No. 05-___

IN THE

Supreme Court of the United States

Stephen P. Medeiros,

Petitioner,

v.

W. Michael Sullivan, Director of the Rhode Island Department of Environmental Management, Atlantic States Marine Fisheries Commission, and United States of America.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 27, 2006

QUESTION PRESENTED

Whether a person directly harmed by the federal government's commandeering of a state government in violation of the Tenth Amendment and principles of federalism is nonetheless categorically prohibited from challenging that Tenth Amendment violation.

PARTIES TO THE PROCEEDING BELOW

Frederick J. Vincent appeared as an appellee below in his capacity as interim director of the Rhode Island Department of Environmental Management ("DEM"). See Pet. App. 1a. He replaced Jan Reitsma, who appeared as a defendant in the district court and as an appellee at the commencement of the First Circuit appeal in his capacity as director of DEM. See ASMFC C.A. Br. (cover).

W. Michael Sullivan is substituted as respondent in this Court. On April 5, 2005, he was appointed as the director of DEM, replacing Frederick J. Vincent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen P. Medeiros respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-17a), dated December 12, 2005, is published at 431 F.3d 25. The district court's order granting respondents' motion for summary judgment (Pet. App. 18a-33a) is published at 327 F. Supp. 2d 145. On March 6, 2006, Justice Souter extended the time to file this petition to and including March 27, 2006. App. 05A811. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant statutory and regulatory provisions are reproduced in the Appendix at 34a-53a.

STATEMENT

Petitioner brought this suit to challenge a federal statute that required Rhode Island to adopt a fisheries regulation that harms petitioner's business as a commercial fisherman. Petitioner challenged the federal statute as violating the Tenth Amendment's anti-commandeering principle. The lower courts did not doubt that petitioner had been injured by the federal mandate. They nonetheless held that petitioner lacked standing because private individuals are powerless to raise such a Tenth Amendment challenge. Deeming the contrary holdings of the Seventh and Eleventh Circuits – which allow private plaintiffs to litigate such a claim – "problematic," the

First Circuit invited this Court to revisit this "complex [] issue of constitutional law," Pet. App. 17a, noting that the Court had previously granted certiorari to decide the question, but ultimately left it unresolved, *id.* 16a (citing *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003)).

1. In 1942, Congress approved an interstate compact among the Atlantic coast states "to promote the better utilization of the fisheries * * * of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries." Act of May 4, 1942, Pub. L. No. 77-539, 56 Stat. 267, 267. The compact created the Atlantic States Marine Fisheries Commission ("ASMFC" or "Commission"), which, as originally established, had no actual authority over the member states. Instead, the Commission was limited to "recommend[ing] to the governors and legislatures of the various signatory states, legislation dealing with the conservation of * * * fisheries." 56 Stat. at 268. Such recommendations took the form of interstate fishery management plans. *Ibid.*; ASMFC Rules and Regulations, art. vi, *available at* http://www.asmfc.org (visited Mar. 27, 2006). While each member state had "the opportunity to participate in" recommended fishery management plans, *id.* art. vi, § 4, the states' only affirmative duty was to contribute to the Commission's operating budget, 56 Stat. at 269.

In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act ("Act"), Pub. L. No. 103-206, 107 Stat. 2419 (codified at 16 U.S.C. 5101-08). In essence, the Act created a federal mandate that member states comply with the Commission's recommendations. The Act requires the Commission to "adopt coastal fishery management plans" and to "specify the requirements necessary for States to be in compliance with [a] plan." 16 U.S.C. 5104(a)(1). The states must then "implement and enforce the measures of such plan[s]," *id.* § 5104(b)(1), by "enact[ing] and implement[ing] laws or regulations as required to conform with the provisions

of a coastal fishery management plan and to assure compliance with such laws or regulations," *id.* § 5102(10).

The Act further requires the Commission to monitor the states' compliance with these fishery management plans; if the Commission finds that a state "has not implemented and enforced such a plan," it is required to notify the U.S. Secretaries of the Interior and Commerce. *Id.* § 5105(a)-(b). If the Secretary of Commerce finds that (i) a state "has failed to carry out its responsibility" to enact these laws, and (ii) that "the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery," then the Secretary must "declare a moratorium on fishing in the fishery in question within the waters of the noncomplying state." *Id.* § 5106(a)(1)-(2), (c)(1). Once a moratorium is in place, all "fishing for any species of fish to which the moratorium applies" is prohibited, with violators subject to both civil and criminal penalties that may include forfeiture of their vessels, gear, and cargo. *Id*. § 5106(e)-(g). The state can free itself from the moratorium only by enacting and enforcing the Commission's plan. *Id*. § 5106(c)(2).

2. Lobsters are found along much of the Atlantic coast and are especially abundant along the inshore areas from Maine to New Jersey. See ASMFC American Lobster Fact Sheet, *available at* http://www.asmfc.org (visited Mar. 22, 2006). These lobster fisheries are among the Atlantic coast's most valuable, with commercial landings in 1999 exceeding 87 million pounds, worth approximately $323 million. *Ibid*. Nearly eighty percent of the annual lobster catch is landed in state waters, which extend from the coastline to three miles offshore. *Ibid*.

The first plan for the management of the American lobster fishery was the Interstate Fishery Management Plan for American Lobster, promulgated by the Commission in the 1970s. ASFMC C.A. Br. 6. In 1997, the Commission adopted Amendment 3 to the Plan, which as relevant here restricts "fishermen using gear or methods other than traps

(non-trap fishermen) * * * to no more than 100 lobsters per day * * * up to a maximum of 500 lobsters per trip, for trips 5 days or longer." Pet. App. 52a.

To implement the Commission's new mandate, as required by the federal statute, the Rhode Island Marine Fisheries Council ("RIMFC")[1] enacted Regulation 15.18 in November 1998. The regulation, which took effect in January 1999, tracked the language of Amendment 3, see Pet. App. 53a, and brought Rhode Island into compliance with the ASMFC's management plan and the requirements of the Act.

