No. 11-420

**In the**
# Supreme Court of the United States

VIRGINIA, ex rel. KENNETH T. CUCCINELLI, II,
ATTORNEY GENERAL OF VIRGINIA,
*Petitioner,*

v.

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, MATTHEW SISSEL, AMERICANS FOR FREE CHOICE IN MEDICINE, AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER


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## QUESTION PRESENTED

This Court's precedents establish that States have standing to sue to defend their sovereign interest in enacting laws regulating matters that the Constitution reserves to their jurisdiction, such as laws regulating the drinking age, laws governing the hunting of wildlife, or laws regulating the conduct of state elections. *See*, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987); *Missouri v. Holland*, 252 U.S. 416 (1920); *Oregon v. Mitchell*, 400 U.S. 112 (1970). Does the State of Virginia also have standing to defend its sovereign interest in enacting laws that declare and secure individual rights that the federal Constitution neither enumerates nor confers exclusively to federal jurisdiction?

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . iv

IDENTITY AND
INTEREST OF AMICI CURIAE . . . . . 1

SUMMARY OF REASONS
FOR GRANTING THE PETITION . . . . . 3

REASONS
FOR GRANTING THE PETITION . . . . . 4

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE TENTH, SECOND, FIFTH, D.C., AND THIRD CIRCUITS, IN HOLDING THAT THE STATE MAY NOT DEFEND ITS SOVEREIGN POWER TO ARTICULATE AND DEFEND INDIVIDUAL RIGHTS . . . . . 4

A. The Decision Below Conflicts With Well-Settled Precedent Allowing States to Litigate in Defense of Their Sovereign Authority . . . . 4

B. The "Administering State Programs" Test Created By the Decision Below Finds No Foundation in American Jurisprudence, and Conflicts With the Existing Law of Standing . . . . . 8

C. This Case Is Crucial to Maintaining the States' Role in the Federalist Structure . . . . . 13

**TABLE OF CONTENTS—Continued**

**Page**

II. *MASSACHUSETTS v. MELLON* HAS LED TO CONFUSION AND CONTRADICTIONS AND SHOULD BE CLARIFIED . . . . . 16

A. *Mellon* Has Led to Significant Confusion Over the Relationship Between Standing and Political Question Doctrines . . . . . 16

B. *Mellon*'s Language Barring Parens Patriae Actions Was Inaccurate, Conflicts With Subsequent Decisions, and Requires Clarification . . . . . 19

CONCLUSION . . . . . 24

## TABLE OF AUTHORITIES

**Page**

### Cases

*Abrams v. Heckler*,
582 F. Supp. 1155 (S.D.N.Y. 1984) . . . . . 21-22

*Alabama Power Co. v. Ickes*,
302 U.S. 464 (1938) . . . . . 18

*Alaska v. U.S. Dep't of Transp.*,
868 F.2d 441 (D.C. Cir. 1989) . . . . . 6

*Alden v. Maine*, 527 U.S. 706 (1999) . . . . . 13

*Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,
458 U.S. 592 (1982) . . . . . 3, 6, 8-9, 15, 21

*Am. Elec. Power Co. Inc. v. Connecticut*,
131 S. Ct. 2527 (2011) . . . . . 2, 22

*Baker v. Carr*, 369 U.S. 186 (1962) . . . . . 17-18

*Bond v. United States*,
131 S. Ct. 2355 (2011) . . . . . 2, 4, 16

*Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (per curiam), *cert. denied sub nom. Carey v. Baldridge*, 455 U.S. 999 (1982) . . . . . 21

*Castillo v. Cameron County, Texas*,
238 F.3d 339 (5th Cir. 2001) . . . . . 6

*Cherokee Nation v. Georgia*,
30 U.S. (5 Pet.) 1 (1831) . . . . . 5

*City of New York v. Heckler*,
578 F. Supp. 1109 (E.D.N.Y. 1984) . . . . . 22

**TABLE OF AUTHORITIES—Continued**

**Page**

*Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237 (D. Conn. 2005) . . . . . 23

*Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009) . . . . . 22

*Coons v. Geithner*, No. 2:10-cv-01714 (D. Ariz. June 23, 2011) . . . . . 1

*Cooper v. California*, 386 U.S. 58 (1967) . . . . . 11

*Dep't of Health & Human Servs. v. Florida*, No. 11-398 (petition for certiorari pending) . . . . . 1

