words, based on their business operations in Alabama.

9 In our view there's no -- no need to look any
10 further because any tax that allows in-State corporations
11 to, in effect, determine their own tax liability and not
12 out-of-State corporations is facially discriminatory.

13 In their merits brief in this Court, respondents
14 obviously have abandoned their defense on both of these
15 issues, and they've raised three new issues, one involving
16 the jurisdiction of the Alabama State courts, one
17 challenging this Court's appellate authority under the
18 Eleventh Amendment, and one attacking the entire body of
19 this Court's negative Commerce Clause jurisprudence.

20 The first of these issues need not concern the
21 Court any longer because 2 weeks ago Mr. Cooper wrote a
22 letter to the clerk withdrawing his jurisdiction argument
23 and acknowledging that it was in error. And in our
24 view --

25 QUESTION: Mr. Evans, may I just --

1 MR. EVANS: Yes.

2 QUESTION: -- ask to -- I -- I take it, from
3 what you've said so far, that -- that Justice See on the
4 Alabama Supreme Court who spoke before on the nine -- that
5 his position is essentially right. Is that --

6 MR. EVANS: Yes, exactly right. Justice See
7 actually -- just -- just one minor correction -- spoke for
8 three with another who did not join the opinion but -- but
9 also dissented.

10 In our view, the Court need not reach any of the
11 other issues that -- either of the other issues that
12 respondents raise here because they've waived those
13 arguments by not presenting them in their brief in
14 opposition. But if the Court does reach the issues, we
15 believe the Court should reject both of these arguments.
16 Both ask the Court to overrule rafts of its own precedents
17 without any serious justification in our view.

18 The Eleventh Amendment theory is that in actions
19 brought against the State in State court with the State's
20 consent, this Court has no constitutional power at the end
21 of the -- the end of the process to review a resulting
22 State court judgment raising Federal questions and -- and
23 deciding them in the favor of -- in favor of the State.
24 But that issue was unanimously resolved against
25 respondents' position just 9 years ago in McKesson, and

1 respondents have provided no good reason to revisit it.

2 And in their negative Commerce Clause argument,
3 the respondents ask the Court to nullify a principle the
4 Court has embraced for at least a century and a half and
5 that has engendered enormous reliance throughout the
6 Nation's economy. And moreover, they ask the Court to do
7 this in the least controversial aspect of the negative
8 Commerce Clause, one that invalidates State laws that --
9 that facially discriminate against interstate commerce.

10 As we explain in our reply brief, there is
11 simply no reason to do either of these things. Neither of
12 the doctrines that we're talking about were announced and
13 splintered or badly reasoned opinions that reflected
14 departure from established precedent. Neither has proved
15 unworkable. Some members of the Court have questioned
16 what they view as excesses in the application of the
17 negative Commerce Clause, but even those members have
18 regularly expressed a willingness to continue to apply the
19 core principle of anti-discrimination.

20 And finally, it's not insignificant that
21 Congress has power to alter the effects of both of these
22 jurisprudential principles. Under the negative Commerce
23 Clause, they can exercise authority to permit the States
24 to do what respondents here would like to be able to do,
25 and even under Article III, Congress could restrict this

1 Court's appellate authority if it felt it was appropriate
2 to do so. And the Court's precedents have repeatedly made
3 clear that stare decisis has extra force where Congress
4 can itself make changes in the Court's decisions.

5 QUESTION: Mr. Evans, do you think the -- the
6 Congress could cut off this Court's appellate
7 jurisdiction, say, just in Commerce Clause cases?

8 MR. EVANS: I -- I don't know the answer to
9 that, and it's clearly not something we need to worry
10 about at the moment. But I think it would raise an
11 interesting question, and it may well be able to do that
12 under -- under its Commerce Clause authority. It would be
13 an interesting question I think constitutionally whether
14 that is appropriate or not.

15 QUESTION: But it can reverse our Commerce
16 Clause decisions.

17 MR. EVANS: That's for sure.

18 This -- one of the things that I've noticed
19 recently, in this term even, is that the Court has
20 repeatedly refused to consider arguments raised by
21 respondents as alternative grounds for affirmance that
22 have not been preserved, sometimes invoking rule 15.2,
23 sometimes not. And the most recent was in El Al Airlines
24 just last week where the Court declined to consider an
25 argument that was not presented in the brief in

1 opposition. Earlier this term, there was a case called
2 Knowles.

3 So, from the point of view of petitioners, the
4 Court should not address either of these new arguments
5 that have been made by respondents, but should simply
6 decide the questions on which it granted certiorari,
7 reject the arguments that respondents made in their brief
8 in opposition on those grounds, reverse the judgment, and
9 remand it for provision of appropriate relief consistent
10 with the Court's precedents.

11 QUESTION: In any of those cases, was the new
12 argument that we rejected an argument to the effect that
13 we have no jurisdiction?

