No. 18-1531

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly vacated a preliminary injunction in this suit challenging a decision to halt construction of a facility that would not have been completed for another 30 years on the ground that petitioner lacks standing and the challenge is not ripe.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.C.):

South Carolina v. *United States*, No. 18-cv-1431 (June 7, 2018)

United States Court of Appeals (4th Cir.):

South Carolina v. *United States*, No. 18-1684 (Jan. 8, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 912 F.3d 720. The order of the district court (Pet. App. 34a-82a) is reported at 329 F. Supp. 3d 214. A subsequent order and opinion of the district court (Pet. App. 27a-33a) is not published in the Federal Supplement but is available at 2018 WL 3120647.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on January 8, 2019. On March 29, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 7, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Savannah River Site (SRS) in western South Carolina is the location of various attempts by the

federal government to process surplus weapons-usable plutonium. Gov't C.A. Br. 3-4.

In 2002, Congress directed the Secretary of Energy to submit a plan for the construction and operation of a mixed oxide fuel fabrication facility (MOX facility) at SRS that could be used to dispose of over 30 metric tons of surplus weapons-usable plutonium. Pet. App. 4a; see *id.* at 93a-94a. MOX facilities convert weapons-usable plutonium into mixed-oxide fuel, which can be used in commercial nuclear reactors. Gov't C.A. Br. 2. Although the MOX facility would be built in South Carolina, it was meant to process surplus plutonium from across the United States. *Ibid.* Congress imposed reporting requirements on the Department of Energy (Department) and consequences for failing to complete the MOX facility on schedule. 50 U.S.C. 2566 (2012 & Supp. V 2017). Among other things, Congress provided that "[i]f the MOX production objective is not achieved * * * the Secretary shall * * * remove from the State of South Carolina, for storage or disposal elsewhere * * * not later than January 1, 2022," all defense plutonium transferred to SRS between April 15, 2002, and January 1, 2022, and not ultimately processed by the MOX facility. 50 U.S.C. 2566(c)(2) (2012 & Supp. V 2017).

The first budget estimate for the MOX facility at SRS forecast project completion in 2016 at a cost of $4.8 billion. Pet. App. 5a. This estimate proved highly inaccurate due to significant construction delays and cost overruns. *Ibid.* According to the most recent estimate, which was independently confirmed by the Government Accountability Office (GAO), the MOX facility could be completed at the earliest in 2048—more than 30 years behind schedule—at a cost of $17.2 billion, nearly quadruple the original estimate. *Ibid.*; see Gov't C.A. Br. 4. Among

other costs, the estimate now must account for increased obsolescence of equipment due to the protracted project timeline. Gov't C.A. Br. 4. This estimate reflects only the building of the MOX facility, and does not include the additional time and costs associated with operating the facility to process plutonium after construction is complete, which would add many years and tens of billions of dollars to the cost. *Ibid.*

The Department has developed an alternative method for processing plutonium currently stored at SRS, referred to as the "Dilute and Dispose" method. Pet. App. 5a. Under that approach, plutonium is blended with other materials to ensure it cannot be recovered without extensive processing, and is then shipped from SRS to a Waste Isolation Pilot Plant (WIPP) in New Mexico for permanent disposal. *Ibid.* The Dilute and Dispose method is already being used to process certain plutonium at SRS that was not designated for processing by the MOX facility. Gov't C.A. Br. 6; see 81 Fed. Reg. 19,588 (Apr. 5, 2016).

b. In December 2017, the President signed into law the National Defense Authorization Act for Fiscal Year 2018 (NDAA), Pub. L. No. 115-91, 131 Stat. 1283. Section 3121 of that statute directs the Secretary of Energy to "carry out construction and project support activities relating to the MOX facility," but expressly provides that the "Secretary may waive th[at] requirement" by "submit[ting] to the congressional defense committees":

> (A) the commitment of the Secretary to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—

> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP–03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office, as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO–09–3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle cost of the mixed-oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

