2016 WL 7011431 (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 RESOURCES, Respondent.

No.
16
-
721

November 28, 2016.

On Petition For Writ Of Certiorari To The U.S. Court of Appeals for the D.C. Circuit

Petition for Writ of Certiorari

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*i QUESTIONS PRESENTED FOR REVIEW

Under Article III of the U.S. Constitution, a plaintiff has standing to invoke federal jurisdiction so long as the plaintiff has suffered an injury in fact that is fairly traceable to the challenged conduct and that is redressable by a favorable judgment. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1991). The plaintiff's injury must be concrete, as opposed to abstract, and must also be particular, as opposed to generalized.

The questions presented in this case are:

(1) Whether *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), precludes the conclusion that an injury is insufficiently concrete simply because it is "inherently immeasurable" or "not particular";

(2) Whether a State claiming a breach of state sovereignty has alleged a sufficient injury-in-fact under cases like *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel, Barez,* 458 U.S. 592 (1982), or is such an injury analogous to a "generally available grievance about government"; and

(3) Whether a non-federal entity (public or private) has standing to challenge the delegation of authority to it to set or enforce federal law, such as the delegation found to be unconstitutional delegation "in its most obnoxious form" in *Carter v. Carter Coal Co.,* 298 U.S 238 (1936).

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*1 OPINIONS BELOW

In the decision under review, the U.S. Court of Appeals for the D.C. Circuit affirmed the judgment of the U.S. District Court for the District of Columbia. This opinion is reported at 827 F.3d 81 and is reprinted in the Appendix at App. 1a.

The decision of the U.S. District Court for the District of Columbia granting the motion by the U.S. Department of Health and Human Services to dismiss this action for lack of Article III standing is reported at 145 F. Supp. 3d 94 and is reprinted in the Appendix at App. 9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 over the judgment of the U.S. Court of Appeals affirming the district court's order dismissing this case for lack of Article III jurisdiction. The judgment of the U.S Court of Appeals for the D.C. Circuit was entered on July 1, 2016. On September 19, 2016, the Chief Justice granted Petitioner's application to extend the deadline to file this Petition to November 28, 2016. No. 16A279. This Petition is timely filed within that deadline.

*2 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced in the appendix: U.S. Const. art. II, § 3 (the Take Care Clause); U.S. Const. art. III, § 2, cl. 1 (the Judicial Power); 42 U.S.C. §§ 300gg-300gg-6, 300gg-8 (the Affordable Care Act's eight market requirements); and 42 U.S.C. §§ 300gg-22 (the Affordable Care Act's cooperative-federalism enforcement regime).

*4 PETITION FOR CERTIORARI

The D.C. Circuit's decision finding that West Virginia lacked standing conflicts with or undermines several of this Court's precedents, including *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel, Barez,* 458 U.S. 592 (1982), and *Carter v. Carter Coal Co.,* 298 U.S 238 (1936). And, if permitted to stand, the decision will remove an important check on the Federal Government's role in our system of dual sovereignty.

In the decision below, the D.C. Circuit affirmed that West Virginia has not suffered an injury-in-fact even though the court agreed that the Federal Government has "left the States holding the bag." App. 2a-5a. The statutory scheme at issue employs a "cooperative-federalism" enforcement regime, in which the States are given the first opportunity to enforce certain federal requirements, but if they refuse to do so, the Federal Government is required to act as a backstop. Through the administrative action being challenged, the Federal Government abandoned its backstop role, thereby leaving the States with the full and final decision over whether federal law would be enforced or not enforced within their respective borders. As a result, the D.C. Circuit acknowledged, "West Virginia now confronts different political terrain than it did before [the Federal Government] announced its new non-enforcement policy." App. 6a.

Nevertheless, the D.C. Circuit concluded that this new burden on the State is somehow not a cognizable injury-in-fact.

*5 *First,* the appeals court concluded that West Virginia's injury was not sufficiently concrete because it was both "inherently immeasurable" and "not particular." But just last term, this Court reaffirmed in *Spokeo, Inc. v. Robins* that concrete injuries need not be measurable, and that concreteness and particularity are different concepts.

Second, the D.C. Circuit concluded that even if the new burden on West Virginia was an intrusion on the State's sovereignty, the harm was akin to a "generally available grievance" and therefore insufficiently personal. *Id.* But that conclusion contradicts this Court's many precedents, such as *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* which recognize that no injury to a state could be more personal than a breach of its distinct sovereign status.