*FERC v. Mississippi*, 456 U.S. 742 (1982) . . . . . 9

*GDF Realty Invs., Ltd. v. Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005) . . . . . 2

*Gordon v. United States*, 117 U.S. (2 Wall.) 697 (1865) . . . . . 14

*Government of Guam v. Fed. Maritime Comm'n*, 329 F.2d 251 (D.C. Cir. 1964), *cert. denied*, 385 U.S. 1002 (1967) . . . . . 23

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) . . . . . 14

*Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348 (4th Cir. 2005) . . . . . 9

*Illinois ex rel. Scott v. Landrieu*, 500 F. Supp. 826 (N.D. Ill. 1980) . . . . . 23

*Kansas v. United States*, 748 F. Supp. 797 (D. Kan. 1990) . . . . . 22

*Maine v. Taylor*, 477 U.S. 131 (1986) . . . . . 10

**TABLE OF AUTHORITIES—Continued**

**Page**

*Massachusetts v. EPA*,
549 U.S. 497 (2007) . . . . . 22

*Massachusetts v. Mellon*,
262 U.S. 447 (1923) . . . . . 3, 16-21, 23

*McCulloch v. Maryland*,
17 U.S. (4 Wheat.) 316 (1819) . . . . . 5, 7, 15, 20

*Missouri v. Holland*, 252 U.S. 416 (1920) . . . . . 7, 17

*New Jersey v. Sargent*, 269 U.S. 328 (1926) . . . . . 17

*New York v. United States*,
505 U.S. 144 (1992) . . . . . 7, 17

*New York v. United States*, 65 F. Supp. 856
(N.D.N.Y. 1946), *aff'd*, 331 U.S. 284 (1947) . . . . 21

*Oregon v. Hass*, 420 U.S. 714 (1975) . . . . . 11

*Oregon v. Mitchell*, 400 U.S. 112 (1970) . . . . . 7, 17

*Pennsylvania ex rel. Shapp v. Kleppe*,
533 F.2d 668 (D.C. Cir. 1976) . . . . . 17, 23

*Pennsylvania v. New Jersey*,
426 U.S. 660 (1976) . . . . . 4

*Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir.
1981), *cert. denied*, 458 U.S. 1121 (1982) . . . . . 7

*Phillips v. Wash. Legal Found.*,
524 U.S. 156 (1998) . . . . . 9

*PruneYard Shopping Ctr. v. Robins*,
447 U.S. 74 (1980) . . . . . 11

**TABLE OF AUTHORITIES—Continued**

**Page**

*Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310 (D.P.R. 1999) . . . . . 22

*Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004) . . . . . 2

*Schaffer v. O'Neill*, No. 01-94, *cert. denied*, 534 U.S. 992 (2001) . . . . . 2

*Sconiers v. Whitmore*, No. 1:08-cv-1288, 2008 U.S. Dist. LEXIS 101962 (E.D. Cal. Nov. 24, 2008) . . . . . 9

*Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. filed May 23, 2011) . . . . . 1

*Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263 (D.D.C. filed July 26, 2010) . . . . . 1-2

*Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) . . . . . 2

*South Carolina v. Katzenbach*, 383 U.S. 301 (1966) . . . . . 21

*South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) . . . . . 9

*South Dakota v. Dole*, 483 U.S. 203 (1987) . . . . . 7, 17

*Texas v. Interstate Commerce Comm'n & R.R. Labor Bd. No. 24*, 258 U.S. 158 (1922) . . . . . 17

**TABLE OF AUTHORITIES—Continued**

**Page**

*Texas v. Mosbacher*,
783 F. Supp. 308 (S.D. Tex. 1992) . . . . . 23

*Thurlow v. Massachusetts*,
46 U.S. 504 (1847) . . . . . 20

*United States v. Morrison*,
529 U.S. 598 (2000) . . . . . 2

*Virginia ex rel. Cuccinelli v. Sebelius*,
Nos. 11-1057 & 11-1058,
2011 U.S. App. LEXIS 18632
(4th Cir. Sept. 8, 2011) . . . . . 3, 8, 15, 19-20

*Wyoming ex rel. Crank v. United States*,
539 F.3d 1236 (10th Cir. 2008) . . . . . 5-6