RIMFC repealed Regulation 15.18 on June 6, 2000, however. The repeal reflected state officials' concerns that Amendment 3 provided "no meaningful conservation benefit," was "inappropriate for application in Rhode Island waters," and was "discriminatory." Pet. App. 54a-61a. Though the head of Rhode Island's Department of Environmental Management ("DEM") and the state's governor "disagreed with the strategy of falling out of compliance with the Lobster Plan and triggering the possibility of a moratorium," they "shared [RIMFC's] concerns" regarding Amendment 3's deleterious effects on Rhode Island, *id.* 60a; indeed, prompted by the quandary Amendment 3 presented for the state, the DEM Director communicated to the federal government the state's "long-standing concerns regarding state-federal relations in fisheries management." *Id.* 61a.

On October 19, 2000, the Commission found Rhode Island noncompliant with Amendment 3 and, as required by the Act, reported its finding to the Secretaries of the Interior and Commerce. To avoid a threatened moratorium on all lobstering within its waters, Rhode Island reenacted a temporary regulation by emergency rule on November 29,

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[1] RIMFC, which was responsible for regulation of all marine animal species within the state from 1981 until July 2001, became an advisory body in July 2001. See Pet. App. 22a n.2.

2000, but asked the Department of Commerce to reevaluate its position on the necessity of the Amendment. See Pet. App. 58a-61a. After finding that Rhode Island had failed to meet its obligation under the Act to permanently enact a "necessary" state law, the Secretary of Commerce published a moratorium notification in the Federal Register. 66 Fed. Reg. 13,443, 13,444 (Mar. 6, 2001). DEM then readopted its regulation on a permanent basis "to avoid imposition of [this] moratorium." Pet. App. 22a.

3. In this case, petitioner Stephen Medeiros is the plaintiff and the defendants are the United States, the Commission, and DEM. Petitioner is a resident of Rhode Island and operates a commercial fishing vessel there. Petr. C.A. App. 69. Although petitioner does not fish primarily for lobsters, he frequently catches them in his nets, particularly during the months when they are more prevalent at the bottom of the ocean and when other fish are out of season. *Id.* 91. Petitioner sells the lobsters he does catch, supplementing his other fishing income. By restricting the number of lobsters that he is permitted to catch in his nets, Amendment 3 (and, as a result, Regulation 15.18) thus places an economic burden on petitioner's livelihood. It is undisputed that, absent the challenged regulation, petitioner could and would catch and sell lobsters in excess of the regulatory limits.[2]

a. Petitioner accordingly sought a declaration that, *inter alia*, the Act violates the Tenth Amendment by requiring Rhode Island to "implement and enforce" laws not of its own choosing. Pet. App. 29a.[3] Petitioner also sought an

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[2] Indeed, on June 5, 1999, petitioner was criminally charged in Rhode Island Superior Court with landing thirty-one more lobsters than permitted under Amendment 3 and Regulation 15.18. That court dismissed the charges, finding on the facts of that case that the state would be unable to prove the charges beyond a reasonable doubt. See Petr. C.A. App. 43.

[3] Petitioner initiated the case in October 2001 by suing DEM, which removed to federal district court. The Commission was

injunction that would prohibit DEM from enforcing Amendment 3, as implemented by Regulation 15.18.

On cross-motions for summary judgment, the district court rejected respondents' argument that petitioner lacked standing because he had not demonstrated a distinct injury-in-fact. Pet. App. 29a. Noting that the courts of appeals were in "disagreement" on the issue, the court accepted respondents' contention that petitioner lacked standing to raise his Tenth Amendment claim because private individuals, the court held, are categorically precluded from seeking to enforce the limitations imposed on the federal government by the Tenth Amendment. *Id.* 23a. For that conclusion, the district court relied on this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 144 (1939) ("*TVA*"). In *TVA*, this Court – considering a Tenth Amendment challenge to the Tennessee Valley Act brought by private utility companies – had briefly noted that, "absent the states or their officers," those companies lacked "standing in this suit to raise any question" under the Tenth Amendment. Pet. App. 30a (quoting *TVA*, 306 U.S. at 144). The district court acknowledged this Court's subsequent recognition in *New York* v. *United States*, 505 U.S. 144 (1992), that "the Constitution divides authority between federal and state governments for the protection of individuals," and that when "Congress exceeds its authority relative to the States * * * the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." Pet. App. 31a-32a (quoting *New York*, 505 U.S. at 181-82) (alteration in district court opinion). However, the district court deemed that "observ[ation]" "not determinative of the issue" because "[t]he standing of a private litigant to assert a Tenth Amendment claim was not at issue" in *New York*. *Id.* 31a-32a. The district concluded that, because this Court had recently granted certiorari to consider – but declined to resolve – the

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added as an indispensable party, and the United States intervened to defend the Tenth Amendment claim. See Petr. C.A. Br. xi-xii.

very question presented in this case, see *Pierce County*, 537 U.S. at 148 n.10, it remained bound by "the principle enunciated in" *TVA*. Pet. App. 32a.

b. On appeal, the First Circuit affirmed the district court's holding that private parties such as petitioner lack standing to raise Tenth Amendment claims. Pet. App. 13a. Like the district court, the court of appeals deemed this Court's statement in *TVA* "binding precedent" having "direct application to" petitioner's case insofar as "it involved private parties attempting to assert Tenth Amendment claims, whereas *New York* did not." *Id.* 14a-15a. And while the court of appeals acknowledged the possibility that "if a State refuses to oppose an unlawful commandeering, an individual citizen is the only remaining party with an interest and incentive to vindicate that violation, and therefore the *New York* Court necessarily must have envisioned that the private citizen would have standing to bring suit on the Tenth Amendment claim," it dismissed that conclusion as only "one plausible interpretation." *Id.* 15a. Equally plausible, in the court's view, was that "the Court may simply have intended that 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." *Ibid*. However, the court ultimately concluded that it "need not determine which interpretation is more likely, but only that it is at least debatable whether, or to what extent, the *New York* decision undermines the *TVA* holding." *Id.* 15a-16a.

