No. 05-1243

In the Supreme Court of the United States

STEPHEN P. MEDEIROS, PETITIONER

v.

W. MICHAEL SULLIVAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a private citizen has standing to bring a Tenth Amendment commandeering challenge to a federal law that allegedly coerced a State into enacting a state law that governs his conduct, when the State opposes the Tenth Amendment claim and represents that it was not commandeered and that it would leave the state law in place even if the federal law were held to be unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 431 F.3d 25. The memorandum and order of the district court (Pet. App. 18a-33a) is reported at 327 F. Supp. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2005. On March 6, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including March 27, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a fisherman, argues that the federal government impermissibly coerced the State into enacting a state law that regulates the catching of lobsters. The district court held that petitioner lacks standing to pursue that claim, and the court of appeals affirmed.

1. United States fisheries management is guided by principles of cooperative federalism, under which the United States and the States divide and share regulatory authority. In the Atlantic Ocean, fisheries within three miles of shore are principally within the jurisdiction of the Atlantic States Marine Fisheries Commission (the Commission), a body governed by the 15 States bordering that ocean. The Commission was created by an interstate compact approved by Congress in 1942. Act of May 4, 1942, ch. 283, 56 Stat. 267; Pet. App. 45a.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (the Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.* (Pet. App. 34a-44a), "to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources." 16 U.S.C. 5101(b). Congress found that inconsistent implementation of the Commission's management plans had harmed fish stocks and fishermen in the States that had complied with those plans. See 16 U.S.C. 5101(a); H.R. Rep. No. 202, 103d Cong., 1st Sess. 6 (1993); S. Rep. No. 201, 103d Cong., 1st Sess. 2 (1993).

Under the Atlantic Coastal Act, "[t]he Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that [a] State has not implemented and enforced [such a plan] within the timeframes established under

the plan or under section 5104 of this title." 16 U.S.C. 5105(a). The Commission shall notify the Secretaries of Commerce and of the Interior of such a determination. 16 U.S.C. 5101(b). The Secretary of Commerce must then determine "whether the State in question has failed to carry out its responsibility under section 5104," and, "if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question." 16 U.S.C. 5106(a).

If the Secretary makes those two findings, he "shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." 16 U.S.C. 5106(c)(1). The Act provides a number of opportunities for a State, the Commission, and the Secretary to resolve concerns about fishery management plan implementation before a moratorium occurs, including opportunities for the States to present their views and meet with the Secretary, and a provision that allows the Secretary to delay a moratorium for up to six months to permit conservation concerns to be resolved. 16 U.S.C. 5106(b) and (c).

2. Following the enactment of the Atlantic Coastal Act, a committee of the Commission drafted a fishery management plan for lobster. Amendment 3 to that plan, which was adopted in 1997, addresses the overfishing of lobster by setting uniform minimum standards for state regulation. Pet. App. 3a. Those standards include range-wide restrictions on lobster size and catch of egg-bearing females, and a number of limits on lobster traps. With respect to "non-trap gear," such as nets, the amendment includes a "100/500 rule," under which 100 lobster a day may be caught with non-trap gear, up to a

maximum of 500 per trip. A.R. 02362-02365; see Pet. App. 3a-4a.[1]

The State of Rhode Island participated in the development of Amendment 3, and voted in favor of the amendment when the Commission adopted it. A.R. 01401-01404. Rhode Island accordingly issued a regulation, known as Regulation 15.18, which implements the 100/500 rule. R.I. Code R. 12 080 012 § 15.18 (2006). See Pet. App. 53a.

After the regulation entered into force, the Rhode Island Marine Fisheries Council voted to rescind it. The Council was a state body composed of eight private citizens (primarily representing fishing interests) and the Director of the State's Department of Environmental Management (DEM). See Gov't C.A. Br. 9. The Director opposed the rescission of the regulation, and both he and the Governor voiced their objections to that decision. A.R. 06331, 06542.