**United States Constitution**

U.S. Const. amend. X . . . . . 6-8, 10, 13

Declaration of Independence,
1 Stat. 1 (1776) . . . . . 10

**State Constitutions**

Cal. Const. art. I, § 24 . . . . . 12

Va. Const. art. I, § 3 . . . . . 11

**State Statute**

Va. Code Ann. § 38.2-3430.1:1 . . . . . 8-9, 14

**Rules of Court**

Sup. Ct. R. 37.2(a) . . . . . 1

Sup. Ct. R. 37.6 . . . . . 1

**TABLE OF AUTHORITIES—Continued**

**Page**

**Miscellaneous**

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**TABLE OF AUTHORITIES—Continued**

**Page**

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Woods, Thomas E., *Nullification* (2010) . . . . . 15

Woolhandler, Ann & Collins, Michael G., *State Standing*, 81 Va. L. Rev. 387 (1995) . . . . . 14, 19

## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), Matthew Sissel, Americans for Free Choice in Medicine (AFCM), and Center for Constitutional Jurisprudence respectfully submit this brief amicus curiae in support of the petition for certiorari. PLF is widely recognized as the largest and most experienced nonprofit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has participated as amicus curiae in several lawsuits challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA), including *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (petition for certiorari pending); *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. filed May 23, 2011); and *Coons v. Geithner*, No. 2:10-cv-01714 (D. Ariz. June 23, 2011). In addition, PLF attorneys represent amicus Matthew Sissel, a citizen of Iowa, and decorated Iraq War veteran and small business owner, who is the plaintiff in a lawsuit challenging the constitutionality of PPACA, *Sissel v. U.S. Dep't of Health & Human Servs.*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

No. 1:10-cv-01263 (D.D.C. filed July 26, 2010). AFCM is a national nonprofit, nonpartisan, educational organization based in California, which promotes the philosophy of individual rights, personal responsibility, and free-market economics in the health care industry. AFCM members include patients, physicians, nurses, health care professionals, and others.

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with residuary sovereign authority reserved to the states or to the people. In addition to providing counsel for parties in state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *Am. Elec. Power Co. Inc. v. Connecticut*, 131 S. Ct. 2527 (2011); *Bond v. United States*, 131 S. Ct. 2355 (2011); *GDF Realty Invs., Ltd. v. Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied*, 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

## SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents a vital question of federalism: may states resort to federal court to defend their sovereign interests in making legal codes that declare and defend the unenumerated individual rights left to their supervision by the Ninth and Tenth Amendments? Although this Court has held that States have standing to file lawsuits to defend their sovereign interest in enacting and enforcing their legal codes, *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982), the court below dismissed the case on the grounds that such standing is only available where the State is either governing individual behavior or administering a State program. *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-1057 & 11-1058, 2011 U.S. App. LEXIS 18632, at *21 (4th Cir. Sept. 8, 2011). This modification of the law of standing would undermine the ability of States to defend their sovereign authority, and would damage the federalist system under which States are expected to counterbalance federal power. This Court should grant certiorari to determine the extent of States' standing to defend their statutes in Court.

The panel was led to its conclusion by its reading of *Massachusetts v. Mellon*, 262 U.S. 447 (1923), a confusing precedent that has been significantly limited by subsequent decisions. Even if this case is construed as a parens patriae action rather than a case asserting the State's own interests, this case should be allowed to proceed. *Mellon*'s overly broad—and internally inconsistent—bar against parens patriae standing cannot withstand analysis and must be clarified or narrowed. Certiorari is necessary to resolve enduring

confusion regarding when States may sue the federal government over questions of their respective jurisdictions.

## REASONS FOR GRANTING THE PETITION

## I

## THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE TENTH, SECOND, FIFTH, D.C., AND THIRD CIRCUITS, IN HOLDING THAT THE STATE MAY NOT DEFEND ITS SOVEREIGN POWER TO ARTICULATE AND DEFEND INDIVIDUAL RIGHTS

### A. The Decision Below Conflicts With Well-Settled Precedent Allowing States to Litigate in Defense of Their Sovereign Authority

States have played a critical role in challenging federal overreaching since the nation's earliest days. While they may not simply volunteer to litigate the personal interests of citizens, states may sue to defend their own sovereign authority as political entities. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). The most crucial sovereign interest States have is in enacting laws that describe and defend their citizens' rights. Where the Constitution entrusts rights exclusively to *federal* jurisdiction, States can have no power. But on matters over which States *do* retain sovereignty, their autonomy is essential to the proper functioning of federalism. *Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011). The decision below conflicts with this Court's longstanding precedent affirming the power of States to act in this way.