14 MR. EVANS: There are cases, Justice Scalia, in
15 which -- at least two cases in which the Court has
16 recently said that if a State does not raise an Eleventh
17 Amendment argument, it need not be considered. And in one
18 case, Patsy --

19 QUESTION: Is that because that may not be a
20 jurisdictional argument?

21 MR. EVANS: Well, that's right. It has -- it
22 has -- as the Court has put it, it partakes of
23 jurisdiction in the sense that it can be raised later in
24 the process than at the first instance, but it is not
25 jurisdictional in the sense that the Court must consider

1 it on its own motion. And in -- in fact, in Patsy, where
2 the argument was raised in a brief in opposition but not
3 pursued in the merits brief, the Court felt no obligation
4 to consider it.

5 QUESTION: I think you have to make that point
6 because -- I think you have to make that point because if
7 it is strictly speaking a jurisdictional --

8 MR. EVANS: Yes.

9 QUESTION: -- point, not only do we have to
10 entertain it if -- if the respondent raises it here for
11 the first time or the petitioner, indeed we have to
12 entertain it on our own, even if he doesn't raise it here
13 for the first time.

14 MR. EVANS: I -- I fully agree.

15 QUESTION: Well, there's some earlier Eleventh
16 Amendment cases, aren't there, Reed Detective and that
17 Indiana case, that say it can be raised here for the first
18 time?

19 MR. EVANS: It can be raised here for the first
20 time, and I'm not suggesting anything to the contrary, but
21 it needs to be raised properly. And here, where in -- in
22 these more -- in Patsy where it was not raised properly in
23 the merits brief, even though it had been raised here, the
24 Court felt no obligation to consider it.

25 Here, what I think is even worse, it was not

1 signaled to the Court in the brief in opposition, but
2 showed up for the first time in the merits brief.
3 Certainly a respondent could not come here and make an
4 argument for the first time in oral argument. There's
5 some requirement of propriety about when something must be
6 presented, and this Court has every reason to disregard an
7 argument that shows up for the very first time in the
8 brief on the merits.

9 QUESTION: Mr. Evans, what are the two cases you
10 were saying where we had done this before?

11 MR. EVANS: The case called Knowles, K-n-o-w-l-
12 e-s, which was decided earlier this term, footnote 2,
13 which refused to consider an alternative argument
14 presented for the first time in the merits brief and not
15 in the brief in opposition, and El Al Airlines, which
16 again was not preserved in the -- where the argument was
17 not preserved in the merits brief, and that was in
18 footnote 10 of that decision.

19 QUESTION: Well, I don't see why -- why is it
20 inappropriate to raise this? What he's raised in the
21 Commerce Clause is an argument he couldn't really raise
22 before this Court. I mean, the argument previously was
23 whether or not the Commerce Clause jurisprudence was
24 properly applied, and -- and now he agrees that Alabama
25 was wrong. They didn't apply it properly. But he's

1 saying that the cases of this Court which set it forth are
2 wrong and we should overturn them. Well, I don't it's
3 fair to ask him to have raised that before the lower
4 court --

5 MR. EVANS: And I'm not -- Justice Breyer, I'm
6 not asking that they do -- that the respondents have any
7 obligation to do that. If they want to present that
8 argument here --

9 QUESTION: Yes.

10 MR. EVANS: -- they can. But they do have an
11 obligation to present it in their brief in opposition, in
12 part, to give notice to petitioners so that we can
13 consider briefing the issue in the opening brief, but more
14 importantly, for this Court's control of its own docket,
15 to know what it is buying into when it grants certiorari.

16 QUESTION: And also to give notice to the
17 amicus.

18 MR. EVANS: And to the amici, absolutely.

19 QUESTION: And that's why we have it in our
20 rules, that if you want to bring it up, put it in the
21 brief in opposition and not for the first time in the
22 respondents' brief.

23 MR. EVANS: That's right, Justice Ginsburg.

24 Unless the Court has further questions, at this
25 point I will reserve the balance of my time.

1 QUESTION: Very well, Mr. Evans.

2 Mr. Cooper?

3 ORAL ARGUMENT OF CHARLES J. COOPER

4 ON BEHALF OF THE RESPONDENTS

5 MR. COOPER: Mr. Chief Justice -- excuse me --
6 and may it please the Court:

7 The argument that has preceded me has
8 crystallized, I think, two issues: one with respect to
9 our Eleventh Amendment argument, one whether or not it is
10 appropriate for it to be taken up and considered by the
11 Court in light of the fact that it was not mentioned in
12 the opposition to the certiorari; and second, if it is,
13 whether it has merit.

14 This Court's rule 15.2 says that we may waive an
15 objection based upon what occurred in the proceedings
16 below if the objection does not go to jurisdiction. Go to
17 jurisdiction. We submit to the Court that the Eleventh
18 Amendment goes to the jurisdiction of this Court.