Third, the D.C. Circuit rejected West Virginia's argument that it had standing as the recipient of an unconditional delegation of federal authority to ask a court to rid it of that unwanted responsibility. The D.C. Circuit concluded that *no* entity in that situation would have standing, but that conclusion cannot be squared with *Carter v. Carter Coal Co.,* in which this Court struck down such a delegation as unconstitutional "delegation in its most obnoxious form."

This Court's intervention is needed to correct the D.C. Circuit's failure to heed this Court's precedents, but also because the lower court's decision will have significant consequences for the federal-state balance. This Court has expressly endorsed cooperative-federalism regimes as a careful and *6 constitutionally permissible balance between the powers of

the Federal Government and the States. But the D.C. Circuit's decision encourages the Federal Government to legislate a cooperative-federalism regime and then abandon the backstop role that is critical to protecting the States' separate sovereignty under the Tenth Amendment. That is a dangerous precedent in a court that plays an outsized role in the nation's administrative law and cooperative-federalism cases.

The petition for certiorari should be granted and the judgment of the D.C. Circuit vacated.

STATEMENT

I. Legal and Statutory Background

A. Article III Standing

Under Article III of the U.S. Constitution, the federal judicial power is limited to cases and controversies in which a plaintiff has suffered an "injury in fact" that is "fairly traceable" to the challenged conduct and that would be "redressable" by a judgment in the plaintiff's favor. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1991).

An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized." *Ibid.* For an injury to be particularized, "it 'must affect the plaintiff in a personal and individual way.' " *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan,* 504 U.S. at 560 n.1). A plaintiff may not allege "a generally available grievance about government - claiming *only* harm to his and every citizen's interest in *7 proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan,* 504 U.S. at 573-74 (emphasis added). But, "standing is not to be denied simply because many people suffer the same injury." *United States v. SCRAP,* 412 U.S. 669, 687 (1973).

Concreteness is a separate inquiry, and requires an injury to be " 'real []' and not 'abstract.' " *Spokeo,* 136 S. Ct. at 1548. That does not require, however, that an injury be "tangible." *Id.* at 1549. An injury can be concrete even if the harm "may be difficult to prove or measure." *Ibid.*

This Court has frequently recognized that intrusion on a state's sovereignty is an injury-in-fact for purposes of standing. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592 (1982), this Court "easily identified" two "sovereign interests" that would justify standing, including "the exercise of sovereign power over individuals and entities within the relevant jurisdiction." *Id.* at 601. And in *Maine v. Taylor,* 477 U.S. 131 (1986), this Court found that the State of Maine had standing because, as a separate sovereign, the State "clearly has a legitimate interest in the continued enforceability of its own statutes." *Id.* at 137. In general, States are "not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA,* 549 U.S. 497, 518-20 (2007).

Finally, this Court has instructed that when evaluating a motion to dismiss for lack of Article III standing, courts must "accept as true all material allegations of the complaint," *8 *Warth v. Seldin,* 422 U.S. 490, 501 (1975), including the underlying allegations of unlawful conduct, *id.* at 502. This ensures that a court not " 'confus[e]" any perceived "weakness on the merits with absence of Article III standing." *Arizona State Legislature v. Ariz. Independent Redistricting Commission,* 135 S. Ct. 2652, 2663 (2015) (citation omitted). Standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth,* 422 U.S. at 500.

B. The Administrative Fix to the Affordable Care Act [1]

The Patient Protection and Affordable Care Act (Affordable Care Act or ACA) creates eight federal market requirements for individual health insurance plans, 42 U.S.C. § 300gg-300gg-6, 300gg-8, [2] that were to be enforced under a cooperative-

federalism regime beginning January 1, 2014, 42 U.S.C. §§ 300gg-22(a)(2); App. 12a. As under all cooperative-federalism regimes, States have the initial option to enforce these requirements voluntarily against non-compliant plans. 42 U.S.C. §§ 300gg-22(a)(2). But if a State chooses not to do so, the U.S. Department of Health and Human Services (HHS) "shall" enforce them itself. 42 U.S.C. §§ 300gg-22(a)(2). This type of "arrangement" - under which the federal government *9 retains ultimately responsibility for the enforcement of federal law - "is replicated in numerous federal statutory schemes" and has been endorsed by this Court as a means for Congress to "influenc[e] a State's policy choices" without violating the Tenth Amendment. *New York v. United States,* 505 U.S. 144, 166-67 (1992).