Because the State was no longer in compliance with the interstate fishery management plan, the Commission made a moratorium referral to the Secretary of Commerce. Pet. App. 4a. The State then temporarily reinstated Regulation 15.18 through an emergency rule. See 66 Fed. Reg. 13,444 (2001). The Secretary published a moratorium notification which found that implementation of the 100/500 rule was necessary to the conservation of the resource, and that Rhode Island had

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[1] Those limits were selected because lobster caught in nets are generally bycatch—that is, they are not the principal target of fishing effort. The levels set by the 100/500 rule were intended to be high enough to allow fishermen who catch lobster incidentally as bycatch to retain those lobster. Net fishing targeted directly toward lobster has a number of adverse effects, including significant mortality among young, newly molted lobster. Pet. App. 7a, 9a.

failed to implement it. *Ibid.* The Secretary delayed application of the moratorium, however, to give the State time to make its temporary rule permanent. *Ibid.*

The State subsequently made its reinstatement of Regulation 15.18 permanent, and the Secretary withdrew the moratorium declaration before it was scheduled to go into effect. The state legislature also amended state law to remove all authority from the Council that had rescinded the rule, rendering it an advisory body. R.I. Gen. Laws § 20-3-2 (Supp. 2005). See Pet. App. 4a.

3. Petitioner catches fish with an otter trawl, which consists of a net, a weight that holds the trawl on the seabed, and boards that hold the net open. He brought this suit against the DEM to challenge Regulation 15.18. Petitioner alleged that the regulation violates the Due Process and Equal Protection Clauses of the Constitution because it imposes different restrictions on lobster fishing with trap and non-trap gear. He also alleged that the Atlantic Coastal Act's moratorium provision commandeered Rhode Island to impose Regulation 15.18, in violation of the Tenth Amendment. The United States intervened to defend the constitutionality of the federal statute pursuant to 28 U.S.C. 2403. See Pet. App. 4a, 20a, 23a-24a.

The district court granted summary judgment to respondents. Pet. App. 18a-33a. With respect to petitioner's equal protection and due process claims, the court held that Regulation 15.18 is subject to rational basis review. *Id.* at 26a-27a. Because Regulation 15.18's provision regarding non-trap fishing is "one component of a comprehensive management scheme which regulates both trap and non-trap lobster fishing as part of the effort to reduce lobster mortality," the Court con-

cluded that the rational basis standard is satisfied. *Id.* at 28a.

As to petitioner's Tenth Amendment claim, the district court held that only state officials, not private parties like petitioner, have standing to contend that a federal law encroaches on state sovereignty in violation of the Tenth Amendment. Pet. App. 30a-32a. The court followed this Court's holding in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118, 144 (1939), that private parties, "absent the state or their officers, have no standing * * * to raise any question under the [Tenth] Amendment." Pet. App. 30a.

4. The court of appeals affirmed. Pet. App. 1a-17a. After holding that Regulation 15.18 is subject to rational basis review under the Equal Protection Clause, the court concluded that the regulation's restrictions on nets are rational in light of the lobster mortality that nets cause and the possibility that, as finfish become overfished, trawlers will redirect their fishing efforts towards lobster. *Id.* at 5a-6a, 9a-10a. The court applied the same analysis to petitioner's substantive due process claim. *Id.* at 11a-12a.

The court next held that petitioner lacks standing to pursue a Tenth Amendment claim. Pet. App. 12a-17a. The court agreed with the district court that this Court's decision in *TVA* "held that private citizens lack standing to maintain Tenth Amendment claims." *Id.* at 13a. Although petitioner relied on this Court's subsequent decision in *New York* v. *United States*, 505 U.S. 144 (1992), the court of appeals explained that "since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed, the word 'standing' was never

mentioned." Pet. App. 15a. After acknowledging that *New York* observes that the Tenth Amendment "divides authority between federal and state governments for the protection of individuals," *id.* at 14a (quoting *New York*, 505 U.S. at 181), the court of appeals explained that the "specific focus" of that passage is not standing but "whether a state could assert a Tenth Amendment 'commandeering' claim where a previous administration of that state had initially acquiesced in the commandeering," *id.* at 15a.

The court of appeals noted that many courts have followed *TVA*. Pet. App. 16a. It distinguished a Seventh Circuit case that upheld a police officer's standing to pursue a Tenth Amendment claim, *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 702-704 (1999), cert. denied, 528 U.S. 1116 (2000), explaining that in the "specialized circumstances" of that case, "it is debatable whether the plaintiff," a government employee, was "acting in behalf of the state or simply as a private citizen." Pet. App. 16a. The court also described a line of Eleventh Circuit cases as "problematic" because "the Eleventh Circuit's precedent commenced without any reference to *TVA*, and subsequent panels have expressed concern as to whether the omission has resulted in the perpetuation of a circuit precedent inconsistent with TVA." *Ibid.* (citing *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (11th Cir. 2000) (Barkett, J., concurring)).