19 Just a little over 2 years ago, this Court in
20 Seminole Tribe said that the Eleventh Amendment stands for
21 the constitutional principle that State sovereign immunity
22 limited the Federal courts' jurisdiction under Article II.
23 The Court has repeatedly stated that the Eleventh
24 Amendment, for example, in the Ford case which really is
25 on all fours with our circumstance here, the Ford Motor

1 case --

2 QUESTION: Mr. Cooper, may I interrupt you with
3 this point to read from a unanimous opinion 9 years ago
4 with which you are no doubt familiar. It says, the
5 Eleventh Amendment does not constrain the appellate
6 jurisdiction of the Supreme Court over cases arising from
7 State courts. Period.

8 Now, that -- you are asking us to overrule a
9 unanimous 9-year-old decision. Is that correct?

10 MR. COOPER: That is accurate, Justice Ginsburg.
11 I have many reasons for that request that I -- that I will
12 -- that I will address, but --

13 QUESTION: May I ask you also as an anterior
14 question, do we take it that you are not pursuing any of
15 the -- the questions that were in -- raised originally?
16 You are -- you are not defending the res judicata point
17 that the Alabama court relied on and you're not defending
18 their analysis of the discriminatory tax.

19 MR. COOPER: Justice Ginsburg, that is accurate.
20 We are saying that the Commerce Clause merits argument is
21 that we -- we're entitled to prevail on that but not
22 because of the Alabama Supreme Court's correct application
23 of the Commerce Clause precedents, but rather because, as
24 three members of this Court argued not long ago, the
25 dormant Commerce Clause cases are not well considered, and

1 the Court should carefully reexamine those arguments that
2 were advanced by those --

3 QUESTION: But so, if we don't -- if we don't
4 accept these new arguments you're presenting today, then
5 you agree that we must reverse the -- the judgment.

6 MR. COOPER: Unless some member of this Court
7 can think of a different argument, Justice Ginsburg, for
8 upholding the Alabama Supreme Court's decision, that is
9 accurate.

10 Our premise argument however, Justice Ginsburg,
11 is that this Court cannot reach the merits of this issue
12 because of the Eleventh Amendment.

13 And again, Ford Motor Company, which I think the
14 Chief Justice was referring to earlier, the Indiana case,
15 Your Honor, is on, we believe, all fours in terms of the
16 ability of the Court to take the case up. There the --
17 the State of Indiana did not raise the Eleventh Amendment
18 in the district court. It didn't raise it in the Seventh
19 Circuit. It didn't raise it in its op cert. In fact, it
20 raised it in its merits brief because --

21 QUESTION: Of course, we've changed our rules on
22 what the brief in opposition has to include since the City
23 of Tuttle -- Oklahoma City against Tuttle I think.

24 MR. COOPER: If -- if the -- if this is not a
25 jurisdictional point, if this issue doesn't go to

1 jurisdiction, then the Court could certainly exercise its
2 discretion not to reach the issue. It's our submission,
3 Justice Stevens, that the Eleventh Amendment and this
4 Court's consistent understanding and application of it --

5 QUESTION: I don't understand your rule
6 actually. I mean, this is -- can you explain? The copy I
7 have, which may be -- it says, any objection -- any
8 objection to consideration of a question presented, based
9 on what occurred in the proceeding below, if the objection
10 does not go to jurisdiction, may be deemed waived.

11 I take it yours is not an objection based on
12 what occurred in the proceeding below.

13 MR. COOPER: Not at all, Justice Breyer. In
14 fact --

15 QUESTION: Then this rule doesn't cover it.

16 MR. COOPER: Well, this -- this -- the
17 element --

18 QUESTION: Is that an argument? I don't know.
19 I haven't focused on this rule.

20 MR. COOPER: Oh, it's -- it is absolutely our
21 argument, Justice Breyer. Our -- our contention is not
22 that the Alabama Supreme Court was barred by the Eleventh
23 Amendment. We don't have a problem with what -- what took
24 place below. It is that what took place below, the
25 adjudication of the merits of the issue, can't take place

1 here. That -- that is our argument. And the reason it
2 can't take place -- so, we have a double argument under
3 the -- under rule 15.2, Justice Breyer. That's point
4 number one.

5 But point number two is in any event, the
6 Eleventh Amendment goes to jurisdiction.

7 QUESTION: Well, a better practice under rule 15
8 under the previous part of the rule, two sentences
9 previous as to what Justice Breyer quoted, is for you to
10 notify the Court what issues are properly before us,
11 including jurisdictional issues. You don't think you can
12 just lay back --

13 MR. COOPER: No, Your Honor.

14 QUESTION: -- from the standpoint of good
15 practice and not tell us about jurisdictional issues.

16 MR. COOPER: No, Your Honor. We regret that
17 this point was not mentioned in the opposition to
18 certiorari. It would have been better practice if it had
19 been.

20 The part of the rule, however, that goes to and
21 alerts counsel to the possibility of waiving an argument
22 speaks to jurisdiction and it speaks to objections based
23 upon what occurred below.

