No. 18-1531

In The
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* UNITED STATES SENATOR LINDSEY GRAHAM IN SUPPORT OF PETITIONER

M. DAWES COOKE, JR.
BARNWELL WHALEY PATTERSON AND HELMS, LLC
288 Meeting Street, Suite 200
Charleston, South Carolina 29401
mdc@barnwell-whaley.com
Telephone: (843) 577-7700

Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Senator Lindsey Graham is a member of South Carolina's congressional delegation, and has been closely involved in the decade-plus of negotiations between South Carolina and the federal government concerning the storage and processing of weapons-grade plutonium within South Carolina's borders as a member of both the U.S. House of Representatives and the U.S. Senate. Further, the Savannah River Site (SRS) is located within Senator Graham's jurisdictional authority and responsibility. *Amicus curiae* is personally familiar with the negotiations and agreements entered into between the State of South Carolina and the federal government, including the relevant statutory provisions. He has a profound interest in ensuring that the United States' commitments to South Carolina, which he helped secure to protect South Carolina's sovereign and proprietary interests, are considered by the judiciary.

SUMMARY OF ARGUMENT

Constitutional principles of federalism demand that South Carolina be allowed to proceed with this case in order to protect its sovereign interests. As a fellow sovereign, South Carolina is entitled to the federal

[1] The State of South Carolina assisted with the preparation of this brief and funded the cost of printing and filing. Counsel of record for all parties received notice at least ten days, prior to the due date, of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

government's respect and should be able to rely on the federal government to engage in good-faith dealings. In the early 2000s, the federal government made several commitments to the State, ultimately codified through the enactment of 50 U.S.C. § 2566. Section 2566 ensured that plutonium was only allowed to enter South Carolina on the condition that South Carolina would not become the final repository for that plutonium. These commitments were made directly to the State by statute; they provide South Carolina, as a sovereign, certain protections and rights.

In 2017 and 2018, two more statutes were enacted to ensure that the termination of certain legal duties and obligations to South Carolina was justified and followed an enumerated protocol. National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, 131 Stat. 1283, § 3121 (NDAA FY18); *see* Consolidated Appropriations Act for Fiscal Year 2018, Pub. L. 115-141, 132 Stat. 348, § 309 (CAA FY18). But the federal government reneged and failed to comply with the enumerated protocol, instead opting to simply abandon and terminate the project at issue. Having breached the legal rights and duties owed to South Carolina, the federal government has caused direct injury to the State by rendering it the *de facto* permanent depository of the nation's excess weapons-grade plutonium.

The Fourth Circuit erroneously determined that the State did not have standing to pursue its claims to enforce legal duties and protections afforded South Carolina by statute. It also erroneously determined that the State's injuries are not sufficiently ripe for

adjudication. Principles of federalism and separation of powers demand that this Court grant review of the State's Petition in order to correct those grave errors.

ARGUMENT

I. This case presents important questions regarding principles of federalism and separation of powers involving a state acting to protect its sovereign interests.

The fundamental question presented in this case is whether a state can be denied access to the judiciary to air a grievance against the federal government when the federal government fails to comply with a statute enacted by Congress for the protection of that state. The answer must be no.

The United States Constitution created a system of dual sovereignty, one that recognizes the sovereignty of the federal government as well as that of the states. If the Constitution is to be effective, as well as just, it is essential "to provide against Discord between national and State Jurisdictions, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent, and yet sufficiently combined[.]" John Jay, *The Correspondence and Public Papers of John Jay*, Henry P. Johnston, ed. (1890–93) Vol. 3 (1782–93). As sovereigns, states "are owed by the federal government as well as by each

other the mutual respect of sovereigns[.]" *E.E.O.C. v. Illinois*, 69 F.3d 167, 170 (7th Cir. 1995).

These constitutional principles demand that the federal government recognize the sovereignty of the State of South Carolina by allowing it to pursue its claims.