Finally, the court noted that a re-examination of *TVA* would require consideration of "complex" questions such as "whether [petitioner] should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials reinstated the regulation with dispatch following its brief repeal in 2000." Pet. App. 17a.

ARGUMENT

Petitioner argues (Pet. 8-28) that he has standing to bring a Tenth Amendment commandeering challenge to a federal law that allegedly coerced a State into enacting a state law, even though the State opposes the Tenth Amendment claim, argues that it was not commandeered, and represents that it would leave the state law in place even if the federal law were held to be unconstitutional. The decision of the court of appeals is correct and does not implicate a square circuit conflict. Further review is not warranted.

1. Under this Court's precedents, petitioner lacks standing to challenge an alleged commandeering of the state government. In *Tennessee Electric Power Co.* v. *Tennessee Valley Authority (TVA)*, 306 U.S. 118 (1939), this Court held that only a State may raise a Tenth Amendment claim based on its sovereign interests. In *TVA*, a group of utilities argued that the establishment of the Tennessee Valley Authority constituted "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143. This Court held that the utilities lacked standing to sue because "absent the states or their officers," private parties "have no standing * * * to raise any question under the [Tenth] [A]mendment." *Id.* at 144.

Although petitioner contends that *TVA* addressed standing only "in passing" while addressing the merits of the Tenth Amendment claim, Pet. 25 (quoting *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000)), the Court expressly rejected the Tenth Amendment claim on both standing and merits grounds, 306 U.S. at 143-144. As the court of appeals recognized, both rationales (stand-

ing and the merits) are alternative holdings, framed in equally definitive terms, and there is no basis for characterizing one as more authoritative than the other. See *ibid.*; Pet. App. 13a. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).[2]

Although petitioner argues (Pet. 25) that *TVA* is not binding precedent because it also addressed standing to sue under the Ninth Amendment, and this Court has subsequently addressed issues touching on the Ninth Amendment in cases brought by private parties, no Ninth Amendment standing question was raised or considered in those cases. Nor did those cases purport to overrule *TVA*. See *Webster* v. *Doe*, 486 U.S. 592 (1988); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Thus, no inference can be drawn from those cases, which, in any event, did not involve the Tenth Amendment (and only barely involved the Ninth Amendment). See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

Petitioner also errs in contending (Pet. 20-22) that *New York* v. *United States*, 505 U.S. 144 (1992), is inconsistent with *TVA*. As both lower courts emphasized,

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[2] *TVA* did not involve a commandeering challenge, but instead involved a claim that the federal government invaded the sphere of authority reserved by the Constitution to the States. This Court has subsequently limited the scope of such claims under the Tenth Amendment. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But the claims at issue in *TVA* parallel petitioner's commandeering claim because they involved the extent of a State's reserved sovereignty under the Tenth Amendment; the decision did not turn on the reach of particular enumerated powers under the Constitution.

New York does not address private party standing. Pet. App. 15a, 31a. Instead, it addresses the question whether state officials' consent to a Tenth Amendment violation precludes subsequent state officials from challenging that violation. 505 U.S. at 181-183. The Court held that the State—not a private party—could challenge the violation, notwithstanding its previous consent, because the Constitution "divides authority between federal and state governments for the benefit of individuals," not for the benefit of the States. *Id*. at 181-182.

It by no means follows that private citizens have standing to assert the State's rights. Just as a State's consent does not preclude it from later challenging a violation, so too the federal government is generally not bound by principles of estoppel in light of "the interest of the citizenry as a whole" in the enforcement of the laws. *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). Nonetheless, private citizens do not generally have standing to assert the government's rights in court. Instead, citizens must rely on their elected government officials, be they federal or state officials, to exercise their discretion in determining which claims to pursue. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-833 (1985).