24 QUESTION: I understand.

25 MR. COOPER: And with all due respect, we

1 maintain that this Court actually doesn't have discretion
2 in a jurisdictional argument that is waived -- that is
3 asserted to the Court to -- to not reach the issue.
4 Again --

5 QUESTION: Mr. Cooper, this is -- this is the
6 problem, as I see it, with fair notice. One could hardly
7 anticipate such a question given that there was a
8 unanimous decision 9 years ago addressing precisely that
9 question and rejecting your position. So, the petitioner
10 could hardly expect that that would be an issue in this
11 case, and that's why this is so troublesome, that you're
12 bringing up something that one really could not have
13 anticipated.

14 MR. COOPER: Your Honor, all I can say is that
15 the issue, again, goes to jurisdiction. The question is
16 whether or not -- I think there are two different
17 questions, whether it would have been better practice, and
18 certainly it would have, to have mentioned this in the
19 opposition to certiorari. The issue had been spotted that
20 in fact what we have in this case is a suit in which --
21 that was commenced by the petitioners, none of whom are
22 citizens of Alabama, against the State of Alabama and its
23 Department of Revenue, State defendants. And if this
24 Court exercises -- does reach the merits, it will be
25 exercising the judicial power of the United States.

1 The case is squarely within the very letter of
2 the Eleventh Amendment, and it is our respectful
3 submission to the Court that the McKesson case, for a
4 number of reasons, was simply wrong. In fact --

5 QUESTION: If -- if it is a jurisdictional
6 objection based upon sovereign immunity, which is what you
7 assert, right, the Eleventh Amendment being a reflection
8 of sovereign immunity, sovereign immunity is normally
9 waivable, isn't it, by the sovereign? So, I mean, it may
10 be jurisdictional, but -- but maybe it's a peculiar -- it
11 has to be a peculiar kind of jurisdiction.

12 MR. COOPER: Your Honor, sovereign immunity can
13 be waived, but this Court's decisions have clearly stated
14 that sovereign immunity must be waived in the most
15 unequivocal way, that --

16 QUESTION: Not this particular situation of --
17 of appellate review by the Supreme Court. This was not
18 just a offhand statement. This is a very heavily
19 footnoted, 5-page discussion of the issue, citing cases
20 going back to Martin against Hunters Lessee.

21 MR. COOPER: You're referring to McKesson?

22 QUESTION: Yes.

23 MR. COOPER: Well, Justice Ginsburg, since that
24 case was decided, the Seminole Tribe case has been
25 decided, and four members of this Court characterized the

1 reasoning in McKesson as being specious, particularly in
2 light of the Seminole Tribe case. And I would --

3 QUESTION: They were also the same four who
4 would find Federal question jurisdiction here.

5 MR. COOPER: Yes, Your Honor, but if there is
6 Federal question jurisdiction, if -- if -- if the Eleventh
7 Amendment does, indeed, bar a Federal question case, that
8 is, a case as in Seminole brought by a citizen of the
9 State against the State, then the Court's analysis -- or
10 the dissenting Justices' analysis in Seminole Tribe, it
11 seems to us, is precisely correct.

12 QUESTION: Well, of course, those -- those who
13 agreed with the majority position did so on the assumption
14 that the Supreme Court had jurisdiction. If that
15 assumption were to change, then those who were in the
16 majority in McKesson might rethink the correctness of the
17 position advanced in the dissent.

18 MR. COOPER: Might as well, Your Honor, and it
19 may well be that here my argument is focused more
20 specifically on the five members of the Court in the -- in
21 the majority in Seminole Tribe.

22 But McKesson, Justice Ginsburg, while it was a
23 unanimous decision, was premised upon -- its central
24 linchpin was the Cohens case, and it -- it is simply
25 based, we respectfully submit, on a serious misreading of

1 the Cohens case. That case involved --

2 QUESTION: You don't challenge the Cohens case
3 itself, I take it.

4 MR. COOPER: No, not at all, Your Honor. It
5 seems that the Cohens case, Your Honor, is -- is quite
6 correct. It simply stands for the proposition that a --
7 when a State commences a suit against an individual, that
8 is not a -- an individual commencing a suit against the
9 State. And so, it's not within the language of the
10 Eleventh Amendment, number one. It's not within the
11 purpose of the Eleventh Amendment. A State doesn't need
12 immunity to --

13 QUESTION: Why isn't it within the language if
14 it's -- if it's -- the State brings the proceeding, but
15 the person who's bringing it to the Supreme Court on writ
16 of error, or whatever it is, is going against the State at
17 that point. I don't understand why that wouldn't --

18 MR. COOPER: Your Honor --

19 QUESTION: You say, oh, and the language in one
20 case -- in the Cohen case, the language covers it. In the
21 case where the parties are on opposite sides, it doesn't?