The court of appeals acknowledged that its decision was in conflict with the precedent of the Seventh and Eleventh Circuits, both of which have expressly held that private parties have standing to assert Tenth Amendment claims. Pet. App. 16a (citing *Dillard* v. *Baldwin County Comm'rs*, 225 F.3d 1271, 1283 & n.1 (CA11 2000), and *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 702-04 (CA7 1999), cert. denied, 528 U.S. 1116 (2000)). But the court of appeals concluded

that these contrary authorities were "problematic." *Ibid*. Addressing *Gillespie*, in which the Seventh Circuit permitted a state police officer to maintain a Tenth Amendment challenge to a law restricting his ability to possess a firearm, the First Circuit questioned whether the plaintiff was actually acting on behalf of the state or as a private citizen. *Ibid*. The court of appeals was also skeptical of the Eleventh Circuit's numerous decisions granting standing to private parties, emphasizing that the first case to do so failed to discuss *TVA*. *Ibid*. "In contrast," the First Circuit observed, "many courts explicitly have held that *TVA*, until overruled, bars Tenth Amendment claims by private citizens." *Ibid*. (citing *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10), cert. denied, 125 S. Ct. 88 (2004); *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 147-48 (D.D.C. 2002); *Vt. Assembly of Home Health Agencies* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998)). Ultimately, the court of appeals concluded that it could draw no further conclusions about the continued validity of *TVA*, but could only await this Court's clarification of "so complex an issue of constitutional law." *Id.* 16a-17a.

4. This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals properly recognized that only this Court can bring needed clarity and uniformity to this important and recurring question of federal law. Although consistent with the decisions of two other courts of appeals, the decision below openly conflicts with the holdings of the Seventh and Eleventh Circuits and is in substantial tension with decisions by other courts of appeals that have addressed the merits of private parties' Tenth Amendment challenges without doubting their right to bring such a claim. The conflict arises from the inconsistent signals sent by this Court's 1939 decision in *TVA* and its more recent decisions in *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997), inconsistencies that only this Court can resolve. Indeed, this Court previously granted certiorari to consider, but ultimately

did not reach, the very question presented by this petition. See *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003).[4] At oral argument in *Pierce County*, the United States urged this Court to wait to decide this "difficult question" in a case in which it is "properly raised" and adequately briefed. Tr. of Oral Arg. 25, 28-29, 537 U.S. 129 (No. 01-1229), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1229.pdf. Because the question presented was squarely decided below and is not clouded by any antecedent question, this is that case.

Certiorari is also warranted because the decision below is wrong on the merits. The Tenth Amendment is fundamentally a separation-of-powers principle, and this Court has routinely permitted private individuals to challenge federal laws on the ground that they violate the separation of powers ordained by the Constitution as a means of protecting individual liberty. There is no basis for a different result when the division of authority, and protection of liberty, is ordained by the Tenth Amendment.

I. There Is an Acknowledged and Deep Division Among the Circuits Over Private Parties' Standing to Bring Tenth Amendment Challenges.

1. The circuit conflict over the right of private parties to raise a Tenth Amendment challenge has been widely recognized. See Pet. App. 16a-17a (acknowledging split); *United States* v. *Parker*, 362 F.3d 1279, 1284-85 (CA10) (same), cert. denied, 125 S. Ct. 88 (2004); *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700 n.3 (CA7 1999) (same), cert. denied, 528 U.S. 1116 (2000).

The First Circuit held in this case that violations of the Tenth Amendment are immune from challenge by private parties. Pet. App. 13a. Absent further clarification from this

[4] As far as petitioner can determine, the petition in *Pierce County* was the only petition since the circuit split developed to raise the private-party standing issue.

Court, the court of appeals deemed itself bound by *TVA* to reach that result. *Id.* 14a. The Tenth and D.C. Circuits have reached the same result, albeit for somewhat different reasons. In *Mountain States Legal Foundation* v. *Costle*, 630 F.2d 754, 761-72 (1980), cert. denied, 450 U.S. 1050 (1981), the Tenth Circuit held that a non-profit corporation and various individual state legislators could not challenge the EPA's efforts to impose various air quality rules on the State of Colorado. Explaining that only the Colorado Attorney General was authorized to represent the state in legal proceedings, and therefore the individual legislators could not have been acting on the state's behalf, *id.* at 771, the Tenth Circuit declared that "[o]nly the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment," *id.* at 761. The Tenth Circuit subsequently reaffirmed its position in *Parker*, 362 F.3d at 1284-85 & n.4, in which it *sua sponte* held that it could not reach the merits of an individual's claim that the federal government's prosecution of him for violations of state gun laws violated the Tenth Amendment. *Id.* at 1285. While recognizing that other circuits had since resolved the standing issue differently, *id.* at 1284 n.4 (citing *Gillespie*), the panel considered itself bound by the circuit's prior precedent holding that private parties lack standing to bring Tenth Amendment claims, *id.* at 1284-85 & n.4.

The D.C. Circuit has strongly suggested that it too would deny private parties standing to raise Tenth Amendment claims. In *Lomont* v. *O'Neill*, 285 F.3d 9, 13 n.3 (2002), that court considered a Tenth Amendment challenge to a federal firearms statute. Although the court ultimately concluded that it did not need to decide the issue definitively,[5] it described

[5] The court was able to avoid the standing question because two of the plaintiffs had standing to raise a Tenth Amendment challenge by virtue of the fact that they appeared in their capacities as the chief law enforcement officials of their respective jurisdictions. 285 F.3d at 14. Accordingly, the court decided the

the question "whether the private plaintiffs have standing" as "uncertain." *Ibid.* The D.C. Circuit emphasized this Court's statement in *TVA* that the private utilities lacked standing, as well as precedent holding that this Court alone has the prerogative to overrule its own decisions. *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The U.S. District Court for the District of Columbia has since construed *Lomont* as circuit precedent compelling it to deny private parties standing to assert Tenth Amendment claims. See, *e.g.*, *City of Roseville* v. *Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002), aff'd, 348 F.3d 1020 (CADC 2003), cert. denied sub nom. *Citizens for Safer Communities* v. *Norton*, 541 U.S. 974 (2004).