For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the State imposed a tax on banks in order to challenge the constitutionality of the National Bank. When the Bank's manager refused to pay, a State official filed a lawsuit on behalf of the State, arguing that the Bank intruded on its reserved sovereign powers—in that case, the State's power to tax. This Court never questioned Maryland's standing, but proceeded to the merits, and rendered one of its most famous decisions. The question of standing was nothing new to Chief Justice Marshall and his colleagues; the same Court often dismissed what it considered meritorious cases where it believed the parties lacked standing. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), for example, the Court found it lacked jurisdiction even while expressing sympathy for the tribe.

In many other cases, this Court and the courts of appeals have held that states have standing to challenge federal laws that they contend intrude on their constitutionally reserved sovereign powers.

In *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008), the State enacted a law governing how misdemeanor convictions would be expunged from a person's record for purposes of restoring the right to possess firearms. Federal officials contended that this statute conflicted with federal law, and the State's Attorney General filed suit, seeking declaratory relief to determine the validity of the statute. The court found that Wyoming had standing because "States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and

enforce a legal code.' Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong." *Id.* (quoting *Snapp*, 458 U.S. at 601). Under the Tenth Amendment, Wyoming retained power to set its own rules regarding the restoration of rights following conviction of State law crimes; thus federal regulation intruding on that power inflicted a judicially cognizable injury.

Similarly, in *Castillo v. Cameron County, Texas*, 238 F.3d 339 (5th Cir. 2001), the Fifth Circuit ruled that Texas had standing to appeal a court order governing prisons, despite the fact that the order had been issued in a lawsuit brought by individual inmates. The State had a judicially cognizable stake in the case "even though [it] [was] not required to perform or refrain from performing any particular acts" by the terms of the challenged order. *Id.* at 350. This was so because the order allowed the sheriff "in violation of State law, to refuse to incarcerate" persons convicted of crimes. *Id.* at 351. This intruded on the State's sovereign authority to enact and enforce its legal code, inflicting an Article III injury.

In *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441 (D.C. Cir. 1989), the court held that Alaska and 26 other States had standing to seek declaratory relief when the federal government claimed certain State laws governing airline advertising were preempted by federal law. *See id.* at 443. The court took care to distinguish this sovereign interest from parens patriae standing: the States had an independent "sovereign interest in law enforcement" over and above the interests of citizens, and the States had standing to defend that interest. *See id.* at 443 n.1.

In *Pennsylvania v. Porter*, 659 F.2d 306, 316 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), the court held that States have "significant sovereign interests of [their] own in the prevention of future violations of constitutional rights of [their] citizens." This was not a parens patriae interest because the State had its own "vital[] interest[] in safeguarding the health and safety of individuals in its territory." *Id.* at 315. The State's power to protect citizens against unauthorized government actions was "no different in kind" from the State's interest in addressing pollution or ordinary torts. *Id.*

These cases all built on a solid foundation of precedent supporting the proposition that States may sue to defend their authority to govern a wide variety of subjects. States can challenge federal interference with their powers to lay and collect taxes, *McCulloch*, 17 U.S. (4 Wheat.) at 435; to regulate alcohol consumption, *South Dakota v. Dole*, 483 U.S. 203, 205 (1987); to regulate hunting within their borders, *Missouri v. Holland*, 252 U.S. 416, 431 (1920); to regulate the disposal of toxic waste, *New York v. United States*, 505 U.S. 144, 157 (1992); and to operate their elections, *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (opn. of Black, J.).

This case is conceptually indistinguishable from *McCulloch*. That case involved the State's sovereign authority to tax corporations within its limits—a power the Tenth Amendment reserves to the States. This case involves the State's sovereign authority to identify and protect individual rights not enumerated in the federal Constitution. As discussed below, there is no intelligible distinction between Maryland's sovereign interest in taxing and Virginia's sovereign interest in

declaring and protecting rights through the orderly political and legal process. Yet the Fourth Circuit ignored this precedent and ruled that States lack standing to defend the sovereign authority the Tenth Amendment reserves to them. Such a holding is anomalous in the history of standing doctrine, conflicts with this Court's precedents and the rulings of several Courts of Appeals, and throws the law of State standing into disarray.