22 MR. COOPER: Your Honor, Chief Justice Marshall
23 examined that very issue at length. In fact, we've
24 excerpted on page 19 of our briefing the analysis of -- of
25 the Court in Cohens that went to that issue. And the --

1 the central point is that a suit for purposes of the
2 Eleventh Amendment is a judicial proceeding instituted by
3 an individual that seeks some demand upon the State, some
4 demand upon the State. And that character doesn't change
5 when a writ of error is taken to this Court to review a
6 decision. The -- the individual is still seeking a demand
7 upon the State. So --

8 QUESTION: Your view of -- just to kind of --
9 your view is that any proceeding in a State court brought
10 against the State by a citizen of another State could
11 never be reviewed by this Court.

12 MR. COOPER: If -- if the State itself is the
13 party defendant --

14 QUESTION: Right.

15 MR. COOPER: -- as opposed to an officer of the
16 State. And, Your Honor, in this very case, the
17 Commissioner of Revenue was a party until the case went to
18 the Alabama Supreme Court. He was dropped out at that
19 stage, and this Court could have considered this very
20 decision -- this very case had the Commissioner remained
21 in under this Court's decisions in the Ex parte Young.

22 QUESTION: Would the respondent have -- would it
23 be within the judicial power of this Court to grant a
24 motion by the respondent at this stage of the proceedings
25 to add that individual as a defendant in order to preserve

1 the jurisdiction and review?

2 MR. COOPER: I do not think it would be, Justice
3 Stevens. I think whether or not the Commissioner is a
4 party to this suit as a defendant depends upon whether he
5 was a party in the Alabama Supreme Court under this
6 Court's rules.

7 And it is clear from a case called Sperau, which
8 we cite and discuss in footnote 1 of our briefing, that --
9 that when the Commissioner was not named in the notice of
10 appeal from the Circuit Court of Montgomery County to the
11 appellate courts, that the Commissioner was no longer a
12 party. The court there said it is settled law that a
13 notice of appeal from a judgment in favor of two or more
14 parties must specifically name each party whose judgment
15 the appellant wishes to overturn. And this --

16 QUESTION: Let me go back a second. I
17 understand your response to that and I think it's probably
18 correct.

19 But does it -- what is your view of suing
20 individuals in their official capacity, with the Eleventh
21 Amendment as usually taken, to bar such a suit? Can they
22 -- could -- could under your view an out-of-State
23 plaintiff avoid the Eleventh Amendment problem, when it's
24 thinking it may need review in this Court ultimately, by
25 suing State officials in their official capacity?

1 MR. COOPER: Yes. Yes, Your Honor, under Ex
2 parte Young. And --

3 QUESTION: To get money out of the State
4 treasury?

5 MR. COOPER: No.

6 QUESTION: To get back money which they have --
7 they claim was erroneously paid into the State treasury?

8 MR. COOPER: No, Justice Scalia, but they can
9 certainly prevent it from going forward, and that's the
10 purpose of Ex parte Young. The question here I guess
11 would be --

12 QUESTION: You're trying to get it back, though,
13 aren't you? Are you trying to get it back or are you
14 trying to prevent its payment?

15 MR. COOPER: Oh, I'm obviously trying to prevent
16 its payment, Your Honor. I represent the State.

17 QUESTION: But they're trying to get it back.

18 QUESTION: To the extent -- these -- these
19 plaintiffs here -- I thought they had coughed it up
20 already.

21 MR. COOPER: Well but, Your Honor, they --
22 they --

23 QUESTION: So, they're trying to get money back
24 out of the State treasury.

25 MR. COOPER: Not just to get it back. They also

1 sought injunctive relief to prevent the collection in the
2 future of this tax, and that, Justice Stevens, would be a
3 case that if the Commissioner were still in this --

4 QUESTION: But you're saying that they have
5 nothing -- nothing -- no way of getting back -- getting a
6 refund. This is a suit for a refund.

7 MR. COOPER: Well, they -- they -- they have the
8 Alabama court system for getting back a refund. The
9 question is whether or not --

10 QUESTION: Yes, but whatever Alabama says, this
11 Court has no -- and it's a Federal question that we're
12 dealing with. Alabama will be the final word on that
13 Federal question with respect to outsiders.

14 MR. COOPER: With respect to this suit, yes,
15 Justice Ginsburg.

16 QUESTION: Well, all taxpayers from out-of-
17 State.

18 QUESTION: With respect to all suits involving a
19 claim for money.

20 MR. COOPER: Well, but I -- I want to hasten to
21 note, as the Court pointed out in Seminole Tribe, that
22 there are -- there are several methods where ongoing
23 violations of the -- of the Constitution, if that's what
24 this is, can be prevented. The United States can bring an
25 action. An Ex parte Young action can be brought. The

1 Congress can decide to abrogate the State's sovereign
2 immunity.

3 QUESTION: What would be the authority for the
4 United States to bring an action in a case like this where
5 you're talking about the negative Commerce Clause?