In the fall of 2013, insurers canceled millions of health insurance plans in anticipation of the January 2014 effective date, prompting the President to "administratively fix" the Affordable Care Act by withholding federal enforcement. App. 121a-22a, 126a-29a, 159a, 162a. Unless the "state insurance commissioners" choose to enforce the market requirements, the Federal Government would permit insurers to "extend current plans that would otherwise be canceled." App. 128a, 162a. HHS formalized this Administrative Fix in a letter to the States, App. 129a-31a, 133a, 183a-87a, calling it an exercise of agency "enforcement discretion," App. 129a, 132a, 144a-45a. HHS later extended the Fix through December 31, 2017. App. 131a, 188a, 205a, 207a.

The Federal Government thus left *the States* solely responsible for deciding whether or not certain mandates under *federal law* are to be enforced within State borders. App. 136a-138a. This is not a question of States choosing to regulate (or not) under their own state laws. App. 138a. Instead, federal officials have sought to insulate themselves from what federal law requires by making the States fully responsible for determining the effect to give that federal law.

*10 As law professors from across the political spectrum have recognized, there is no plausible legal defense for the Administrative Fix.[3] App. 147a-26a. *First*, the Fix is contrary to the Affordable Care Act, which mandates that HHS "*shall enforce*" the federal market requirements if a State has not done so. 42 U.S.C. § 300gg-22(a)(2) (emphasis added); App. 147a-49a. *Second*, the Administrative Fix was not issued in compliance with notice-and-comment requirements of the Administrative Procedure Act (APA). 5 U.S.C. § 553; App. 149a-50a. *Third*, the Administrative Fix is an unlawful delegation of federal authority to a non-federal entity. *See Carter v. Carter Coal Co.*, 298 U.S 238 (1936); App. 150a-53a. *Fourth*, the Administrative Fix makes the States politically accountable for federal law in violation of the Tenth Amendment. U.S. Const. amend, x; App. 153a-55a.

II. The Proceedings Below

The State of West Virginia filed a complaint against HHS seeking declaratory and injunctive relief in the U.S. District Court of the District of Columbia, App. 115a-57a, but in a lengthy opinion, *11 the court determined that the State lacked Article III standing, App. 9a.

The D.C. Circuit affirmed the district court's judgment, concluding that West Virginia has not suffered an injury-in-fact even though the court agreed that the Federal Government has "left the States holding the bag." App. 2a-5a. The Affordable Care Act, the D.C. Circuit acknowledged, "employs a dual federal-state enforcement mechanism" under which "the federal government is a backup enforcer." App. 2a. Now, the Federal Government has "abandon[ed]" that post and "left the responsibility to enforce or not to enforce the[] [market requirement] provisions to the States." App. 2a-3a. The States have "to decide whether to enforce or not to enforce the very conditions that the federal government determined to abandon." App. 3a. The D.C. Circuit had "no[] doubt that West Virginia now confronts different political terrain than it did before HHS announced its new non-enforcement policy." App. 6a.

Still, the D.C. Circuit held for three reasons that this new burden on the State does not constitute an Article III injury-in-fact. App. 5a-8a. *First*, it held that the "[i]ncreased political accountability" in "having the responsibility to determine whether to enforce [federal law] or not" is not a concrete injury-in-fact because it is an "inherently immeasurable harm." *Id.*

Second, the appeals court concluded that even assuming the Fix was a "breach of State sovereignty" in violation of the Tenth Amendment, the harm to the State is not "a *concrete* injury-in-fact." App. 7a. The court further explained that the injury "is not *12 particular." *Id.* Rather, West Virginia's defense of its sovereignty is analogous to a "generally available grievance." *Id.*

Third, the D.C. Circuit rejected West Virginia's argument "that any party ... has standing to challenge a delegation from the government to carry out a governmental responsibility." App. 8a. Indeed, the court went so far as to hold that *no* entity (public or private) to whom the federal government has unlawfully delegated authority to set or enforce federal law has "standing to challenge that delegation as unconstitutional." App. 8a. It explained: Even "if Congress gave the D.C. Circuit authority, so long as we chose to use it, to set electrical rates in the country as we pleased, we certainly would not have standing to challenge that delegation as unconstitutional." *Ibid.*

REASONS FOR GRANTING THE PETITION

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 held in two ways that West Virginia's asserted injury was not sufficiently concrete. The court concluded that the injury is not "concrete" because it is "inherently immeasurable." App. 6a. And it also determined that West Virginia "lacks a concrete injury-in-fact" because "its injury is not particular." App. 6a-7a.