NDAA § 3121(a) and (b)(1), 131 Stat. 1892-1893; Pet. App. 95a-97a. The comparison between the lifecycle cost of the alternative option and the lifecycle cost of the MOX facility must be based on cost estimates "of comparable accuracy." NDAA § 3121(b)(2), 131 Stat. 1893; Pet. App. 97a. Section 309 of the Consolidated Appropriations Act, 2018 (CAA), Pub. L. No. 115-141, 132 Stat. 348, similarly provides that the Secretary need not fund construction and project support activities for the MOX facility beginning 30 days after he satisfies Section 3121 of the NDAA and submits certain documents to Congress. CAA § 309, 132 Stat. 530; Pet. App. 98a.

c. On May 10, 2018, the Secretary of Energy submitted the congressional notifications required under the NDAA and the CAA to waive the obligation to construct the MOX facility. Pet. App. 107a-109a. As the statute required, the Secretary "confirm[ed] that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." *Id.* at 107a.

The Secretary certified "that an alternative option for carrying out the plutonium disposition program for the same amount of plutonium intended to be disposed of in the MOX facility exists," noting that the Department could use the Dilute and Dispose method as it is doing with other plutonium at the SRS site. Pet. App. 108a. The Secretary informed Congress that this alternative would cost $19.9 billion, less than half of the estimated $49.4 billion that it would cost to complete the MOX facility and process the plutonium there. *Ibid.*

In the submission to Congress, the Secretary explained that some plutonium in South Carolina was already being processed for shipment to the WIPP, and that those efforts would continue and intensify with the installation of additional equipment. Pet. App. 107a-108a. The Secretary also stated that the Department was "exploring whether any of the plutonium currently in South Carolina can be moved elsewhere for programmatic uses" by the federal government. *Id.* at 108a.

As required by statute, the Secretary's letter also certified that the independent cost estimate for the Dilute and Dispose alternative was determined in a manner comparable to the best practices of the GAO, and that the estimates used for the MOX project and for Dilute and Dispose were of comparable accuracy. Pet. App. 108a-109a; see *id.* at 95a-97a. The Secretary certified

that the Department would work with New Mexico to ensure that WIPP has sufficient capacity to receive the plutonium, and noted that the Department had submitted a proposed permit modification to the New Mexico Environment Department. *Id.* at 109a.

2. On May 25, 2018, petitioner filed a complaint in district court and moved for a preliminary injunction to prevent the Department from halting construction of the MOX Facility, which the district court granted on June 7, 2018. Pet. 9-10; Pet. App. 34a-82a.

In its order, the district court concluded that petitioner had standing to pursue its claims. Pet. App. 44a-48a. The court rejected both of petitioner's arguments claiming economic injuries-in-fact and found no cognizable economic harm. *Id.* at 45a-46a. But the court believed petitioner had suffered a procedural injury based on the allegation that the Department had "failed to adequately consult the Governor of South Carolina, as required by 50 U.S.C. § 2567(a)," and on the Department's alleged "failure to conform with the requirements" of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. 47a. The court also concluded that petitioner could establish standing based on "an environmental injury" because of the alleged failure to comply with NEPA. *Id.* at 47a-48a.

On the merits, the district court granted petitioner's request for a preliminary injunction. Pet. App. 81a. The court found that petitioner would not likely succeed on its claim that the government had violated the consultation requirement in 50 U.S.C. 2567 because "the facts of this case show that the Governor was consulted prior to" the Secretary's invocation of the waiver process to cease construction of the MOX facility. Pet. App. 57a. But the court concluded that petitioner would likely succeed on

its claims that the decision to halt construction violated NEPA and that the submission to Congress invoking the waiver authority was inadequate. *Id.* at 59a-72a.

3. The court of appeals vacated the preliminary injunction, holding that petitioner lacked standing and that the case was not ripe. Pet. App. 1a-22a.

The court of appeals observed that "[t]o establish Article III standing, 'a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" Pet. App. 11a (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)). The court further observed that "[o]n appeal, [petitioner] contends that it has suffered an injury-in-fact sufficient to support standing" by claiming it would "become 'the permanent repository of weapons-grade plutonium' and all the environmental, health, and safety risks that entails." *Id.* at 12a, 15a (quoting Pet. C.A. Br. 15-16). The court concluded that "this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support" standing for petitioner's claims. *Id.* at 12a.