Likewise, the Fifth Circuit has expressed its view that private-party standing to raise Tenth Amendment claims is "doubtful," *United States* v. *Brockway*, 769 F.2d 263, 265 (1985), and it subsequently summarily affirmed a district court decision denying a private party standing to raise a Tenth Amendment challenge. See *Gaubert* v. *Denton*, No. 98-2947, 1999 U.S. Dist. LEXIS 8207, at **7-14 (E.D. La. May 28, 1999), aff'd, 210 F.3d 368 (CA5 2000) (table).

In stark contrast, two circuits and one state supreme court have squarely held that private parties do have standing to bring Tenth Amendment challenges and thus would have allowed petitioner's claim to proceed. The Eleventh Circuit has repeatedly reached that conclusion. In *Atlanta Gas Light Co.* v. *United States Dep't of Energy*, 666 F.2d 1359, 1368-69, cert. denied, 459 U.S. 836 (1982), that court allowed several energy companies to pursue their claim that the Fuel Use Act and its regulations violated the Tenth Amendment by displacing state sovereignty. While the Eleventh Circuit "initially express[ed] * * * uncertainty about whether the petitioners ha[d] standing to raise" the Tenth Amendment

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Tenth Amendment question on the merits and upheld the statute. *Id*. at 11-15.

issue when none of them were either states or government officials, it reasoned that this Court had repeatedly granted standing by implication when considering the merits of private parties' Tenth Amendment claims. *Id*. at 1368 n.16 (citing *Helvering* v. *Davis*, 301 U.S. 619, 637, 640 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 573, 585 (1937)). Moreover, although this Court had "intimated" in *Flast* v. *Cohen*, 392 U.S. 83, 105 (1968), that "under its nexus requirement * * * a private party could not have standing to assert the interests of the states as protected by the Tenth Amendment," the Eleventh Circuit regarded this Court's decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as having "expressly limited" the *Flast* nexus requirement to taxpayer suits, *Atlanta Gas*, 666 F.2d at 1368 n.16.

The Eleventh Circuit reaffirmed this holding in *Seniors Civil Liberties Ass'n, Inc.* v. *Kemp*, 965 F.2d 1030, 1034 n.6 (1992), and again in *Dillard* v. *Baldwin County Commissioners*, 225 F.3d 1271, 1275-77 (2000). In *Kemp*, the court considered a claim that the Fair Housing Act violated the Tenth Amendment. 965 F.2d at 1033, 1034. Citing *Atlanta Gas* for the proposition that, "if injury or threatened injury occurs, private parties have standing to assert Tenth Amendment challenges," the court held that the parties had standing. *Id.* at 1036 n.6. In *Dillard* – a case involving a challenge to a lower court's alteration of county voting districts – the court rejected the county commissioners' argument that "private plaintiffs cannot have standing to assert Tenth Amendment claims except in circumstances where they establish some particularized injury which is redressable under some other constitutional or statutory provision." 225 F.3d at 1276. The court of appeals explained, "our case precedent makes clear that * * * 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.[6]

The Seventh Circuit also holds that private parties have standing to bring Tenth Amendment challenges. In *Gillespie*, a police officer contended that a provision in the Gun Control Act that precluded him from carrying a weapon because he had previously been convicted of domestic violence violated the Tenth Amendment. 185 F.3d at 697-700. The federal prohibition, Gillespie contended, effectively commandeered state and local governments by preventing them from hiring people in his position. *Id*. at 700, 708. The Seventh Circuit held that Gillespie had standing to pursue that claim. The discussion of standing in *TVA*, the court of appeals concluded, was a mere "observ[ation] in passing," *id*. at 700, and not a binding holding, particularly because this Court had significantly lowered standing barriers since *TVA* was decided, *ibid.* (citing *United States* v. *Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring)). Moreover, the Seventh Circuit concluded, this Court's subsequent decision in *New York* made clear that the plaintiff was actually asserting his own rights. *Id.* at 703-04. Because Gillespie otherwise met traditional standing requirements, the Seventh Circuit held that he had standing as a private individual to raise his Tenth Amendment objection. *Ibid*.

The First Circuit's suggestion in this case that its ruling could be squared with the Seventh Circuit's *Gillespie* decision

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[6] The decision below wrongly suggests that the Eleventh Circuit has failed to take into account this Court's decision in *TVA*. Pet. App. 16a. Although the Eleventh Circuit's first decision on the question, *Atlanta Gas*, did not discuss *TVA*, the court subsequently reaffirmed its holding in *Dillard*, in which Judge Barkett's concurrence explicitly expressed concern about a possible conflict with *TVA*. See *Dillard*, 225 F.3d at 1275-77; *id*. at 1283 n.1 (Barkett, J., concurring specially). However, even Judge Barkett declined to characterize *TVA*'s standing discussion as a holding, describing it instead as an "observ[ation] in passing." *Ibid*.

is meritless. The First Circuit suggested that Gillespie was accorded standing because he was invoking the interests of the state in his capacity as a public official (*i.e.*, a police officer). Pet. App. 16a. In fact, the Seventh Circuit repeatedly made clear both that Gillespie was "asserting his own rights," 185 F.3d at 703, and that he had standing as a private party, *id.* at 700-04. Any claim that Gillespie was acting on the state's behalf is further belied by the fact that the City of Indianapolis – the very entity whose sovereignty was allegedly violated by the federal law at issue – was a party defendant and explicitly argued that the Tenth Amendment had not been violated. See *id*. at 700. Moreover, the *Gillespie* court itself acknowledged that its ruling conflicted with decisions denying standing, including the Tenth Circuit's decision in *Costle*. See *id*. at 700 n.3. In turn, both the Tenth and D.C. Circuits have noted the conflict between their precedent and *Gillespie*. See *Lomont*, 285 F.3d at 13 n.3; *Parker*, 362 F.3d at 1284 & n.4.