6 MR. COOPER: Well, Your Honor, I -- I think that
7 -- I don't have a case to cite the Court that the United
8 States would have authority on that score, but at least
9 broadly considered, the United States can sue a State and
10 there's no -- there's no Eleventh Amendment problem to
11 this Court's jurisdiction over that.

12 QUESTION: Well, do you think the United States
13 can just go around and sue a State whenever it feels like
14 it?

15 MR. COOPER: Oh, no. No, Your Honor. That's --
16 that is not my submission. But -- but I think the key
17 point here is that Ex parte Young would -- would provide
18 the taxpayers relief with respect to going forward.

19 But --

20 QUESTION: But in any event, for -- for you to
21 prevail here, I guess we would have to overturn McKesson
22 and ignore our own rule as a minimum.

23 MR. COOPER: Your Honor, I think -- I think that
24 the Court need not -- if you're speaking about rule 15.2,
25 I believe the Court can apply its rule and -- and reach

1 the Eleventh Amendment. That is our submission.

2 I do also believe, however, that yes, it is true
3 that McKesson was wrongly decided. The Court should
4 reexamine it, and -- and it should overrule it.

5 Your Honor, sovereign immunity -- inherent,
6 Justice Ginsburg --

7 QUESTION: This is the kind of argument that one
8 would certainly hope that amici would focus on and be
9 interested in. Nobody had a clue it was going to be
10 raised until your remarkable brief appeared here in this
11 Court.

12 MR. COOPER: Once again, Justice O'Connor, the
13 Eleventh Amendment argument is a constitutional one. It
14 is a jurisdictional one, and it is our respectful
15 submission to the Court that the State can raise this in
16 its -- in its merits briefs. By no means did it waive its
17 sovereign immunity in this -- in this case.

18 And, Justice Ginsburg, with respect to the
19 notion that -- that the petitioners here would have no
20 Federal avenue of appellate review, inherent in the notion
21 of sovereign immunity is -- and inherent in the notion of
22 the Eleventh Amendment is that the Federal courts are
23 precluded from taking jurisdiction over a case brought
24 against non-citizens against the State itself. And this
25 is a case against the State itself.

1 QUESTION: Once you hold that -- once you say
2 that, you know -- once you treat the Eleventh Amendment as
3 including citizens of a State against a State, which I
4 take it we have to read into it -- right? Isn't that so?

5 MR. COOPER: Well, that's the Hans case, Your
6 Honor.

7 QUESTION: Yes, all right. So -- so then could
8 -- is it reasonable that the thing -- if we accepted your
9 view of the statute that this applies to the Supreme
10 Court, cases coming out of the State courts, then wouldn't
11 there have been a large subset of cases where it would
12 have been impossible or difficult to enforce a uniform
13 Federal law striking down unconstitutional State statutes,
14 that power that Holmes thought was absolutely essential to
15 create a Federal Nation?

16 I -- I think if your -- if your view had been
17 adopted back then and we had Hans, there would have been a
18 whole subset of potential unconstitutional State laws that
19 it would have been impossible for the -- or State laws
20 that conflict with the Federal statute, that it would have
21 been impossible or difficult for the Supreme Court ever to
22 reach. So, you would have had that.

23 Now, is -- now, you're going to deny that, and
24 I'm very interested in your reasoning.

25 MR. COOPER: Well, Justice Breyer, I think that

1 the point I would make to you is that if Chisolm, in
2 Chisolm against Georgia, had advanced a Federal cause of
3 action, I don't think that the State's reaction would have
4 been any different. It would have -- the general alarm
5 that swept the -- the country when the Supreme Court took
6 jurisdiction over that State law claim against the State
7 would not have -- I would submit to you would not have
8 been different if a Federal constitutional claim had been
9 included in it. And, in fact, the -- the Congress and the
10 ratifiers of the Eleventh Amendment would have used
11 exactly the same words in order to reach what happened
12 there. This -- this Court's --

13 QUESTION: The only way it could have reached
14 the Supreme Court would be if the States basically had
15 waived their sovereign immunity within their own courts.
16 Right? Otherwise, the issue couldn't have come up.

17 MR. COOPER: Well --

18 QUESTION: And if it had come up in that form,
19 what would have been the objection to the Supreme Court
20 hearing it?

21 MR. COOPER: Two points, Your Honor. First,
22 that the -- this Court has recognized that a -- a State's
23 waiver of its own State sovereign immunity in its own
24 courts doesn't -- in Atascadero, the Court made clear that
25 the waiver of sovereign -- of the Eleventh Amendment must

1 be specifically worded. So, Alabama's waiver here does
2 not include a waiver of its Eleventh Amendment because it
3 doesn't mention the Federal -- the Federal court.