### B. The "Administering State Programs" Test Created By the Decision Below Finds No Foundation in American Jurisprudence, and Conflicts With the Existing Law of Standing

The court of appeals sought to distinguish this case from cases in which States were found to have standing by adopting a new element in its standing analysis. In previous cases, it held, States had standing because the statutes they defended "regulated behavior or provided for the administration of a state program," while the Virginia Health Care Freedom Act (VHCFA) "regulates nothing and provides for the administration of no state program." *Cuccinelli*, 2011 U.S. App. LEXIS 18632, at *20.

This Court's precedent holds that States have a judicially cognizable interest in "creat[ing] and enforc[ing] a legal code," *Snapp*, 458 U.S. at 601, but the panel held that they only have a judicially cognizable interest in creating and enforcing a code *that administers a state program or controls individual behavior*. This unprecedented additional element conflicts with federalist principles.

No court has ever held that the only "legal code" interests that States have standing to assert are those that administer state programs or regulate individuals. On the contrary, in *Snapp* itself, this Court recognized that States' sovereign interests include the demand for recognition from other sovereigns and the maintenance of their borders, neither of which involves administering programs or regulating persons. 458 U.S. at 601. Courts have also recognized such sovereign State interests as defining their jurisdiction, *see*, *e.g.*, *South Carolina v. North Carolina*, 130 S. Ct. 854, 870 (2010); setting their own legislative agendas without interference, *FERC v. Mississippi*, 456 U.S. 742, 779 (1982); and defining State property law, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998). Other sovereign interests include the power to "govern[] family relationships . . . settl[e] the estates within [their] jurisdiction . . . [as well as] probate, trusts, estates, and property law . . . [all of which] involve functions which make our states self-governing sovereigns." *Sconiers v. Whitmore*, No. 1:08-cv-1288, 2008 U.S. Dist. LEXIS 101962, at *15 (E.D. Cal. Nov. 24, 2008) (citing *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352-53 (4th Cir. 2005)). None of these involves administering State programs.[2] This Court has also held that States have standing to appeal judgments holding their statutes unconstitutional, not because the statutes involved administered state programs, but because States have

[2] One could contend that each of these powers *contributes* to the operation of programs by defining terms or setting legal rules, but the same is also true of the VHFCA. Like a property recordation system, or a law defining what constitutes a marriage, the VHFCA establishes the framework within which lawful individual or government action may take place.

a cognizable interest in the continued enforceability of their laws. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

The sovereignty reserved to States under the Tenth Amendment is broad and indefinite, reaching to "all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State[s]." *The Federalist* No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961). Thus no comprehensive list of States' sovereign interests can be compiled. Rather, the Constitution reserves to States or the people authority over any subject which the Constitution does not expressly or implicitly withdraw from them. Virginia has a sovereign interest, distinct from the personal interests of citizens, in "defining the laws or rules that govern society, seeing that those laws and rules are obeyed, and punishing those who transgress them. This enforcement interest is a quintessential aspect of sovereignty." Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1242 (2004).

Relevant here, sovereigns also have legitimate interests in declaratory enactments or pronouncements, that describe what rights the State recognizes and promises to protect. Blackstone and Locke recognized that sovereigns have a fundamental interest in "guard[ing] the rights of each individual citizen." 1 William Blackstone, *Commentaries* *48;[3] *see*

[3] Indeed, the articulation and protection of individual rights is the *only* legitimate basis of sovereignty in American law. *See* Declaration of Independence, 1 Stat. 1 (1776) ("[T]o secure these rights, governments are instituted among men."); 5 William (continued...)

*also* John Locke, *Second Treatise of Government* § 143, *in Two Treatises of Government* 409-10 (Peter Laslett ed., rev. ed. 1963) ("The *Legislative* Power is that which has a right *to direct* how *the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it.").

This Court has often recognized that one role of State constitutions is to express and protect individual rights more expansively than the federal Constitution does. *See*, *e.g.*, *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (A State has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *accord*, *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967). Yet this Court has not squarely addressed the question of whether federal interference with the States' power to do so inflicts a judicially cognizable injury.