The court of appeals explained that petitioner's "theory of standing" rested on "a * * * 'highly attenuated chain of possibilities.'" Pet. App. 15a (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). In particular, petitioner's harm would materialize only if the Department failed "to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina" over the course of several decades. *Ibid.* The court noted that "[t]he Secretary of

Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method," and the Department could also develop other methods or "transfer the plutonium out of South Carolina to another location." *Ibid.* The court also stated that "Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina," because "[a] federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed." *Id.* at 15a-16a (citing 50 U.S.C. 2566(c)(2) (2012 & Supp. V 2017)).

"In sum," the court of appeals stated that for petitioner's alleged injury to occur, "(1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation." Pet. App. 16a. The court found "this 'chain of possibilities'" to be "too speculative to give rise to a sufficiently concrete injury-in-fact." *Ibid.*

The court of appeals distinguished its prior decision in *Hodges* v. *Abraham*, 300 F.3d 432 (4th Cir. 2002), cert. denied, 537 U.S. 1105 (2003), which held that South Carolina had standing to challenge the impending shipment of plutonium to South Carolina. The court explained that *Hodges* involved a challenge to the "*current* storage of nuclear material at the Savannah River Site," whereas this case depends on "the alleged *future* adverse environmental impacts on South Carolina * * * if the Department of Energy continues to store the plutonium

in the Savannah River Site *decades in the future*." Pet. App. 18a-19a.

The court of appeals also concluded, for similar reasons, that petitioner's claims were not ripe. Pet. App. 19a-21a. The court explained that "[t]he two claims that [petitioner] advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." *Id.* at 21a. The court recognized that those claims hinged on "numerous 'contingent future events'" that "must occur before South Carolina becomes the *permanent* repository of the nuclear material." *Ibid.* (citation omitted). The court found that "[a]ll of these 'future uncertainties'" demonstrated "that the two claims at issue are not ripe for review at this time—at least as presented by [petitioner]." *Ibid.* (citation omitted).

Finally, the court of appeals stated that the fact "[t]hat the two claims are not currently justiciable does not mean that they never will be so." Pet. App. 22a. "If uncertainty as to several links in the chain of possibilities is resolved," the court observed, petitioner's "alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review." *Ibid.* But the court found that, at this juncture, "the only theory of injury advanced by [petitioner]—that South Carolina will be the permanent repository of the nuclear material"—was too speculative and contingent to permit judicial review. *Ibid.*

ARGUMENT

The court of appeals understood petitioner to assert an injury in this case that would occur, if at all, only decades in the future, and then only if various contingencies

came to pass. The court's factbound conclusion that petitioner's claimed injury was too speculative to permit review at this time is correct. The court properly applied settled law to the particular facts of this case, and its decision does not conflict with any decision of this Court or of another court of appeals. No further review is warranted.

1. The court of appeals correctly held that petitioner had not carried its burden of establishing a concrete injury that is not speculative or conjectural to support judicial review of petitioner's claims at this time.

This case involves a challenge to an agency decision, pursuant to waiver authority specifically granted by Congress, to halt construction of a facility that is more than 30 years behind schedule and could not be completed until 2048 at the earliest, at a cost that is many billions of dollars more than original estimates. Petitioner's claimed injury is that the facility would have been useful in processing plutonium that otherwise might remain in South Carolina and that halting construction might leave the State "as the indefinite repository of defense plutonium." Pet. C.A. Br. 14; see *id.* at 15-16 (contending that South Carolina would be harmed "by being rendered the permanent repository for weapons-grade plutonium as a result of [the Department's] decision"). But it is undisputed that wholly apart from the decision challenged here, the MOX facility would not be completed—and thus would not process any plutonium—for almost 30 years. Petitioner's theory of standing thus amounts to an argument that, 30 years from now, there may be more plutonium in South Carolina than there would have been had the Department not decided to halt construction of the MOX facility and instead pursue alternative means of

disposing of the plutonium that were more efficient and proximate in time.