A. Section 2566 recognized and protected South Carolina's sovereignty.

The statutory protections invoked by South Carolina were enacted in recognition of the State of South Carolina's sovereignty and to protect the State's interests. Federalism principles underpinned the negotiations that led to these statutes' enactment. In recognition of the Constitution's preservation of the sovereign status of the states, prior administrations and members of Congress engaged in high-level negotiations with the State to ensure that its sovereign interests were protected while the federal government pursued the MOX Project.[2] These negotiations recognized and protected South Carolina's sovereign and proprietary interests in the land underlying and surrounding the SRS, as well as the economic benefits that

[2] As discussed in South Carolina's Petition for W*rit of Certiorari*, the MOX Facility was proposed and partially constructed with the goal of transforming weapons-grade plutonium into commercial fuel for nuclear reactors. The termination of the MOX Facility leaves South Carolina as the repository for tons of weapons-grade plutonium transported to South Carolina for the purpose of being processed by the MOX Facility.

would accrue to the State by virtue of the MOX Facility's operations.

Negotiations between South Carolina and the federal government resulted in enactment of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, 116 Stat. 2456, § 3182, *subsequently codified as* 50 U.S.C. § 2566 (Section 2566). Section 2566 codified the commitments of the United States and the Department of Energy (DOE) to the State of South Carolina: while the plutonium may be placed in the State, this placement was not final disposition for long-term storage of plutonium. Rather, it was temporary storage to implement the disposition method of MOX processing in the MOX Facility. As previously reported to Congress, Section 2566 was a direct result of the negotiations between the State and the federal government:

> In a sign of good faith to the State of South Carolina, language was negotiated between the State of South Carolina and the Federal Government that required the Department of Energy to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors . . . or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. . . . South Carolina would not have accepted plutonium without this statute. . . . This is the reassurance the Federal Government gives to South Carolina that it is DOE's intention to see this project through.

S. REP. No. 12740-01, at 5 (2005) (Conf. Rep.), 151 Cong. Rec. S12740-01, 109th Congress, First Session (Nov. 14, 2005). In 2014, the extent of those discussions was further opined upon:

> The bottom line is just not about MOX, but it's about what kind of relationship we're going to have with our states when they step up to the plate to do things?
>
> We've looked through our office files here, and on April 11, 2002, the Secretary of Energy, Spencer Abraham, wrote to the governor of South Carolina, then Jim Hodges, laying out the commitment to the MOX program, because there was concern that the federal government would back out. And he said, a commitment by the Department of Energy, backed up by language in the president's F.Y. '03 budget, to request all needed funds to carry out this program at Savannah River estimated to be $3.8 billion over 20 years.

Hearing on National Nuclear Security Administration Budget for F.Y. 2015 Before the Subcomm. on Energy and Water Development of the S. Committee on Appropriations, 113th Cong. (April 30, 2014) (statement of Sen. Lindsey Graham, Member, S. Comm. on Appropriations).

And the federal government has recognized these commitments over the years during various iterations of congressional testimony:

> We are in discussions with the governor of South Carolina to get this process done. But

> we have strived to put in place as many assurances as we can. Our budget reflects a commitment to move forward . . . we have made a firm commitment and received one from OMB to request all needed funds to carry out the program over the next 20 years. . . . We've done a lot of things to provide certainty on both sides so that we could do this very important project and at the same time move forward with nonproliferation objectives.

Hearing on FY 2003 Energy Defense Activities Before the H. Comm. on Armed Services, 107th Cong. (March 13, 2002) (testimony of Spencer Abraham, Sec. of Energy, Dep't of Energy).

More statements may be found in the record, but these excerpts demonstrate that discussions were undertaken between two sovereigns who ultimately relied upon the enactment of a statute by the legislative branch to memorialize binding commitments that the executive branch would honor on behalf of one sovereign to another. When the executive branch violates the statute and a state seeks to hold it accountable, the judicial branch must, under the constitutional system of checks and balances, provide a counterweight.