Many State constitutions and statutes exist solely to declare the existence of certain rights. This is a legitimate sovereign interest. *See*, *e.g.*, James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), *in Madison: Writings*

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[3] (...continued)
Blackstone, *Commentaries* App. at 14 (St. George Tucker ed., 1803) ("[W]hen the constitution is founded in voluntary compact, and consent, and imposes limits to the efficient force of the government, or administrative authority, the people are still the sovereign; the government is the mere creature of their will; and those who administer it are their agents and servants."). Virginia's Constitution mandates that State officials act, within limited powers, to protect individual rights. *See* Va. Const. art. I, § 3 ("[G]overnment is . . . instituted for the common benefit, protection, and security of the people.").

446-47 (Jack N. Rakove ed., 1999) ("[A]s [bills of rights] have a tendency to impress some degree of respect for [rights], to establish the public opinion in their favor, and rouse the attention of the whole community, [they] may be one mean to controul the [government].").

For example, the California Constitution was amended by popular initiative to declare that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const. art. I, § 24. It is inconceivable that such exercises of State sovereignty do not rise to the level of judicially cognizable interests. Were a federal law enacted purporting to overrule this provision of the California Constitution, the State would undoubtedly have suffered an injury to its capacity to make and enforce law, and have grounds to sue, even though this provision does not administer a program or regulate individuals. *Cf. The Federalist* No. 33, *supra*, at 206 ("Suppose by some forced constructions of its authority (which . . . cannot easily be imagined) the Federal Legislature should attempt to vary the law of [inheritance] in any State; would it not be evident that in . . . it had . . . infringed upon [the jurisdiction] of the State?")

By importing a new and unprecedented element into the standing analysis, whereby a State may only assert a sovereign interest in *administering its programs*, the court of appeals broke with this Court's precedent and exceeded its authority. Certiorari is warranted to restore the law of standing to its proper scope. Where a State suffers a concrete and particularized injury to *any* sovereign interest, Article III entitles it to vindicate that interest in court.

### C. This Case Is Crucial to Maintaining the States' Role in the Federalist Structure

If allowed to stand, the decision below would damage the federalist balance by depriving States—which are well suited for the task—of the opportunity to defend vital Tenth Amendment interests. Ever since the founding, States have asserted these interests in court, and to deny them the opportunity to defend their lawmaking powers, except when engaged in "implementing State programs," would do violence to federalism and encourage *unconstitutional* forms of State resistance to federal law.

The framers expected States to help counterbalance the federal government by defending the sovereignty reserved to them by the Tenth Amendment. *See*, *e.g.*, *The Federalist* No. 51, *supra*, at 351 ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments . . . . The different governments will controul each other; at the same time that each will be controuled by itself."); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1517 (1987) (noting States' "special role and responsibility in protecting their constituents from federal lawlessness"). This creative tension between State and federal authority is critical to what this Court calls "our federalism." *See Alden v. Maine*, 527 U.S. 706, 748 (1999) ("Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns

and joint participants in the governance of the Nation.").

The Constitution explicitly reserves power to the States, and divides States from the federal government for the same reason that the federal government is divided into three branches. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."). Thus it is unsurprising that States have often "adopt[ed] and enforce[d] laws that conflicted with federal laws to test indirectly whether the federal government exceeded its powers." Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 420 (1995).

While the concerns the court of appeals expressed regarding the history of "nullification" are understandable, those concerns are misplaced here. The VHCFA is *not* an attempt to nullify federal law, and does *not* purport to absolve Virginians of the obligation to obey federal statutes. On the contrary, the State has sought to vindicate its autonomy through appropriate legal channels, as the framers anticipated. *See*, *e.g.*, *The Federalist* No. 39, *supra*, at 256 (federal courts will decide "controversies relating to the boundary between" State and federal authority "impartially . . . according to the rules of the Constitution . . . to prevent an appeal to the sword, and a dissolution of the compact."); *see also Gordon v. United States*, 117 U.S. (2 Wall.) 697, 701 (1865) (opn. of Taney, C.J.) (Federal judiciary is "tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective

powers."). Virginia is engaged in an orderly and lawful attempt to vindicate its sovereign authority.[4]

On the contrary, if the decision below is allowed to stand, States will have less opportunity to seek judicial resolution of such controversies, and are more likely to resort to unconstitutional alternatives like actual "nullification." The theory of "nullification" rests on the presumption that federal courts will not fairly adjudicate disputes between States and the federal government. *See*, *e.g.*, Thomas E. Woods, *Nullification* 6 (2010) (arguing for nullification on grounds that the federal government cannot "arbitrate . . . a dispute between itself and the states"). As Professor Amar has warned, it is important that while "discarding the extremism of nullification and interposition" we do not also "throw[] away a rich antebellum tradition emphasizing State protection of constitutional norms against the federal government." Amar, *Sovereignty*, *supra*, at 1517.

