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 A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation—and presents the same issue of the State's Article III standing—as presented in *Massachusetts v. EPA*, 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23–28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA*, it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a–72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA*, and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See*, *e.g.*,

*United States v. Texas*, 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

## ARGUMENT

### I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA*, "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA*. Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA*, 549 U.S. at 518. Accordingly, the dissent read the

majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539–540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf.*, *e.g.*, *Horn v. Banks*, 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane*, 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited—as the United States would have it—to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17–18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA*, 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring

only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA*, 549 U.S. at 518–519 ("[I]n its capacity of *quasi*-sovereign . . . the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA*, those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id*. at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA*, 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA*, 549 U.S. at 517–518); and under

statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17–18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4–10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA*.

As shown in our petition (at 23–28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt*, No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA*, 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

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[1] The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence.

## II. South Carolina Has Article III Standing under *Massachusetts v. EPA*.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21–22. Instead, the United States argues that South Carolina's injuries will not mature until 20*48*, because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats

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Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002).

of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf. Massachusetts v. EPA*, 549 U.S. at 522–523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "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." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the

federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17–18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a–72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a–76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2–3, 19–35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

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[2] In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a–16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has its way that provision is not long for this world. After all, the federal government has not altered its plans

This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA*, 549 U.S. at 516–526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA*, South Carolina's standing follows a fortiori from this Court's decision in that case.

## III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20–23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on

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to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "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. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims*, not its assertions of injury. *See id*. at 19a. Where the Fourth Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21–22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

## IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is

final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government—many of which have reached this Court[3]—and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government . . . are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here—the federal government abandoning its statutory obligations and leaving South Carolina to deal with the

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[3] *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 139 S. Ct. 2779 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

consequences. Sen. Graham *Amicus* Br. 3–10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5–10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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