B. Section 3121 recognized and protected South Carolina's sovereignty.

Subsequent negotiations resulted in passage of two statutes, enacted in 2017 and 2018, that preclude termination of the federal government's efforts to construct the MOX Facility unless very specific conditions

are met: Section 3121 of NDAA FY18 and Section 309 of CAA FY18.

Both of these statutes mandate that appropriated funds only be made available for construction and project support activities for the MOX Facility, and set forth a specific statutory scheme to be followed in the event the federal government determined to abandon their commitments.[3] These subsequent statutes reflect Congress' continued intent to protect South Carolina's sovereign, proprietary, and economic interests in seeing that the MOX Facility is constructed or to provide a legally viable disposition pathway for the weapons-grade plutonium in South Carolina (which is why an alternatives analysis was required *prior* to termination of the MOX Facility—a critical failure of the federal government in this instance).

South Carolina, the intended beneficiary of this statute, has challenged the adequacy of the Secretary's compliance with it. Because South Carolina is the beneficiary of these commitments, it is only natural that

[3] Pursuant to Section 3121(b)(1), the Secretary of Energy must submit to the congressional defense committees: (1) the Secretary's commitment to remove from South Carolina all plutonium intended for disposition at the MOX Facility and ensure a sustainable future for the SRS; (2) a certification that (a) an alternative option for disposition of the plutonium exists and (b) the remaining lifecycle costs for the alternative option would be less than half of the estimated lifecycle costs of the MOX Program; and (3) details of any statutory or regulatory changes necessary to complete the alternative option. NDAA FY18, Pub. L. 115-91, 131 Stat. 1283, § 3121(b)(1). The Secretary was required to satisfy each of these statutory mandates *prior* to terminating construction of the MOX Facility.

South Carolina is the proper plaintiff with "standing" to enforce these commitments. No other state or individual is the intended beneficiary of these statutory commitments, as they were the result of direct negotiations with the State of South Carolina to protect its own sovereign, proprietary, and economic interests. Further, the statutory certification requirements were intended to be enforceable by the State of South Carolina itself. These statutes were also intended to allow the State to enforce and secure compliance with the obligations and commitments of the United States and DOE in the United States District Court. *See* 50 U.S.C. § 2566(d)(3) (contemplating "the State of South Carolina obtain[ing]" injunctive relief against the United States).

As *amicus curiae* was closely involved in the negotiations preceding the passage of each of these statutes, he attests from personal knowledge that it was Congress' intent for the State of South Carolina to be the intended beneficiary of each statute which would afford South Carolina the ability to seek relief if the federal government violated the law.[4]

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[4] Congress has continued to appropriate funds for the MOX Project and issued riders for those appropriations requiring the federal government to use the funds solely to continue with construction and operation of the MOX Facility. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, 132 Stat. 1636, § 3119. Notably, this was enacted *after* the federal government claimed it satisfied the statutory scheme for termination, indicating that Congress did not accept the purported termination.

South Carolina negotiated for the protections provided by Section 2566, NDAA FY18, and CAA FY18 in good faith, with the understanding that the federal government would also act in good faith in carrying out the statutory mandates. When Congress enacted these statutory mandates, it established legal obligations that the federal government must honor. If the constitutional balance of federalism is to remain, states must be certain that the federal government will comply with the law and respect the states' sovereign interests. Principles of federalism and separation of powers demand that South Carolina be allowed to proceed with its claims that the federal government has failed to meet its commitments and statutory obligations to the State and vindicate the rule of law. Failing to recognize an injury to South Carolina in this instance is contrary to the principles upon which this nation was founded.[5]

[5] In 2002, a federal court lectured then-Governor Hodges about respecting the Constitution when he sought to protect the State from the importation of the weapons-grade plutonium for fear that DOE would not comply with its commitments, rendering South Carolina the "dumping ground" for the nation's plutonium. *Abraham v. Hodges*, 255 F. Supp. 2d 539 (D.S.C. 2002). Now, it is the federal court's time to respect the Constitution and allow South Carolina the opportunity to plead its case that the federal government is violating federal law, *id.* at 541 n.2, which the district court found persuasive as it issued a preliminary injunction.