The Washington Supreme Court would also allow petitioner's Tenth Amendment claim to proceed. In *Guillen* v. *Pierce County*, 31 P.3d 628 (Wash. 2001), that court noted that several other courts had recognized private-party standing in Tenth Amendment challenges. See *id*. at 730-31 (citing *Kemp* and *Atlanta Gas*). Those rulings, combined with this Court's statements in *New York*, *id*. at 731, led the Washington court to conclude that "private respondents are not deprived of standing to challenge the constitutionality of a federal law on federalism grounds merely because state officials oppose the challenge," *ibid*. Though this Court later reversed the judgment of the Washington Supreme Court, it did so on other grounds and specifically reserved judgment on the standing question. See *Pierce County*, 537 U.S. at 147-48 & n.10.

The First Circuit's holding is also in considerable tension with decisions of three other circuits – the Second, Fourth,

and Eighth – which have consistently reached the merits of private parties' Tenth Amendment claims.[7] Most of these cases were decided subsequent to this Court's holding in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), that, because standing is jurisdictional, a federal court may not reach the merits of a claim until it first determines whether the party asserting the claim had standing. See *id*. at 101-02.[8]

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[7] Second Circuit: see *United States* v. *Milstein*, 401 F.3d 53, 68-69 (2005); *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2000); *United States* v. *A-Abras, Inc.*, 185 F.3d 26, 32-34 (1999); *United States* v. *Von Foelkel*, 136 F.3d 339, 341 (1998).

Fourth Circuit: see *Metrolina Family Practice Group* v. *Sullivan*, No. 90-2320, 1991 U.S. App. LEXIS 4727, at **2-3 (Mar. 25, 1991) (per curiam) (unpublished) (expressly holding that private individuals have standing to raise Tenth Amendment challenge); see also *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213-14 (2002) (deciding private Tenth Amendment claim); *United States* v. *Nathan*, 202 F.3d 230, 233 (2000) (same); *United States* v. *Bostic*, 168 F.3d 718, 723-24 (1999) (same).

Eighth Circuit: see *United States* v. *Lewis*, 236 F.3d 948, 950 (2001); *United States* v. *Wright*, 128 F.3d 1274, 1276 (1997); *United States* v. *Crawford*, 115 F.3d 1397, 1401-02 (1997).

[8] Decisions in the Ninth Circuit are inconsistent. In at least one case, the court has expressed doubts regarding the availability of private-party standing. See *Nance* v. *EPA*, 645 F.2d 701, 716 (1981) ("insofar as the tenth amendment is designed to protect the interest of the states qua states, [private party standing] may be seriously questioned"); see also *Artichoke Joe's Cal. Grand Casino* v. *Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003) (citing *Nance*, 645 F.2d at 716, in support of its conclusion that private parties lacked standing). On the other hand, the Ninth Circuit has repeatedly reached the merits of such claims. See *United States* v. *Geiger*, 263 F.3d 1034, 1040-41 (2001); *United States* v. *Jones*, 231 F.3d 508, 515 (2000); *FTC* v. *MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (1998); *United States* v. *Gordon*, 974 F.2d 1110, 1115 (1992).

2. Certiorari is also warranted because the circuit split is longstanding and entrenched. This conflict has existed for over twenty-three years, since the Eleventh Circuit issued its decision in *Atlanta Gas* in 1982 in conflict with the Tenth Circuit's holding in *Costle*. Since that time, the conflict has become considerably more entrenched. In *Parker*, for example, the Tenth Circuit could have reconsidered its position denying standing in light of *New York* and the Seventh Circuit's opinion in *Gillespie*, but instead chose to reaffirm its earlier position. 362 F.3d at 1284-85. Similarly, in *Lomont* the D.C. Circuit cited, but implicitly rejected, *Gillespie*'s reasoning. See 285 F.3d at 13 n.3. More generally, it is unlikely that any of those courts that found *TVA*'s statement dispositive will reconsider their positions. See *Rodriguez de Quijas*, 490 U.S. at 484 (holding that lower courts are bound to apply this Court's precedents until this Court chooses to overrule them).

It is similarly unlikely that any of the circuits recognizing private-party standing will reconsider their position. In *Gillespie*, the Seventh Circuit expressly acknowledged that its holding conflicted with that of other circuits. See 185 F.3d at 700 n.3. The Eleventh Circuit has twice reaffirmed its position in *Atlanta Gas*, deeming it binding precedent even in the face of "doubts" as to private-party standing. *Kemp*, 965 F.2d at 1034 n.6; see *Dillard*, 225 F.3d at 1277; see also Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1079 (2000) (describing *Atlanta Gas* as having "locked both the court of appeals for that circuit and its district courts" into granting private-party standing).

4. This circuit split is untenable because its result is that private parties in some circuits may raise Tenth Amendment challenges to federal laws, while those in other circuits may not. In this case, for example, because plaintiffs along the Atlantic seaboard – for instance, those in Rhode Island versus those in Florida – are subject to inconsistent private-party standing rules, a Florida fisherman has standing to challenge

the Act's commandeering regime, but petitioner does not. Given the direct harm to petitioner in this case, petitioner should not be deprived of the opportunity enjoyed by Florida fisherman to challenge the Act.

5. This Court's intervention is further required because the split among the courts of appeals stems in large part from divergent interpretations of this Court's statement in *TVA* that the private utilities in that case, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment." 306 U.S. at 144 (citing *Georgia Power Co.* v. *Tennessee Valley Authority*, 14 F. Supp. 673, 676 (N.D. Ga. 1936)). Because the circuits are mindful that "this Court has the prerogative of overruling its own decisions," *Rodriguez de Quijas*, 490 U.S. at 484, their interpretations of *TVA* often foreclose any further analysis of Tenth Amendment standing.