*13 But neither of these conclusions can be squared with this Court's recent *Spokeo* decision, which the D.C. Circuit failed even to cite, despite being alerted to the decision by the State of West Virginia in a 28(j) letter. 136 S. Ct. 1540 (2016). *First*, this Court held unequivocally in *Spokeo* that although "tangible injuries are perhaps easier to recognize," it has long been apparent that "intangible injuries can nevertheless be concrete." *Spokeo,* 136 S. Ct. at 1549. Thus, an injury-in-fact "may exist solely by virtue of ... the invasion of [legal rights]." *Warth v. Seldin,* 422 U.S. 490, 500 (1975). And a state legislature may sue over an alleged "institutional injury" to its "constitutionally guarded role." *Arizona State Legislature v. Ariz. Independent Redistricting Commission,* 135 S. Ct. 2652, 2663-64 (2015). This Court could not have been clearer: An injury can be concrete even if the harm "may be difficult to prove or measure." *Spokeo,* 136 S. Ct. at 1549. *Spokeo* thus 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]." App. 6a.

Second, like the Ninth Circuit did in *Spokeo,* the D.C. Circuit improperly "elided" the difference between concreteness and particularity. 136 S. Ct. at 1548. As this Court explained in *Spokeo,* concreteness and particularity are "independent requirement[s]." *Ibid.* This Court has "made it clear time and time again that an injury in fact must be both concrete and particularized." *Ibid.* The D.C. Circuit was wrong to conclude that West Virginia "lacks a *concrete* injury-in-fact" because "its injury is not particular." App. 6a-7a.

*14 In short, the D.C. Circuit's standing analysis is flatly inconsistent with both core holdings in *Spokeo.* It did not recognize that immeasurable injuries can be sufficiently concrete, and it "failed to fully appreciate the distinction between concreteness and particularization." *Spokeo,* 136 S. Ct. at 1550. For this reason alone, the decision below cannot stand.

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

The D.C. Circuit also concluded that the Fix's intrusion on West Virginia's sovereignty is not a particularized injury for purposes of Article III standing. Recognizing its duty not to "confus[e]" any perceived "weakness on the merits with

absence of Article III standing," *Ariz. State Legislature,* 135 S. Ct. at 2663, the D.C. Circuit assumed West Virginia correctly argued that the Fix is a "breach of State sovereignty" in violation of the Tenth Amendment. App. 7a. But the court concluded that the infringement on West Virginia's sovereignty was "analogous" to a "generally available grievance" and therefore insufficiently particular. *Id.*

This conclusion contradicts this Court's many precedents recognizing that a breach of state sovereignty is a legally-protected interest for purposes of standing. The leading case is *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* in which this Court listed several "easily identified" "sovereign interests" that can form the basis of a State's standing to bring suit, including the broad interest in "the exercise of sovereign power over ***15** individuals and entities within [its] relevant jurisdiction." 458 U.S. 592 (1982). Other cases include: *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), where this Court found South Carolina to have standing based on an injury to its sovereign "reserved powers," *id.* at 324; and *Maine v. Taylor,* 477 U.S. 131 (1986), where this Court found that Maine had standing based on its "clear[]" sovereign "interest in the continued enforceability of its own statutes," *id.* at 137.[4]

In all of these cases - none of which were cited or addressed by the D.C. Circuit - this Court treated a breach of state sovereignty as a sufficiently particularized injury when asserted by a state plaintiff. And rightly so. For a state, no injury could be more "personal" than a violation of its distinct sovereign status. *Spokeo,* 136 S. Ct. at 1538 ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' "). As this Court has explained, the States' "status as sovereign entities" affords them certain "dignity." *Federal Maritime Com'n v. South Carolina State Ports Authority,* 535 U.S. 743, 760 (2002).

