2017 WL 1192143 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.
STATE OF WEST VIRGINIA ex rel. Patrick Morrisey, Petitioner,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.

No. 16-721.
March 28, 2017.
On Petition for Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit
Reply Brief of Petitioner
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*1 REPLY BRIEF

The Response Brief ("BIO") filed by Respondent United States Department of Health and Human Services ("United States") confirms the need for this Court's intervention. Tacitly acknowledging the indefensibility of the D.C. Circuit's decision, the BIO devotes more space to describing the district court opinion (at 4-5) than the court of appeals opinion under review (at 5-6). It then fails to squarely confront any of the concerns raised in the Petition. In response to the

charge that the decision below conflicts with numerous precedents of this Court, the United States misdirects, misconstrues the opinion below, or ignores points entirely. And the BIO says nothing at all in response to the Petition's argument that, by finding that West Virginia lacks standing to enforce a cooperative-federalism regime intended specifically to protect the state-federal balance, the D.C. Circuit has removed an important check on the federal government's role in our system of dual sovereignty.

I. The D.C. Circuit's decision conflicts with or undermines several of this Court's precedents.

A. The decision below conflicts with this Court's decision in *Spokeo.*

The D.C. Circuit first held, in conflict with this Court's decision in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), that West Virginia's asserted injury is not sufficiently concrete for two reasons. The United States defends that holding on the ground that West Virginia has overstated the conclusions in the D.C. Circuit's opinion. But that opinion speaks for itself, and it is clear that the D.C. Circuit failed in both *2 instances to take into account the *Spokeo* decision, which the court never cited or discussed.

1. As explained in the Petition, *Spokeo* "soundly refutes the D.C. Circuit's conclusion that West Virginia lacked an injury-in-fact simply because its harm could not be quantitatively '[]measure[d].' " Pet. 13 (quoting App. 6a). The United States contends that the D.C. Circuit "did not state, much less hold, that intangible harms can never confer standing." BIO 9. But that misses the point. The problem with the D.C. Circuit's decision is that it rejected an injury as non-concrete *solely on the ground* that the injury is "inherently immeasurable." App. 7a. It is that conclusion - the notion that immeasurability *alone* is sufficient to render an injury non-concrete - that is foreclosed by *Spokeo.*

The United States offers nothing to suggest that the D.C. Circuit's conclusion, properly understood, can be squared with *Spokeo.* To the contrary, the BIO embraces the lower court's flawed reasoning. It argues that West Virginia's asserted injury is not concrete for the sole reason that a court cannot "measure" the degree of harm. BIO 8. But as this Court said in *Spokeo*, an injury can be concrete even if the harm "may be difficult to prove or measure." 136 S. Ct. at 1549.

2. In a separate part of the opinion discussing particularity, *see infra* Section I.B, the D.C. Circuit also ran afoul of *Spokeo* by conflating concreteness and particularity. The United States contends that the court of appeals found West Virginia's asserted injury to be "*neither* concrete *nor* particularized." BIO 11. But that characterization of the decision *3 below is not supported by the opinion. The opinion states that West Virginia "lacks a concrete injury-in-fact" and then explains the basis for that statement in the immediately following sentence, which says that "[West Virginia's] injury is not particular." App. 7a (emphasis altered). That is an obvious "fail[ure] to fully appreciate the distinction between concreteness and particularization." *Spokeo,* 136 S. Ct. at 1550.

B. The decision below conflicts with this Court's numerous decisions holding that an intrusion on a State's sovereignty constitutes an Article III injury-in-fact.

The D.C. Circuit further contravened this Court's precedents when it held that West Virginia's alleged "breach of state sovereignty," assuming its validity, is merely "a generally available grievance" and therefore an insufficiently personal injury. App. 7a (internal quotations omitted). As explained in the Petition, that conclusion cannot be squared with numerous decisions of this Court. Pet. 14-16. Taken together, those cases show that a State claiming harm to its sovereignty is quite unlike an individual claiming "a generally available grievance," *i.e.*, harm to his and every other citizen's general interest in the rule of law. Under this Court's cases, nothing could be

more "personal" to a State than a violation of its distinct sovereign status. *Id.* at 15. That is why this Court has held, time and again, that an intrusion on a State's sovereignty is a sufficient injury for Article III standing. *Id.* at 14-15.