2. Even if this case were not governed by established precedent, petitioner would lack standing to pursue his commandeering challenge. Petitioner is ultimately challenging not the federal statute, which operates only on the State, but the state law that imposes the 100/500 rule he opposes. Even if the federal statute were held to be unconstitutional, petitioner would benefit only if the State chose to exercise its discretion to repeal the state law. The State has repeatedly explained, however, that it chose to implement the 100/500

rule as an act of state policy, that it was not commandeered by the federal statute, and that "the 100/500 limit would remain in place even if the Atlantic Coastal Act were declared unconstitutional" because "Rhode Island has made a legislative and contractual commitment to carry out the Compact and implement the 100/500 landing limit of Amendment 3." Vincent C.A. Br. 14, 27 (State C.A. Br.); see *id.* at 27-34.

a. In those circumstances, petitioner cannot even satisfy the normal standing requirements of injury-in-fact, causation, and redressability, which he concedes apply here (Pet. 26). Although the petition claims that "[t]he court of appeals did not doubt that petitioner satisfied the traditional requirements of Article III standing," Pet. 20; see Pet. 1, the court of appeals did not reach that question, as the petition later concedes, Pet. 25-26. The State has, however, repeatedly stated that it made an independent decision to implement the 100/500 rule based on state policy concerns. See State C.A. Br. 27-34. Based on those representations by the State, there is no reason to believe that an invalidation of the federal statute would have any effect on petitioner. Because "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,'" petitioner lacks Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

Petitioner's arguments about injury, causation, and redressability largely ignore the critical fact that his conduct is governed by state, not federal, law. The petition argues (Pet. 27), for example, that "[a]ny claim of executive commandeering under the Tenth Amendment would undisputedly be redressable: the individual would

not be required to comply with the state regulation adopted pursuant to the unconstitutional federal mandate." But that would be true only if the State chose to repeal the state law, which it has said it would not do. When a State raises a Tenth Amendment challenge to alleged federal commandeering, it can choose to stop complying with the federal law in the event that it prevails. But when a private party sues based on injury caused by a state law, its ability to obtain redress depends on independent action by the State. Thus, here as in *ASARCO Inc.* v. *Kadish*, petitioner cannot establish standing because whether his "claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors * * * whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see *Allen* v. *Wright*, 468 U.S. 737, 759 (1984) ("chain of causation" is "far too weak for the chain as a whole to sustain * * * standing," where it depended on actions of "numerous third parties" making "independent decisions").

Petitioner's contention (Pet. 28) that the State would likely repeal the state law if the federal law were invalidated ignores not only the State's own representations, but also the events leading up to this litigation. Rhode Island voted for Amendment 3 when it was adopted by the Commission, and it implemented the 100/500 rule by state regulation shortly thereafter. See Pet. App. 21a. Amendment 3's brief repeal resulted from actions of a state commission controlled by private fishing interests that acted contrary to the wishes of the Governor and the Director of the DEM—and that was then stripped of all authority by the state legislature. See Pet. App. 4a;

Gov't C.A. Br. 9. To the extent that some former state officials expressed concerns about the policy basis for the 100/500 rule, they made clear that they intended to pursue their concerns through the Commission's representative processes, which were established by the interstate compact the State voluntarily joined and continues to support. See Pet. App. 55a, 59a-60a.

b. Even if the State had not opposed petitioner's Tenth Amendment claim and had not made clear that it would retain the 100/500 rule if the federal statute were invalidated, petitioner would still lack standing under *TVA* to assert his commandeering claim. The *TVA* rule both protects state sovereignty and reflects the general principle that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). Ordinarily a litigant may represent the rights of third parties (like the State here) only when there is a nexus between the litigant and the third party and "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). At a minimum, there is no impediment to the State's ability to protect its rights. The State is free to bring suit against the Commission or the United States, but it has chosen instead to defend the federal and state laws.

Allowing private parties like petitioner to bring Tenth Amendment commandeering challenges would infringe on the sovereignty of the affected States. Here, the State has exercised its sovereign prerogatives by establishing a policy of following its obligations under the interstate compact. The legislature has declared that it is "the policy of the state of Rhode Island to perform and carry out the compact and to accomplish its

purposes," and has directed state officials "to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of the compact in every particular." R.I. Gen. Laws § 20-8-7 (1998). The State has a strong interest in ensuring that the Commission is effective in protecting coastal fisheries and that its neighbors implement the Commission's decisions. Because petitioner's interests are inconsistent with the State's policy "to perform and carry out the compact" in "every particular," *ibid.*, he should not be permitted to pursue a challenge that purports to assert the State's rights in an attempt to achieve a goal that is directly at odds with state policy. In analogous contexts, this Court has been careful to protect States' sovereign interests by holding that when a State elects not to defend the constitutionality of one of its statutes, its citizens lack standing to defend the statute. *Diamond* v. *Charles*, 476 U.S. 54, 64-65 (1986); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65-66 (1997); *Raines* v. *Byrd*, 521 U.S. 811 (1997); *Flast* v. *Cohen*, 392 U.S. 83, 105 (1968).