For example, some circuits – including the First Circuit in this case, see Pet. App. 13a – have interpreted this Court's statement in *TVA* as a far-reaching holding that individuals never have standing to invoke the Tenth Amendment. Rejecting petitioner's assertion that the sentence was dicta, the First Circuit construed *TVA* as "dismiss[ing] the Tenth Amendment claim after analyzing both the standing issue and the merits," such that "the former holding is an alternative ground, rather than obiter dictum." *Ibid.* Likewise, the D.C. Circuit has strongly suggested that *TVA* represents an across-the-board holding that individuals can never raise Tenth Amendment challenges. *Lomont*, 285 F.3d at 14 n.3.

Other circuits have interpreted *TVA* quite differently. In *Gillespie*, the Seventh Circuit characterized *TVA*'s discussion of Tenth Amendment standing as an "observ[ation] in passing" rather than an explicit holding. 185 F.3d at 700. The Eleventh Circuit, which has consistently permitted private parties to maintain Tenth Amendment challenges for over two decades, has accorded so little weight to *TVA* that it has never cited it in a majority opinion, even after a

concurring judge specifically raised the issue. See *Dillard*, 225 F.3d at 1275-77 & n.2, 1281; *id.* at 1283 n.1 (Barkett, J., concurring specially); *Seniors Civil Liberties Ass'n*, 965 F.2d at 1034 n.6; *Atlanta Gas*, 666 F.2d at 1368 n.16. Nor have those circuits that have simply assumed Tenth Amendment standing explained their interpretation of *TVA*. See, *e.g.*, cases cited *supra* note 7.

II. The Question Presented Is Important and Recurs Frequently.

As this Court has recognized, delineating the boundaries between federal and state power involves "questions of 'great importance and delicacy.'" *New York*, 505 U.S. at 155 (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816)). Precisely because a central concern of this Court's anti-commandeering jurisprudence is to ensure that lines of political accountability are not blurred, see *New York*, 505 U.S. at 168-69, the question of who can enforce the Tenth Amendment's principles when state or local governments acquiesce in allegedly unconstitutional federal regimes is of central importance.

Tenth Amendment challenges to a broad spectrum of federal statutes arise frequently in the lower courts. See, *e.g.*, *Frank* v. *United States*, 129 F.3d 273, 275 (CA2 1997) (Brady Handgun Violence Prevention Act of 1993); *Petersburg Cellular Pshp.* v. *Bd. of Supervisors*, 205 F.3d 688, 691 (CA4 2000) (Telecommunications Act of 1996); *Condon* v. *Reno*, 155 F.3d 453, 455-56 (CA4 1998) (Driver's Privacy Protection Act), rev'd, 528 U.S. 141, 148 (2000); *City of Abilene* v. *EPA*, 325 F.3d 657, 659 (CA5 2003) (Clean Water Act); *Ass'n of Cmty. Orgs. for Reform Now* v. *Edwards*, 81 F.3d 1387, 1388 (CA5 1996) (Lead Contamination Control Act of 1988); *Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 834 (CA6 1997) (National Voter Registration Act of 1993); *Bd. of Natural Res.* v. *Brown*, 992 F.2d 937, 940-41 (CA9 1993) (Forest Resources Conservation and Shortage Relief Act).

The question presented thus is inevitably a recurring one, as federal courts must determine standing before reaching the merits of a party's Tenth Amendment claim. See *Steel Co*., 523 U.S. at 101-02. Accordingly, it is unsurprising that the question presented has not only been closely considered in five circuits (see *supra* at 9-13), but also is the subject of frequent litigation in district courts.[9]

The frequency and diversity of such private Tenth Amendment challenges illustrates the importance of the question presented and the pressing need for guidance from this Court. Indeed, this Court recognized the need to decide this question three years ago, granting certiorari on the same question in *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). This Court ultimately did not reach the question in that case, see *id*. at 148 n.10, and nothing since then has obviated the need for this Court's intervention. Moreover, this case presents the ideal vehicle for deciding the question, as the only question presented is the threshold standing question.

III. Private Parties Have Standing to Raise Tenth Amendment Challenges to Federal Statutes.

Certiorari is also warranted because the decision below is wrong on the merits. As the Seventh Circuit has recognized, permitting private parties to bring Tenth Amendment claims helps to protect the individual liberty secured by that constitutional provision. See *Gillespie*, 185 F.3d at 703. Indeed, this Court has squarely recognized that the Constitution protects state sovereignty not only for the benefit of states, but rather to secure the liberty that flows from the diffusion of power. As with other violations of the

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[9] See, *e.g.*, *Velazquez* v. *Legal Services Corp.*, 349 F. Supp. 2d 566, 581 (E.D.N.Y. 2004); *Artichoke Joe's Cal. Grand Casino*, 278 F. Supp. 2d at 1181; *Vt. Assembly of Home Health Agencies, Inc.* v. *Shalala*, 18 F. Supp. 2d 355, 370-71 (D. Vt. 1998); *Gilliard* v. *Kirk*, 633 F. Supp. 1529, 1549 (W.D.N.C. 1986), rev'd on other grounds sub nom. *Bowen* v. *Gilliard*, 483 U.S. 587 (1987).

Constitution's structural plan, private parties must have standing to correct for federal encroachment on state sovereignty, especially when the encroached-upon state has acquiesced in the violation. In such cases – as this Court recognized in *New York* v. *United States*, see 505 U.S. at 182-83 – policing the constitutional plan cannot be left to the political process, because the violation itself is a corruption of that very process. Moreover, because the anti-commandeering principle arises in part from the constitutional guarantee of the separation of powers, it must be the case that individuals can invoke it. To be sure, nothing about Tenth Amendment claims relaxes the general constitutional requirements for standing, but in cases, such as petitioner's, in which those requirements are met, the Tenth Amendment imposes no additional barrier.

A. There Is No Basis For Imposing Additional Standing Requirements on Private Parties Who Seek to Challenge Federal Statutes on Tenth Amendment Grounds.