The D.C. Circuit's assertion that a breach of state sovereignty is analogous to a generally available grievance, App. 7a, misunderstands that doctrine. Under Article III, a plaintiff must assert an injury-in-fact particular to itself, not "a generally available grievance about government - claiming ***16** *only* harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573-74 (1991) (emphasis added). That is simply not the case here. West Virginia is not claiming harm based solely on "every citizen's interest in proper application of the Constitution and laws." *Ibid.* It is claiming harm based on its unique status as a distinct sovereign from the Federal Government, which status this Court has recognized makes States "not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA,* 549 U.S. 497, 518-20 (2007); *see also Fed. Maritime Com'n,* 535 U.S. at 751 ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government.").

To the extent the D.C. Circuit's assertion is based on the fact that all 50 states can assert the same injury, a similar contention was rejected by this Court in *Massachusetts v. EPA.* There, this Court held that Massachusetts had standing even though the injury it claimed was "widely shared." 549 U.S. at 522. Quoting *United States v. SCRAP,* this Court noted that standing "is not to be denied simply because many people suffer the same injury." *Massachusetts,* 549 U.S. at 526 n.24 (quoting *SCRAP,* 412 U.S. 669, 687 (1973)).

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

Finally, the D.C. Circuit broadly concluded that *no* entity (public or private) to whom the federal ***17** government has unlawfully delegated authority to set or enforce federal law would *ever* have "standing to challenge that delegation as unconstitutional." App. 8a. West Virginia had argued that any recipient of such delegated power should have the ability to ask a court to relieve it of that unwanted responsibility. The D.C. Circuit disagreed, concluding that even if Congress gave the court the authority to set federal "electrical rates in the country as we pleased, we certainly would not have standing to challenge that delegation as unconstitutional." *Ibid.*

This sweeping conclusion undermines this Court's holding in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In that case, this Court reviewed an attempt by Congress to delegate federal regulatory authority to a non-federal entity. Congress had enacted a statute that forced coal producers to join an industry "code" under which certain code members would make regulatory decisions for the industry as a whole. *Id.* at 279. This Court struck down the law as unconstitutional "delegation in its most obnoxious form." *Id.* at 311.

Under the D.C. Circuit's categorical reasoning, the very object of the "most obnoxious" delegation in *Carter Coal* could not have asked a court to rid it of that responsibility. At best, the D.C. Circuit leaves open that a third party to the delegation could bring suit. But that has the Article III standing analysis exactly backwards. This Court's case law *favors* suits brought by those directly and personally affected by the challenged action. *See Lujan,* 504 U.S. at 560 n.1. In contrast, "when the plaintiff is not himself the ***18** object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* at 562 (quoting *Allen v. Wright,* 468 U.S. 737, 758 (1984)).

The D.C. Circuit dismissed Carter Coal on the ground that the case did not explicitly discuss standing. App. 7a. That misses the point. The issue is that the holding of *Carter Coal* would have very little force if no one has standing to bring suit against similarly "obnoxious" delegations. And as discussed above, the entities with the strongest case to do so - those most clearly affected in a "concrete" and "particularized" way by such delegations - are the delegees. Here, that entity is West Virginia.

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

A. The federal-state enforcement regime at issue in this case is an example of a "cooperative-federalism" regime. Such arrangements give States the option of acting in accordance with federal policy, but if they refuse, the "full regulatory burden *will be borne* by the Federal Government." *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 289 (1981) (emphasis added). They have been "replicated in numerous federal statutory schemes" and upheld by both this Court and lower courts against Tenth Amendment challenges. *New York v. United States,* 505 U.S. 144, 166-67 (1992); *see also Hodel,* 452 U.S. at 289.

***19** This Court has expressly endorsed these regimes as a careful and constitutionally permissible balance between the powers of the Federal Government and the States. These regimes do not unconstitutionally coerce the States into implementing federal policy if Congress has the power to preempt the States *and has committed to do so* in the event the States choose not to act. *Hodel,* 452 U.S. at 289-90; *see also New York,* 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). Under those important conditions, where the Federal Government can and is committed to serve as a backstop, the States retain the critical ability to choose not to be accountable for the enforcement or non-enforcement of federal law. *New York,* 505 U.S. at 168-69.