4 And the -- as I say, in the Chisolm case, the --
5 if -- if there had been a contract clause or -- and that
6 was an original action. But, Your Honor --

7 QUESTION: So, your answer to me is, well, the
8 Eleventh Amendment does create such a subset of cases.
9 All the State has to do is keep out of the courts. And --
10 and this doesn't make matters that much worse. That's the
11 answer.

12 MR. COOPER: That's -- that's -- that's
13 essentially it, Your Honor. But -- but I think the
14 Court's focus on -- on -- on Chisolm is -- or at least on
15 the origins of the Eleventh Amendment is -- is -- is well
16 taken.

17 QUESTION: Well, does your -- does your doctrine
18 that you're espousing now have a Ex parte Young exception
19 to it?

20 MR. COOPER: Your Honor --

21 QUESTION: So that you could sue -- you could
22 sue the Alabama Revenue Commissioner in -- in -- in State
23 court and bring that suit here if it was decided against
24 you on a Federal ground.

25 MR. COOPER: Yes, Your Honor.

1 QUESTION: For refund? For refund, is it?

2 MR. COOPER: No. Thank you, Justice Stevens. I
3 think that's an important amendment. I think Ex parte
4 Young only goes as far as Ex parte Young, but I think it's
5 available to the petitioners in this case and it would --
6 and it would allow the case to be brought to this Court as
7 an at least --

8 QUESTION: How -- how many years was, Mr.
9 Cooper, this case in litigation, this refund claim?

10 MR. COOPER: Your Honor, the -- the refund claim
11 I think was in the Alabama court somewhere on the order of
12 a decade.

13 QUESTION: Yes, and all that time the
14 corporation must pay the tax, and on your Ex parte Young
15 theory, maybe there could be a prospective relief, but for
16 all those 10 years, the Federal Court, this Court, is
17 unable to say that the State law was unconstitutional.
18 And there's no remedy at all for 10 years of
19 unconstitutional behavior on the part of the State.

20 MR. COOPER: Your Honor, I think that's -- I
21 think that is the consequence, the unavoidable
22 consequence, of sovereign immunity. I think that is
23 inherent in the notion of sovereign immunity.

24 QUESTION: And that would certainly run counter
25 to Justice Breyer's reference to Holmes saying it wouldn't

1 matter so much if this Court didn't have the authority to
2 declare an act of Congress unconstitutional, but if it
3 lost that power with respect to State laws, the Union
4 would be something quite different from what it is.

5 MR. COOPER: Your Honor, the -- the language of
6 the Eleventh Amendment, its -- its very letter, does not
7 contemplate this exception. It says the judicial power of
8 the United States. When this Court reaches the merits of
9 this case, it will be exercising the judicial power of the
10 United States. The Eleventh Amendment specifically and
11 precisely enjoins this Court from construing the judicial
12 power of the United States to extend to a suit commenced
13 by these petitioners, non-citizens of Alabama, against
14 Alabama.

15 QUESTION: Well, if we're going to be fastidious
16 about the language of the Eleventh Amendment, we'd have to
17 redo a lot of our jurisprudence, wouldn't we?

18 (Laughter.)

19 MR. COOPER: Well, Your Honor, I think that --
20 my answer, Justice Kennedy, is this. Never has this Court
21 cut back on the Eleventh Amendment. In fact, every time
22 it has recognized that the letter of the Eleventh
23 Amendment doesn't exhaust the protections of the Eleventh
24 Amendment, it has extended it, such as in Hans, to
25 citizens of a State, such as in Monaco, to foreign

1 nations.

2 How is it -- how can it be that in Seminole
3 Tribe that a case that is not within the letter of the
4 Eleventh Amendment, brought by citizens of the State of
5 Florida, and despite --

6 QUESTION: Mr. Cooper, the issue I suppose, even
7 on the letter, is whether this is a suit within the
8 meaning of the Eleventh Amendment, and that's the answer
9 Justice Marshall gave. The writ of error was not a suit.
10 And you could similarly, it would seem to me, say that a
11 proceeding in State court is not a suit within the meaning
12 of that provision because that's dealing primarily with
13 original Federal actions.

14 MR. COOPER: Your Honor, I think Cohen is a very
15 difficult road for that argument. A writ of error in that
16 case wasn't a suit because it was -- because the suit had
17 been commenced by the State against the individual.

18 QUESTION: I understand.

19 MR. COOPER: And -- and --

20 QUESTION: But it's still a key to your argument
21 that we read the word suit to refer to the State
22 proceeding because --

23 MR. COOPER: Oh, yes.

24 QUESTION: -- the petition for cert isn't a
25 suit. So -- and -- and it seems to me one could

1 conceivably say they were thinking about actions
2 originated in a Federal court, and that's the kind of suit
3 that is referred to in that -- in that provision. That's
4 consistent with what Chief Justice Marshall said.

5 And incidentally, we don't just have to overrule
6 McKesson. We've got overrule all the cases in the
7 footnote he cited too. There are about 30 of them there.