The court of appeals did not doubt that petitioner satisfied the traditional requirements of Article III standing. Petitioner easily satisfies those requirements, as would many other Tenth Amendment plaintiffs who have suffered particularized, redressable injuries as a result of federal commandeering of state or local governments. See *infra* at 25-28. Instead, the court of appeals erected a distinct standing barrier based on its view that the Tenth Amendment is directed entirely at protecting the prerogatives of states rather than the interests of individuals. That view of the Tenth Amendment, and the conclusion the First Circuit drew from it, is incorrect.

1. In *New York*, this Court invalidated as contrary to the Tenth Amendment a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that directed states to choose between the unconstitutional alternatives of either taking title to all radioactive waste generated within the state

or enacting a federally mandated state regulatory program. 505 U.S. at 174-75. This Court reasoned that each measure, in and of itself, constituted federal commandeering of state governmental machinery. The first option was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* at 175. The second option – "regulating pursuant to Congress' direction" – presented an unconstitutional "command to state governments to implement legislation enacted by Congress." *Id.* at 175-76.

Although New York officials had supported enactment of the federal statute, this Court nonetheless deemed the law "an unconstitutional infringement of state sovereignty," 505 U.S. at 181, explaining that

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. *To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals*. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from diffusion of sovereign power." * * * [T]he departure from the constitutional plan *cannot be ratified by the "consent" of state officials*.

Id. at 181-82 (citation omitted) (emphasis added). To further elucidate the point, the Court drew an analogy to separation-of-powers cases such as *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), which struck down measures that violated the Constitution's structural plan even though the "encroached-upon" branch had approved the infringement. 505 U.S. at 182. The political process, the Court explained, could not be relied upon to police such boundaries:

> [T]he facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. * * * The interests of public officials * * * may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Id. at 182-83.

In light of these risks, and the basic purpose of the Constitution's division of government powers, it is unsurprising that this Court has repeatedly allowed private individuals to challenge federal legislation on the ground that it violates separation-of-powers principles. For example, in *Chadha*, this Court held that an individual has standing to mount a separation-of-powers challenge to a federal statute, even though "his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests." 462 U.S. at 935-36. Similarly in *Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998), this Court rejected the claim that private health care providers were the wrong parties to challenge the line-item veto as violating separation-of-powers principles. See also *Buckley*, 424 U.S. at 113-18 (holding that individuals could challenge the appointment of members of the Federal Election Commission on separation-of-powers grounds). In many other separation-of-powers challenges, this Court has simply assumed the standing of individuals without discussion. See, *e.g.*, *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457 (2001); *Plaut* v. *Spendthrift Farm*, 514 U.S. 211 (1995); *Mistretta* v. *United States*, 488 U.S. 361 (1989); *Clinton* v. *City of New York*, 524 U.S. 417 (1998).

There is no basis for a different result when a private plaintiff challenges a federal statute as violating the constitutionally ordained separation of powers between the

state and federal governments. To secure the "protection of individuals" guaranteed by the Tenth Amendment, it follows *a fortiori* that individuals must have standing to challenge encroachments upon state sovereignty. *Gillespie*, 185 F.3d at 703. In both *Buckley* and *Chadha*, for instance, private enforcement was necessary precisely because the constitutionally separated entities had consented to the commingling of their powers. See *New York*, 505 U.S. at 182 (citing *Buckley*, 424 U.S. at 118-37, and *Chadha*, 462 U.S. at 944-59). If private parties cannot bring Tenth Amendment claims in the face of such state acquiescence, then the Constitution's vertical separation of powers will constitute "'a mere parchment delineation.'" *Morrison* v. *Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

2. The decision below suggests that even if a state refuses to pursue a valid Tenth Amendment claim, private-party standing is unnecessary because "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. But states may have a variety of reasons for acquiescing in unconstitutional commandeering, and for failing to join private-party litigation once it has commenced:

> They may want to conserve resources, or they simply may not find the legislation sufficiently intrusive to warrant a constitutional challenge. Alternatively, state officials may intentionally elect to enforce potentially unconstitutional regulations, *either to avoid antagonizing the federal government*, or because the officials approve of the legislation, but do not want to face the political ramifications of enacting the statutory scheme themselves.

Gershengorn, *supra*, at 1066-67 (emphasis added). Moreover, as this Court explained in *New York*, separation-of-powers violations often corrupt the very political process

through which the First Circuit would have individuals seek a remedy. See 505 U.S. at 182-83 ("powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests").

Here, Rhode Island officials expressed repeated doubts about the fairness and efficacy of the congressionally mandated Regulation 15.18, Pet. App. 54a-61a, which was enacted only after the federal government threatened an absolute ban on Rhode Island's lobster trade. Faced with the prospect of such a punishment, it is no wonder the state would consent to commandeering. Moreover, because Rhode Island cannot single-handedly change Commission policy, it may be hesitant to challenge the Commission for fear of later reprisal through promulgation of additional policies that similarly harm Rhode Island. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 118-21 (2001) (explaining why "some states [would] seek to use federal power as an instrument for imposing their preferences on other states"). In such a setting, petitioner cannot rely on the political process to secure redress of his grievance; individual access to the courts is necessary so that the judiciary can "play[] a supporting role by enforcing the basic rules of political competition." *Id.* at 130.