One need not agree that Virginia is correct on the merits of this case to see the critical importance of its

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[4] The Fourth Circuit rejected this analysis because "a state could acquire standing to challenge any federal law merely by enacting a statute." *Cuccinelli*, 2011 U.S. App. LEXIS 18632, at *26. But the enactment of a statute is not a simple process; Virginia laws must pass two houses of the legislature and be signed by the governor; when enacted, they represent a declaration of the State's public policy. Moreover, this Court has made clear that Article III entitles States to defend their constitutionally reserved power to make laws. *McCulloch*, 17 U.S. (4 Wheat.) at 436; *Snapp*, 458 U.S. at 607. There is no reason to allow a state to "acquire standing" by enacting statutes in one circumstance, but not in another. In short, the Fourth Circuit's worry that States will flood courthouses to challenge such long-standing laws as the Social Security Act is both farfetched and insufficient to overcome Article III.

ability to bring such lawsuits. States play an essential check-and-balance role in restraining the federal government. *Bond*, 131 S. Ct. at 2364-67. Indeed, federalism is a "mechanism designed to institutionalize a permanent struggle between state and national power" as a means of protecting individual liberty. James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1728 (2003). To deprive States of the power to defend their sovereignty in court would shove a spoke into that mechanism's gears.

## II

## *MASSACHUSETTS v. MELLON* HAS LED TO CONFUSION AND CONTRADICTIONS AND SHOULD BE CLARIFIED

The decision below also demonstrates the continued confusion arising from the decision in *Mellon*, 262 U.S. 447. The Court should grant certiorari to clarify and narrow that precedent.

### *A.* *Mellon* Has Led to Significant Confusion Over the Relationship Between Standing and Political Question Doctrines

*Mellon* held that Massachusetts lacked standing to challenge a federal welfare law, because the State asserted only an abstract interest in seeing the Constitution followed, not a conflict with any actual State law or interest. Thus the question was "political and not judicial in character." *Id.* at 483. The State was asking the Court

> to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government . . . . [T]his Court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress.

*Id.* at 484-85. Yet at the same time, the Court "[did] not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress." *Id.* at 485. *See also Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 677 n.52 (D.C. Cir. 1976) (noting "ambiguity" in *Mellon* given contradictory statements about State parens patriae standing.)

*Mellon* was a contradictory jumble of jurisdictional concepts. Moreover, in the years since, this Court has held—in cases like *Dole*, *Holland*, *Mitchell*, and *New York*—that States may defend their residual sovereignty where a case does present an actual conflict between statutes. The Court has also rejected State standing in cases where, as in *Mellon*, the State had no statute on the books with which the federal law conflicted. *See, e.g.*, *Texas v. Interstate Commerce Comm'n & R.R. Labor Bd. No. 24*, 258 U.S. 158, 162 (1922); *New Jersey v. Sargent*, 269 U.S. 328, 338-39 (1926).

These precedents imply that *Mellon* is better seen as a political question decision than as a standing case. Indeed, *Baker v. Carr*, 369 U.S. 186 (1962),

characterized *Mellon* as a political question case, noting that Massachusetts had not

> claim[ed] infringement of *an interest particular and personal to [it]self, as distinguished from a cause of dissatisfaction with the general frame and functioning of government*—a complaint that the political institutions are awry. What renders cases of this kind non-justiciable is *not necessarily the nature of the parties* . . . nor . . . the nature of the legal question involved . . . . The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy.

*Id.* at 287 (emphasis added). Even the author of *Mellon* explained in *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938), that *Mellon* only "established" the "principle" that "courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; *but may consider that question "only when [it involves] direct injury suffered or threatened* . . ." meaning a wrong which directly results in the violation of a legal right." *Id.* at 478-79 (emphasis added).