The intrusion on state sovereignty would be especially great here because in order to prevail, petitioner would have to inquire into the State's motivation for enacting the legislation. Under petitioner's theory of standing, it appears that he would have to prove that the State would likely repeal the state law (notwithstanding its contrary representations) if he were to prevail in this litigation. See Pet. 28; *Lujan*, 504 U.S. at 560-561. And on the merits of petitioner's commandeering claim, "the question might arise as to whether he should be allowed discovery to determine why Rhode Island officials initially adopted Regulation 15.18, or why those officials

reinstated the regulation with dispatch following its brief repeal in 2000." Pet. App. 17a.[3]

Such discovery would be improper, as it would amount to an unwarranted collateral attack by a citizen of Rhode Island on the basis for the State's policy decisions, as well as its position in this litigation. The federal courts have generally avoided intrusion into States' policy decisions and internal administration. See, *e.g.*, *Diamond*, 476 U.S. at 65 (referring to "[t]he concerns for state autonomy that deny private individuals the right to compel a State to sue to enforce its laws"); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984) (holding that courts will not consider a dispute between a State and one of its citizens arising under state law); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976) (describing federal court abstention from deciding "policy problems of substantial public import" within a State). There is even less reason to undertake such an inquiry here, because "it is a contradiction in terms to say that * * * it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 358 (1909) (Holmes, J.). "The very meaning of sovereignty is that the decree of the sover-

[3] Petitioner's theory assumes, of course, that asking a State to choose between adoption of a particular state regulation or the imposition of federal regulation constitutes "commandeering" if the State would have preferred a different course. As *South Dakota* v. *Dole*, 483 U.S. 203, 210-211 (1987), makes clear, that is not the law. Congress is free to encourage States to regulate in a manner consistent with federal policy by establishing appropriate disincentives for inaction. The mere exercise of congressional authority to conserve an over-fished species by banning specified fishing activity in the face of state inaction cannot constitute commandeering.

eign makes law," *ibid.*, and here the State, not the federal government, made the law that regulates petitioner's conduct.

If petitioner believes that state officials are eschewing their responsibilities and should not enforce the 100/500 rule, his recourse lies in the State's internal mechanisms of accountability. As the court of appeals explained, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." Pet. App. 15a.

c. Although petitioner asserts (Pet. 21-23) that private-party standing to bring Tenth Amendment commandeering claims should be analogized to standing to assert violations of the separation of powers among the three branches of the federal government, petitioner's analogy is inapposite. Adjudication of federal separation-of-powers claims generally requires only a non-intrusive comparison of the divisions of responsibility among the branches as set forth in the Constitution and revealed by historical practice, and the allegedly unconstitutional law generally operates directly on the plaintiff, causing an injury that creates the basis for standing. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 935-936 (1983) (holding that individual had standing to challenge violation of bicameralism-and-presentment requirement because, if the law were found to be unconstitutional, "the deportation order against [plaintiff] will be canceled," giving him a direct personal stake in the outcome of the challenge); *Buckley* v. *Valeo*, 424 U.S. 1, 117 (1976) (per curiam) (holding that litigants could chal-

lenge composition of commission because it was designated to adjudicate their own rights).

In a commandeering challenge, however, the federal law operates on a State, and a private plaintiff's alleged injury stems from the state action that was allegedly compelled by the federal government. Adjudication of such a claim may not only require a federal court to inject itself into a dispute between a State and one of its citizens on a question of state policy, but also raise intrusive questions of causation and motivation. See pp. 13-16, *supra*. In addition, although it would raise awkward justiciability issues for different branches of the federal government to sue one another, States are independent sovereigns that are quite capable of pursuing legal redress for Tenth Amendment violations. Cf. *Powers*, 499 U.S. at 411 (holding that one party's standing to assert a third party's rights turns in part on whether there is "some hindrance to the third party's ability to protect his or her own interests").

3. Although there is some disagreement among the lower courts about private party standing to pursue some types of Tenth Amendment claims, this case does not implicate a square circuit conflict.