The United States never answers this charge. Nowhere does it explain how a State claiming a breach of its sovereignty - essentially an intrusion on *4 the State's "dignity," *Fed. Maritime Com'n v. S. Carolina State Ports Auth.*, 535 U.S. 734, 760 (2002) - lacks a particularized stake in a legal challenge. Instead, the United States seeks merely to distinguish on their facts just three of the cases relied upon by the State. As before, that misses the point entirely. The error in the D.C. Circuit's analysis is not its failure to follow one particular state sovereignty decision, but rather its conclusion that a breach of state sovereignty can somehow be dismissed under this Court's cases as a mere "generally available grievance."

C. The decision below undermines this Court's decision in *Carter Coal.*

Finally, in tension with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the D.C. Circuit rejected West Virginia's alternative argument that the State suffered injury from an unconstitutional delegation of authority to set or enforce federal law. As previously explained, this Court in *Carter Coal* struck down as unconstitutional delegation "in its most obnoxious form" an attempt by the federal government to delegate federal regulatory authority to a non-federal entity. *Id.* at 311. But under the D.C. Circuit's decision, which rejected West Virginia's standing as a delegee to challenge a delegation of federal authority, the very object of the delegation in *Carter Coal* could not have asked a court to rid it of its unwanted responsibility.

In its BIO, the United States does not dispute this assertion, but rather embraces it. It does not contest that the D.C. Circuit's decision will preclude an entity delegated unwanted federal authority from *5 challenging that delegation. Instead, it proffers that the only third parties suffering "economic injuries" at the hands of those exercising the delegated authority could sue to challenge the underlying delegation. BIO 12.

The United States offers no answer, however, to the fact that its view and that of the D.C. Circuit turns the Article III standing analysis on its head. As noted in the Petition, this Court's case law favors suits brought by those directly affected by a challenged action over those brought by third parties. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1991).

II. The D.C. Circuit's decision removes an important check on the federal government's role in our system of dual sovereignty.

A. Beyond failing to show that the D.C. Circuit's decision is consistent with this Court's cases, the United States does not respond to the argument that West Virginia must have standing because the federal government has fundamentally altered a "cooperative-federalism" regime. As previously explained, this Court has expressly endorsed these regimes as a permissible means to involve States in a federal regime without unconstitutionally transgressing the "separation of the [state and federal] spheres." *Printz v. United States*, 521 U.S. 898, 919 (1997). If Congress has the power to preempt the States *and has committed to do so* in the event the States choose not to act, that ensures each sphere "remain[s] accountable to its own citizens." *Id.* at 920. But in this case, the federal government "abandon[ed]" its statutorily mandated backup role *6 and "left the States holding the bag." App. 3a. Yet the States - the very entities protected by the requirements of a cooperative-federalism regime - are barred from seeking judicial review of the federal government's actions.

The United States asserts that "[v]irtually any decision by the federal government to regulate (or refrain from regulating) in a particular area … could also be cast as altering the 'political terrain' facing States." BIO 8. But that is, again, unresponsive to West Virginia's actual argument.

Cooperative-federalism regimes, like the one at issue here, are distinguishable from other federal regulatory (or deregulatory) regimes. As explained in the Petition and above, withdrawing the federal government from a cooperative-federalism regime blurs lines of political accountability between the state and federal governments, and raises constitutional concerns, in ways that do not occur in other contexts.

For example, the United States cites *Massachusetts v. Mellon*, 262 U.S. 447 (1923), but that case is readily distinguishable. In *Mellon*, the Court found that a choice presented to the States under the Spending Clause is not sufficiently burdensome to support standing. Under its spending power, the federal government is authorized to put States to a choice as to whether to implement federal law if Congress also commits to providing federal funds to States that opt in to the federal regime. That is not a violation of state sovereignty because States agreed as part of the constitutional compact that if Congress is willing to commit federal dollars *7 as a financial inducement, it has the power to make States choose.

Here, unlike in *Mellon*, there is no specific authorization in the Constitution for the choice being put to the States. Congress has not acted pursuant to its spending power, and there are no federal dollars on the line. In these circumstances, the federal government does not have the power to make States the ultimate decision makers over the enforcement (or non-enforcement) of federal law. That violation of state sovereignty is an injury sufficient to support standing.

B. The United States also does not respond to several other key points. It does not dispute the importance of certiorari in a case like this given the outsized role that the D.C. Circuit plays in administrative law and cooperative-federalism cases. Pet. 20. Nor does the United States dispute that mootness is not a concern or that, even if the matter were to become moot, this Court should still grant certiorari and vacate the decision below. *Id.* at 21-22; *see also* *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-40 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the U.S. Court of Appeals for the D.C. Circuit should be reversed or vacated.

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