But the D.C. Circuit's decision encourages the Federal Government to legislate a cooperative-federalism regime and then abandon its crucial backstop role. As even the D.C. Circuit must admit, the Federal Government in this case "abandon [ed]" its statutorily mandated backup role and "left the States holding the bag." App. 3a. Where the States previously had the choice to be free from political accountability, they now must "assume the political responsibility of deciding whether or not to implement a federal statute." App. 6a; *see also ibid.* ("We do not doubt that West Virginia now confronts different political terrain than it did before HHS announced its new non-enforcement policy."). Yet the ***20** D.C. Circuit has determined that the States - the very entities meant to be protected by the careful balancing of a cooperative-federalism regime - cannot even ask a court to review the Federal Government's decision to fundamentally

alter that regime. And as noted by at least one judge at oral argument, it is unclear that *any* other entity would have a better case for standing than the States. [5]

Heightening the concern over this decision is the outsized role that the D.C. Circuit plays in administrative law and cooperative-federalism cases. This decision will be precedential in cases where the D.C. Circuit has exclusive jurisdiction, including many under cooperative-federalism statutes like the Clean Air Act and the Clean Water Act. And even where it is not precedential, the D.C. Circuit's perceived expertise in these areas of law will give this decision extra weight. *Cf. Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199 (2015) (granting certiorari to reverse an erroneous interpretation of the Administrative Procedure Act followed exclusively by the D.C. Circuit); *Milner v. Dept. of Navy,* 562 U.S. 562, 567 (2011) (tracing to a single D.C. Circuit decision an erroneous interpretation of the Freedom of Information Act that had been followed by several courts of appeal).

B. Though the conflicts with this Court's precedents are alone enough to warrant certiorari, ***21** these concerns about the decision's consequences for the federal-state balance confirm the need for this Court's intervention. The judiciary is critical to protecting the States' "residuary and inviolable" sovereign interests from intrusion by the Federal Government by deciding "controversies relating to the boundary between the two jurisdictions." The Federalist No. 39, at 318-19 (James Madison) (Clinton Rossiter ed., 1961). As this Court has said, States are "not normal litigants for the purposes of invoking federal jurisdiction," precisely because they have "surrender[ed] certain sovereign prerogatives" to the Federal Government and still retain unique sovereign and institutional interests. *Massachusetts,* 549 U.S. at 520. The D.C. Circuit's decision takes an improperly cramped view of the judiciary's role and must be revisited.

Even if the new Administration were to rescind the Administrative Fix or if the Affordable Care Act were to be repealed in whole or in part, the D.C. Circuit's decision cannot be permitted to stand. As a threshold matter, the underlying issue would arguably fall within an exception to mootness. The practice of claiming enforcement discretion to entirely suspend federal laws for temporary periods of time is likely to recur and continue to escape review. *See Kingdomware Techs., Inc. v. United States,* 136 S. Ct. 1969, 1976 (2016). Moreover, the voluntary cessation of challenged conduct "does not ordinarily render a case moot." *Knox v. Serv. Employees Int'l Union, Local 1000,* 132 S. Ct. 2277.

But more importantly, even if this Court were to determine that the matter has become moot or that ***22** mootness should be evaluated in the first instance by the D.C. Circuit, this Court should still grant certiorari and vacate the decision below before remanding for further consideration. The clear conflicts between the D.C. Circuit's decision and several of this Court's precedents, together with the decision's potentially significant impact on federal-state relations, require that this Court take at least those steps to ensure consistency and protect our system of dual sovereignty.

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 vacated.

Footnotes

1 The facts in this statement come from West Virginia's complaint, App. 115a, which must be taken as true in reviewing the Government's motion to dismiss for lack of Article III standing.

2 The market requirements include mandates such as a prohibition on insurers discriminating based on preexisting conditions.

3 *E.g.*, Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA,* 2014 New. England J. Med. 370 (May 22, 2014), at http://www.nejm.org/doi/full/10.1056/NEJMp1402641; Eugene Kontorovich, *The Obamacare 'Fix' Is Illegal,* Politico (Nov. 22, 2013), at http://www.politico.com/magazine/story/2013/11/the-obamacare-fix-is-illegal-100254.html#. U-Op-GOK1nY; Zachary S. Price, *Enforcement Discretion and Executive Duty,* 67 Vand. L. Rev. 671, 671, 750 (2014); *cf.* Philip Hamburger, Is Administrative Law Unlawful? 65-82, 125-28 (2014).

4 For more cases, see Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 Va. L. Rev. 2051, 2063-86 (2011) (cataloguing state sovereign standing decisions).

5 *See* Oral Argument Audio, No. 15-5309 (Apr. 15, 2016), available at https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/4A35E20046482D7985257F96006585FB/$file/15-5309.mp3 (colloquies from 25:00 to 29:33; 34:40 to 35:10).

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