Like the court of appeals below, the Tenth Circuit has held that some private parties lacked standing to pursue their Tenth Amendment challenges. *United States* v. *Parker*, 362 F.3d 1279, cert. denied, 543 U.S. 874 (2004); *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 763 (1980), cert. denied, 450 U.S. 1050 (1981). Only two other circuits, the Seventh and the Eleventh, have considered private party standing to bring Tenth Amendment claims. Although those circuits upheld private parties' standing to bring some Tenth Amendment challenges, the claims in those cases were distinguish-

able from petitioner's claim, and it is not clear that in this case those circuits would reach a different result from the decision below. Most importantly, none of those cases considered whether a private party has standing to bring a commandeering challenge to a federal statute that allegedly regulates a State but not the plaintiff—especially where, as here, the State has separately enacted a state law causing the plaintiff's alleged injury, and expressed an intent to retain that law regardless of the outcome of the commandeering challenge.[4]

a. In *Gillespie*, the Seventh Circuit held that a state police officer had standing to challenge a federal statute, 18 U.S.C. 922(g)(9), that prohibits persons convicted of domestic violence offenses from possessing firearms in or affecting commerce. 185 F.3d at 703. The court explained that plaintiff suffered "a concrete injury—the loss of his ability to carry a firearm, and the consequent loss of his job as a police officer." *Ibid.* "That injury can also be fairly traced to the [alleged] constitutional violation," the court explained, "for if we declared the

[4] The District of Columbia, Fifth, and Ninth Circuits have found it unnecessary to resolve Tenth Amendment standing questions. *Lomont* v. *O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002); *United States* v. *Brockway*, 769 F.2d 263, 265 (5th Cir. 1985); *Nance* v. *EPA*, 645 F.2d 701, 716 (9th Cir.), cert. denied, 445 U.S. 1081 (1981). Although the petition cites *Lomont* as taking sides on the issue, see Pet. 14, 16, the petition correctly recognizes elsewhere that *Lomont* did not decide the question, Pet. 10-11. Petitioner argues (Pet. 14-15) that other circuits have adjudicated Tenth Amendment claims brought by private parties, but no standing question was raised or considered in those cases. The fact that a case assertedly presents an antecedent legal question, jurisdictional or otherwise, does not mean that a court issues a *sub silentio* ruling on that question by not considering it. See, *e.g.*, *Steel Co.*, 523 U.S. at 91; *NRA Political Victory Fund*, 513 U.S. at 97.

statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm." *Ibid*.

As the *Gillespie* court explained, the federal statute at issue in that case (unlike the one at issue here) is "not directed at States or state officials," and is instead "a criminal law of general application" that "regulates the behavior of individuals as individuals." 185 F.3d at 708. Because the federal statute directly regulated the plaintiff, no state legislation was implicated, and the traditional standing requirements of injury, causation, and redressability were clearly satisfied. See *id*. at 703.

In addition, the thrust of the *Gillespie* plaintiff's Tenth Amendment claim was that the statute exceeded Congress's Commerce Clause powers, and therefore infringed on territory reserved to the States. 185 F.3d at 704. There is no question that private individuals can challenge legislation as exceeding Congress's enumerated powers under Article I when the traditional standing criteria are satisfied. Although the plaintiff also raised an insubstantial commandeering claim, the court quickly disposed of it in two paragraphs, *id*. at 707-708, and the court did not expressly address the question whether private plaintiffs have standing to pursue commandeering (as opposed to other Tenth Amendment) claims—especially where, as here, the State opposes the challenge and stands behind the state law on state policy grounds.

Moreover, as the court of appeals noted (Pet. App. 16a), the plaintiff in *Gillespie* was a government employee, a police officer, and there is some question as to whether he should be considered a private or state actor for this purpose. See *Lomont* v. *O'Neill*, 285 F.3d 9, 13

(D.C. Cir. 2002) (finding standing for law enforcement officers to raise Tenth Amendment claim).

b. The Eleventh Circuit cases cited by petitioner (Pet. 11-12) are similarly distinguishable. *Atlanta Gas Light Co.* v. *United States Department of Energy*, 666 F.2d 1359, cert. denied, 459 U.S. 836 (1982), and *Seniors Civil Liberties Ass'n* v. *Kemp*, 965 F.2d 1030 (1992), both involved challenges to federal laws that operated directly on the plaintiffs, not on States. In *Atlanta Gas*, the plaintiffs challenged a federal law that prohibited the distribution of natural gas for use in outdoor lighting. 666 F.2d at 1362. The court explained that the federal law "operates against [plaintiff] local gas distribution companies" and levies fines against them for noncompliance. *Id.* at 1364 n.7; see *id.* at 1368 n.16. Similarly, *Seniors Civil Liberties Ass'n* involved a challenge to provisions of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, that prohibited discrimination by the plaintiffs' condominium complex. 965 F.2d at 1033; see *id.* at 1034 ("nothing in the Fair Housing Act regulates the states as states"). Thus, neither of those cases presented the issues raised here regarding a commandeering challenge based on a State's enactment of state legislation.