8 MR. COOPER: Your Honor, I think Chief Justice
9 Marshall in Cohens made clear that the -- that -- and that
10 was a case that came up out of the State --

11 QUESTION: Correct.

12 MR. COOPER: -- appellate system. And -- and --
13 and if it was as easy as nothing that happens in the State
14 constitutes a suit, then --

15 QUESTION: Within the meaning of the Eleventh
16 Amendment.

17 MR. COOPER: Within the meaning of the Eleventh
18 Amendment, then a very short opinion.

19 But Justice -- but Chief Justice Marshall
20 analyzed at great length what a suit is, and he said it's
21 any proceeding brought in a court of law, court of
22 justice, which included, presumably, the courts of
23 Virginia, by a non-citizen.

24 So, Your Honor, I think -- I think it would be a
25 very strange, with all due respect, interpretation of the

1 word suit to suggest that the framers and the ratifiers of
2 the Eleventh Amendment didn't contemplate at all a suit
3 coming to the courts through the appellate route as
4 opposed to initially instituted in the Federal court
5 route. In fact, presumably, the Federal courts of appeals
6 could be authorized to review State supreme court
7 decisions if -- if -- if that view is correct.

8 QUESTION: They are actually in some instances.
9 In the FDIC area --

10 MR. COOPER: Well, this --

11 QUESTION: -- there were some. In the FDIC
12 area, there -- when -- a Federal takeover of a bank, there
13 is appellate jurisdiction. I've had them. We had those
14 cases.

15 MR. COOPER: But surely not when the State is --

16 QUESTION: Yes, it was tried in the State court,
17 tried in the State court, and they got their appeal over
18 to the Federal appeals court.

19 MR. COOPER: When the State itself is a
20 defendant.

21 QUESTION: In that case.

22 MR. COOPER: Yes.

23 QUESTION: I -- it didn't *

24 MR. COOPER: Your Honor, I -- my time is about
25 expired and obviously I have little time left to devote to

1 our -- our respectful request that the Court reexamine
2 this Court's negative Commerce Clause jurisprudence. We
3 have nothing to add to the treatment that was provided by
4 Justice Thomas in his dissenting opinion not -- not long
5 ago in the -- in the Camps Newfound case on the merits of
6 that point.

7 But I would like very briefly to address the
8 issue of stare decisis and the -- thank you, Your Honor.

9 QUESTION: Thank you, Mr. Cooper.

10 Mr. Evans, you have 18 minutes remaining.

11 REBUTTAL ARGUMENT OF MARK L. EVANS

12 ON BEHALF OF THE PETITIONERS

13 MR. EVANS: Just three very quick points.

14 Mr. Cooper has referred to Seminole's -- the
15 opinion in Seminole as suggesting that there are other
16 routes to raise Federal issues. The footnote I believe he
17 is referring to is footnote 14, and the three items that
18 are mentioned are a suit by the United States, an Ex parte
19 Young action, and then I'd like to just quote this
20 language.

21 And this Court is empowered to review a question
22 of Federal law arising from a State court decision where a
23 State has consented to suit. That is this case, just to
24 underscore Justice Kennedy's point that the assumption
25 underlying Seminole may well have included this Court's

1 appellate authority over a case like this.

2 Second, Mr. Cooper mentioned the Ford Motor case
3 as an example of one that held that a -- a waiver of State
4 sovereign immunity does not necessarily translate into a
5 waiver of Eleventh Amendment immunity. True, but only
6 with respect to actions in the district court. That very
7 case, which is typically cited for this proposition, says
8 the following at page 470 at 323 U.S.

9 As we indicated in the Reed case, the
10 construction given the Indiana statute leaves open the
11 road to review in this Court on constitutional grounds
12 after the issues have been passed on by State courts. So,
13 the very decision in which the Court held that a -- a
14 State sovereign immunity waiver does not convert to an
15 Eleventh Amendment waiver also assumes that there's review
16 available in this Court.

17 And finally, a lot of this we believe is
18 entirely hypothetical because the -- for purposes of
19 Alabama law -- this is a case cited at page 6 of our reply
20 brief -- in a case called State against Norman Tobacco,
21 which was basically the reason the jurisdictional argument
22 that Mr. Cooper had made as his first argument did not
23 work. The Alabama Supreme Court said that a -- an action
24 of the sort we have here -- and I'm quoting again -- is
25 not a suit against the State. Now, that doesn't

1 necessarily bind this Court in its interpretation of the
2 Eleventh Amendment, but that bears some relevance to the
3 question.

4 Unless the Court has further questions.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Evans.

6 The case is submitted.

7 (Whereupon, at 11:44 a.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

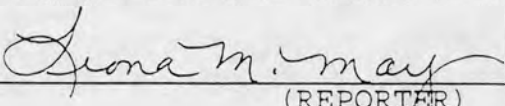
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The United States in the Matter of:

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL., Petitioners v.
ALABAMA, ET AL.

CASE NO: 97-2045

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