As the court of appeals recognized, that claim of injury is far from imminent and is highly conjectural. Pet. App. 15a-19a. The court reasoned that petitioner's concern about becoming "'the permanent repository of weapons-grade plutonium'" would come to pass only decades in the future and only if it turned out, among other things, that "the proposed Dilute and Dispose method" failed and "the Department * * * fail[ed] to identify an alternative method for disposing of the nuclear material." *Id.* at 16a (quoting Pet. C.A. Br. 15-16). Because petitioner's claimed injury relies on a "highly attenuated chain of possibilities," it does not satisfy this Court's requirement that injury be "certainly impending." *Id.* at 14a-15a (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).

Nor can petitioner establish standing by asserting (Pet. 9) that "South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing," which is not "going anywhere anytime soon." As the court of appeals recognized, that state of affairs will not change based on the outcome of this case. The MOX facility could not be completed until 2048 at the earliest, and the processing of plutonium would not begin until that time. Pet. App. 5a. Petitioner thus cannot claim injury based on the presence of plutonium that is currently stored at SRS, but rather must contend that it will be harmed three decades in the future if the processing of that plutonium is further delayed beyond the year 2048.

As the court of appeals recognized, that alleged distant injury is highly conjectural. Far from deciding to leave the plutonium at SRS, the Department is actively

seeking better strategies for the disposal and removal of the material. Congress authorized the Secretary of Energy to follow exactly this process if he formally committed to removing the plutonium from SRS and identified a less expensive way to do so. See Pet. App. 95a-97a. The Secretary's decision to exercise this statutory authority and pursue alternate methods of disposal does not amount to a decision to permanently abandon the plutonium in South Carolina. Indeed, the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty.

In addition to committing to removing the plutonium from South Carolina, the Secretary of Energy has identified the Dilute and Dispose method as an alternative means of disposing of plutonium—and one that does not require constructing a facility that is already 30 years behind schedule and billions of dollars over budget. Pet. App. 108a. The Secretary has certified to Congress that this method is technically feasible and would cost significantly less than the MOX program. *Ibid.* No factual basis exists to conclude that the Department will fail to use Dilute and Dispose (or another method) to remove plutonium at least as fast as the MOX facility could do so—even assuming the MOX facility could be constructed according to the current schedule, which would require billions more dollars of funding from Congress and the absence of any further delays or setbacks. In light of these circumstances, petitioner cannot establish that the court of appeals erred in concluding that petitioner's claim of injury based on its concern about "becoming 'the permanent repository of weapons-grade plutonium'" was

"too speculative to give rise to a sufficiently concrete injury-in-fact." *Id.* at 16a (quoting Pet. C.A. Br. 15-16).

Petitioner appears to contend (Pet. 31) that the court of appeals misunderstood its claim of injury when the court observed that "the only theory of injury" petitioner advanced was "that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site." Pet. App. 22a. But the court relied on petitioner's own statements in analyzing standing. Petitioner asserted that "[t]he State is harmed by being rendered the permanent repository for weapons-grade plutonium as a result of the Department's decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121 of NDAA FY18." Pet. C.A. Br. 15-16. In any event, petitioner's factbound disagreement with the court's understanding of the claimed injury in this case does not warrant this Court's review. See Sup. Ct. R. 10.

Petitioner's challenge (Pet. 20-23) to the court of appeals' ripeness holding is similarly without merit. The court understood petitioner to challenge a decision to make South Carolina "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." Pet. App. 21a. But no such decision has been made. Indeed, the challenged action involved a certification by the Secretary of Energy that instead "confirm[ed] that the Department is committed to *removing* plutonium from South Carolina intended to be disposed of in the MOX facility." *Id.* at 107a (emphasis added). The court accordingly correctly concluded that petitioner's challenge was not ripe in light of the contingent future events that would have to occur before the Department determined to permanently store the mate-

rial at SRS. *Id.* at 107a-108a. Petitioner's factbound disagreement with the court's understanding of its claim does not merit further review.