In the other Eleventh Circuit decision relied on by petitioner, *Dillard* v. *Baldwin County Commissioners*, 225 F.3d 1271 (2000) (Pet. 12), an intervenor argued that a district court's re-districting order exceeded its authority under the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*, and violated the Tenth Amendment. The court held that voters have standing to challenge an allegedly illegal voting scheme to which they are subject. 225 F.3d at 1274, 1277-1280. In doing so, the court emphasized that "in order to establish standing to bring a Tenth Amendment claim, just as for any other claim, the

plaintiff must show that it suffered an injury in fact caused by the challenged action." *Id.* at 1277. The court also distinguished cases in which individuals sought to bring suit based on distinctly sovereign prerogatives. See *id.* at 1278-1279 (distinguishing *Arizonans*, *supra*, and *Raines*, *supra*). Thus, although the Eleventh Circuit found that a plaintiff had standing to challenge a court-imposed voting scheme, it did not address the question whether a plaintiff would have standing to bring a commandeering challenge to a federal statute in the circumstances of this case.

Moreover, the Eleventh Circuit has expressed doubt about its Tenth Amendment standing cases. See *Atlanta Gas*, 666 F.2d at 1368 n.16 (deciding question in a brief footnote, without citing *TVA*, while admitting that "we must * * * express our uncertainty"); *Seniors Civil Liberties Ass'n,* 965 F.2d at 1034 n.6 (relying on *Atlanta Gas* "with admitted doubts"); *Dillard*, 225 F.3d at 1283 (Barkett, J., concurring) (expressing "reservations" about whether the Eleventh Circuit's decisions "were correct"). The Eleventh Circuit's admitted discomfort with its decisions suggests that it may limit them, and that at a minimum it would be reluctant to extend them to commandeering claims in the circumstances of this case.

c. Petitioner also relies (Pet. 14) on the state court decision in *Guillen* v. *Pierce County*, 31 P.3d 628 (Wash. 2001) (en banc), rev'd, 537 U.S. 129 (2003), which this Court reversed on the merits without reaching the standing question, *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003). In *Guillen*, there was no claim that Congress commandeered the state government. Instead, the Washington Supreme Court's Tenth Amendment analysis focused almost exclusively on whether

there was a Commerce Clause violation. See 31 P.3d at 653-655. As this Court explained, "[r]espondents contend in passing that § 409 violates the principles of dual sovereignty embodied in the Tenth Amendment," but "[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress's enumerated powers." 537 U.S. at 148 n.10 (citation omitted).

Although petitioner emphasizes (Pet. 1-2, 8-9) that this Court granted certiorari on a Tenth Amendment standing question in *Guillen*, he reads far too much into that grant. The Washington court held a federal statute unconstitutional, and this Court granted a petition for a writ of certiorari, which included but was not limited to the standing question, in order "to resolve the question of the constitutionality of th[e] federal statute." 537 U.S. at 140. It does not follow that the standing question independently warrants review, especially with respect to the type of commandeering claim at issue here.

4. As explained above, the decision of the court of appeals is correct and does not implicate a square circuit conflict. Other factors also counsel against further review. The question whether private parties may bring Tenth Amendment commandeering claims has not been extensively analyzed in the courts of appeals. The cases that have addressed private-party standing to bring Tenth Amendment claims largely involved Commerce Clause challenges, and the courts generally did not consider the additional issues that are raised by efforts by private parties to press commandeering claims over the objection of a State that enacted the state law governing those parties' conduct.

In addition, the dispute here is unusual in that it involves petitioner and three other parties—the State, the

Commission, and the United States—and the State voluntarily joined the interstate commission that promulgated the 100/500 rule at issue. As a result, the causation and redressability questions in this case are more complicated than in most others. Those questions were not, however, specifically considered by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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