C. Federalism and separation of powers require South Carolina's case to be heard.

The bedrock constitutional principles of federalism and separation of powers between a sovereign state government and a sovereign federal government cannot be displaced by the jurisprudential construct of a standing doctrine based on an interpretation of the Case or Controversy Clause, but rather the constitutional delegation of authority to the judiciary must be available to a sovereign state seeking to enforce the application of those constitutional principles. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 Northwestern L. Rev. 169 (2012); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1395 (1988); *see also* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*?, 102 Mich. L. Rev. 689 (2004).

This Court has repeatedly recognized that principles of federalism demand that the sovereignty of the states must be respected. "[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). As this Court has observed, "the founding document 'specifically recognizes the States as sovereign entities.'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)). Thus, "the states entered the federal system

with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1996).

"The federal system established by our Constitution preserves the sovereign status of the States . . . it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. The states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Id.* (quoting *The Federalist No. 39* (J. Madison)). "The States thus retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations, but retain the dignity, if not the full authority, of sovereignty." *Id.*

Principles of federalism protect not just the states as sovereign entities, but the individual freedoms of the citizens of the United States. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. *Bond v. United States*, 564 U.S. 211, 221 (2011). As this Court wrote:

> The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. Federalism has more than one dynamic. It is true that the federal structure

> serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.

Id. See U.S. Const. amend. X. For this reason, "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation omitted)).

A second but equally important constitutional principle demands this Court's review of the Fourth Circuit's erroneous decision, as this case presents a significant question of the ability of one branch of the federal government to disregard clear federal statutes enacted by another branch of the federal government, without any check by a third branch of the federal government. Under the Constitution's principle of separation of powers, Congress makes the laws, the executive implements and enforces the laws, and the judicial branch interprets the law when a dispute arises. *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). Thus,

> [t]he framers of the Constitution viewed the separation of powers as the great safeguard of

> liberty in the new National Government. To protect liberty, the Constitution divides power among the three branches of the National Government. The Constitution vests Congress with the legislative power. U.S. Const. art. I, § 1. The Constitution vests the President with the executive power including the responsibility to "take Care that the Laws be faithfully executed." *Id.* art. II, § 1, cl. 3; *id.* § 3. The Constitution vests the Judiciary with the judicial power, including the power in appropriate cases to determine whether the executive has acted consistently with the Constitution and statutes. *See id.* art. III, §§ 1, 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

Id. at 418. The Constitution is neither silent nor equivocal about who shall make laws that the executive is to execute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). "[W]hen Congress is exercising its own powers with respect to matters of public right, the executive role of 'tak[ing] care that the Laws be faithfully executed,' U.S. Const. art. II, § 3, is entirely derivative of the laws passed by Congress." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004).

This case presents a fundamental question about the relationship of the state and federal sovereigns under the Constitution, and the rights of a state to enforce federal law that the executive ignores, warranting this Court's critical analysis.

CONCLUSION

The constitutional balance of federalism recognizes that states, as sovereign entities, are entitled to the federal government's respect. They are entitled to protect their interests. The federal government previously made legally binding commitments to the State of South Carolina in recognition of its sovereign status and its proprietary interests. It has now breached those commitments, causing injury to the State that a court may redress. Principles of federalism and separation of powers require that the State be allowed to seek redress for these injuries. For these reasons, this Court should grant South Carolina's Petition for *Writ of Certiorari*.

Respectfully submitted,

M. DAWES COOKE, JR.
Counsel of Record
BARNWELL WHALEY PATTERSON AND HELMS, LLC
288 Meeting Street, Suite 200
Charleston, South Carolina 29401
mdc@barnwell-whaley.com
Telephone: (843) 577-7700

Counsel for Amicus Curiae

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