2. Petitioner is wrong to assert (Pet. 16-19, 23-28) that the court of appeals' decision conflicts with this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and with the decisions of other courts of appeals.

a. Petitioner contends (Pet. 16-18) that the court of appeals erred by failing to accord it "special solicitude" in the standing analysis, in purported contravention of *Massachusetts*. But the court did not have occasion to address whether or how, in a close case, a State's status as a plaintiff would affect the standing analysis, because the court found petitioner's claimed injury to be so clearly speculative and insufficient under Article III of the U.S. Constitution. Although petitioner now contends (Pet. 31) that "this case presents legal claims that crystallize key questions about the nature of the 'special solicitude' recognized in *Massachusetts v. EPA*," petitioner's brief in the court of appeals mentioned *Massachusetts* just once in passing as a "see also" citation, Pet. C.A. Br. 16-17, without any reference to the expression of "special solicitude" in that decision for a State's standing, on which petitioner now centrally relies, see Pet. 16-28.

In any event, the court of appeals' reasoning in this case is consistent with *Massachusetts*. The court applied settled principles to conclude that the highly speculative, distant, and conjectural injury in this case was not an adequate basis for standing. *Massachusetts* did not abandon the requirement that the threatened injury be actual and imminent. To the contrary, the Court held that those requirements were met on the facts of the case in *Massachusetts*, 549 U.S. at 521—an analysis that would

have been unnecessary if a State could rely on speculative and distant threats of injury like petitioner's allegation here that in 30 years it may become "the permanent repository of the nuclear material currently stored at the Savannah River Site" if a number of contingencies occur. Pet. App. 22a. Moreover, this Court in *Massachusetts* attached significance to a special statutory right of judicial review in that case. See 549 U.S. at 519-520. There is no such judicial review provision here.

The court of appeals below specifically recognized that petitioner could have established standing if it had demonstrated that "its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored." Pet. App. 18a. Indeed, the court previously held in *Hodges* v. *Abraham*, 300 F.3d 432 (4th Cir. 2002), cert. denied, 537 U.S. 1105 (2003), that South Carolina had established standing to challenge the shipment of plutonium into the State because it alleged injuries that were not speculative or remote. See Pet. App. 18a-19a (discussing and distinguishing *Hodges*). In this case, the court reaffirmed the analysis of the State's standing in *Hodges*, but distinguished that case on its facts because "[t]here is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*." *Ibid.* As the court correctly recognized, an allegation of injury based on the current storage of plutonium (as in

Hodges) or current and continuing environmental harm (as in *Massachusetts*) cannot be compared to the risk that plutonium may be stored decades in the future following "numerous contingencies" that might not occur. *Id.* at 19a. That factbound holding does not warrant this Court's review.

b. Petitioner also errs in contending (Pet. 23) that other courts of appeals would have "upheld South Carolina's standing to bring the present suit." The cases on which petitioner relies (Pet. 23-28) have not abandoned the principle that injury must be actual and imminent, even if it is alleged by a State. In *Connecticut* v. *American Electric Power Co.*, 582 F.3d 309 (2009), rev'd on other grounds, 564 U.S. 410 (2011), the Second Circuit held that the plaintiff States had satisfied the traditional test for actual and imminent injury. *Id.* at 338. In *Texas* v. *United States*, 809 F.3d 134 (2015), aff'd by equally divided Court, 136 S. Ct. 2271 (2016), the Fifth Circuit held that Texas would suffer imminent financial injury based on the government's action in that case. *Id.* at 152-153, 155. And in *New Mexico* v. *Department Of the Interior*, 854 F.3d 1207 (2017), the Tenth Circuit held that the agency action at issue deprived New Mexico of an opportunity to determine the terms on which gambling would be permitted within its territory. *Id.* at 1216. Regardless of whether those cases were properly decided, they involved facts far afield from the speculative claim of injury at issue here and do not conflict in reasoning or result with the court of appeals' decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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