In sum, "the political process offers legislators myriad incentives to disregard the impact of their actions on our federal structure." Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 886 (2006). In such situations, individuals must have standing to bring constitutional challenges and must have available redress for the unconstitutional scheme that impinges on their liberty.[10]

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[10] Indeed, the Court often steps in even when political safeguards *are* available. Thus, a further "problem with the political safeguards argument is its failure to explain * * * the many instances in which courts engage in judicial review despite the

3. Nothing in this Court's decision in *TVA* compels a contrary result. Rather, the focus of the Court's opinion in *TVA* is squarely on the merits of the utility companies' Tenth Amendment claim. Only after determining that no violation of the Tenth Amendment exists does this Court make its "observ[ation] in passing," see *Gillespie*, 185 F.3d at 700, that "there is no objection to the Authority's operations by the states, and, if this were not so, the [utilities], absent the states or their officers, have no standing in this suit to raise any question under the amendment," 306 U.S. at 144. Indeed, in subsequent cases, this Court has not considered *TVA*'s standing discussion as binding precedent. In the sentence immediately following its discussion in *TVA* of Tenth Amendment standing, this Court held that individuals lack standing under the Ninth Amendment. See *ibid.* Since then, however, this Court has both found individual rights arising out of the Ninth Amendment, see *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965), and permitted individuals to maintain Ninth Amendment challenges, see, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 596, 601-04 (1988) (allowing a constitutional challenge based in part on the Ninth Amendment for wrongful termination of CIA employee), without recognizing any standing limitation imposed by *TVA*.

B. Petitioner and Other Tenth Amendment Claimants Who Show Particularized, Redressable Injuries Traceable to Federal Statutes That Commandeer State or Local Governments Satisfy the Standing Requirements of Article III and Accordingly May Maintain Their Suits.

In the decision below, the First Circuit addressed only the purely legal question whether private citizens ever have standing to bring Tenth Amendment challenges. Thus, if this

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theoretical availability of political protections for the values in question." Baker & Young, *supra*, at 128-33.

Court were to grant certiorari, it need not address whether petitioner himself has Article III standing to pursue his challenge to the Act. That question could be decided by the First Circuit on remand, if necessary. However, it is beyond cavil that both petitioner specifically and many other plaintiffs who raise claims under the Tenth Amendment can show (1) an injury-in-fact (2) that is fairly traceable to the defendant's conduct and (3) that is likely to be redressed by a favorable decision, as required by this Court's constitutional standing jurisprudence, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Injury-in-Fact. It is unquestionable that – as the trial court found, see Pet. App. 29a – petitioner has suffered an injury-in-fact. It is equally apparent that an entire class of similarly situated individuals – those sanctioned or threatened with sanction under laws that are the result of unconstitutional commandeering – suffer injuries-in-fact. When an individual is the object of government action, the injury-in-fact requirement is satisfied. *Lujan*, 504 U.S. at 561-62. Such governmental action is the polar opposite of the type of generalized grievance that the Court has found insufficient for standing in other cases. See, *e.g.*, *id.* at 563-67 (damage to environment in foreign country); *United States* v. *Richardson*, 418 U.S. 166, 167-68, 179-80 (1974) (lack of information about government expenditures).

Traceability. Plaintiffs in Tenth Amendment challenges also demonstrate "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. First, in the case of executive commandeering, traceability presents absolutely no obstacle: the challenged statute "compel[s] the States to implement" federal law at the expense of their citizens. *Printz*, 521 U.S. at 925. There is thus a "'direct' relationship between the alleged injury and the claim sought to be adjudicated." Nor is traceability difficult to demonstrate for legislative commandeering, despite the United States's contention that state laws like the one at issue here are the result of "the State's independent policy." U.S. C.A. Br. 30.

Indeed, this Court roundly rejected an analogous argument in *FEC* v. *Akins*, 524 U.S. 11 (1998), in which it held that a group of voters could challenge the FEC's determination that a certain organization was not a "political committee" within the meaning of the Federal Election Campaign Act of 1971. *Id*. at 13-14. In so holding, this Court explained that the voters' injury was fairly traceable "even though the FEC might reach the same result exercising its discretionary powers lawfully." *Id* at 25. Indeed, Tenth Amendment claims present an even easier standing analysis than *Akins* because, unlike in *Akins*, the allegedly illegal action and the discretionary choice are vested in *different* actors. Moreover, those cases in which this Court has deemed the traceability requirement not to be satisfied involved attenuated causal connections that depended on the uncertain reaction of individuals to altered tax obligations or criminal punishment – a far cry from coercion via a threatened moratorium. See *Allen* v. *Wright*, 468 U.S. 737, 757-59 (1984); *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617-18 (1973).

Redressability. Finally, redressability poses no barrier to individuals' vindication of Tenth Amendment principles. Any 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. Similarly, invalidation of a federal law would preclude enforcement of that law against a plaintiff by state executive officials.[11]

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[11] Respondents have previously argued that the same is not true here because the invalidation of the federal law commandeering a state legislature would not immediately result in the invalidation of the relevant state law. See ASFMC C.A. Br. 27. But that was also true in *New York*. In that case, the State of New York was free to retain the statute it had passed to comply with the challenged federal statute, and the state officials litigating the case

In any event, there is no genuine redressability problem in this or similar cases. Invalidation of the federal statute will restore petitioner's right to be subject only to such restrictions as his state legislature deems it in the public interest to impose. Cf. *New York*, 505 U.S. at 168 (noting that a central vice of commandeering is interference with "the accountability of both state and federal officials"). In this respect, Tenth Amendment claims are closely analogous to the equal protection claim this Court considered in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). There, in the context of a university affirmative action program, this Court held that although a favorable outcome could not *guarantee* the plaintiff's admission, the fact that it gave him a fair opportunity to compete was sufficient to satisfy the redressabiliity requirement. *Id.* at 280 n.14.

Second, there is a substantial likelihood that, if petitioner were to prevail, the state would in fact repeal this law. Compare *supra* at 4-5 (describing Rhode Island's resistance to enacting and enforcing Amendment 3) with *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 506 (1975) (no redressability when "the record is devoid of *any indication* that * * * were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners") (emphasis added) and *Linda R. S.*, 410 U.S. at 618 (no redressability when "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed *only speculative*") (emphasis added). Likelihood, as opposed to certainty, is all that is needed under *Lujan*'s redressability requirement. 504 U.S. at 560.

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on behalf of the state (not to mention the plaintiff counties) lacked the power to repeal those statutes if the suit was successful. See 505 U.S. at 154. Indeed, accepting respondents' construction of the redressability requirement would effectively preclude almost all challenges to legislative commandeering, including not only those by private parties but also those by most public officials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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March 27, 2006