Prominent scholars, including Professors David Currie and Richard Epstein, have complained about *Mellon*'s conflation of standing and political question analysis. *See* David P. Currie, *The Constitution in the Supreme Court the First Hundred Years 1789-1888*, at 304 n.121 (1985) (*Mellon* "perpetuated" a "confusion between political questions and standing."); Richard A. Epstein, *Standing and Spending: The Role of Legal*

*and Equitable Principles*, 4 Chap. L. Rev. 1, 32 (2001) (*Mellon* "confuses standing with political question."); Woolhandler & Collins, *supra*, at 468 (*Mellon* held "that issues of the constitutionality of statutes simpliciter and injuries to sovereignty were not litigable, [and] insist[ed] on the traditional requirements of a common-law injury.").

### *B.* *Mellon*'s Language Barring Parens Patriae Actions Was Inaccurate, Conflicts With Subsequent Decisions, and Requires Clarification

*Mellon* is even more confusing on the subject of parens patriae lawsuits. After expressly refusing to hold that States may never intervene to protect citizens against unconstitutional laws, 262 U.S. at 485-86, the Court declared that

> it is no part of [a State's] duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

*Id.* at 485-86.

The court below construed this case as a parens patriae action and held that *Mellon* establishes a blanket "prohibition against States suing the United States on behalf of their citizens." *Cuccinelli*, 2011 U.S. App. LEXIS 18632, at *18. "When a state brings a suit seeking to protect individuals from a federal statute," the panel held, "it usurps [the] sovereign

prerogative of the federal government and threatens the 'general supremacy of federal law.'" *Id.*

But while it is true that the federal government is parens patriae *with regard to matters falling within its enumerated powers*, the same cannot be true when the federal government acts *outside* of its authority. Outside the scope of enumerated or implied powers, *States*, and *not* the federal government, are sovereign. *McCulloch*, 17 U.S. (4 Wheat.) at 410 ("[T]he powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."); *accord, Thurlow v. Massachusetts*, 46 U.S. 504, 588 (1847) ("States . . . exercise their powers . . . upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government."). If the *Mellon* dictum were employed, as the court below employed it, to bar States from representing their people in challenging *ultra vires* federal action, the result would be a ratchet whereby the federal government can "pass laws for the accomplishment of objects not entrusted to the government," *McCulloch*, 17 U.S. (4 Wheat.) at 423, without effective legal resistance by those entities best suited to protect the federalist structure—and that the framers of the Constitution intended for such a role. *Cf. The Federalist* No. 46, *supra*, at 319 (If the federal government "extend[s] its power beyond the due limits" states would have plentiful "means of opposition,"

including "the embarrassments created by legislative devices.").

In the years since *Mellon*, federal courts have disregarded its broad language, and allowed States to act as parens patriae. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court allowed the State to assert claims under the bill of attainder clause, even though in doing so the State was enforcing "protections for individual persons and private groups . . . who are peculiarly vulnerable to nonjudicial determinations of guilt." *Id.* at 324. In *New York v. United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946), *aff'd*, 331 U.S. 284 (1947), States were allowed to challenge certain actions of the Interstate Commerce Commission as parens patriae. In *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (per curiam), *cert. denied sub nom. Carey v. Baldridge*, 455 U.S. 999 (1982), the Second Circuit allowed New York to sue federal Census officials to press allegations that the census methods would result in a disproportionate undercount of population leading to a loss of representation in Congress.

In *Abrams v. Heckler*, 582 F. Supp. 1155, 1159-61 (S.D.N.Y. 1984), the district court held that the Attorney General of New York could act as parens patriae to seek declaratory relief on behalf of the State to challenge a federal regulation that conflicted with a State law regulating insurance. Noting that States could sue the federal government in parens patriae capacity for interfering with matter "'that the state, if it could, would likely attempt to address through its sovereign law-making powers,'" *id.* at 1160-61 (quoting *Snapp*, 458 U.S. at 607), the court concluded that "New York *actually has* addressed the problem by

legislation . . . . The state's elected lawmakers have weighed the competing private interests and, by statute, expressed New York's sovereign interest." *Id.* at 1161. This meant that the federal law gave rise to a legally cognizable injury. The same observations apply to this case.

More recently, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court also allowed the State to sue as parens patriae to *enforce* federal law. Upon entering the union, the Court observed, States surrender certain powers, and lose the capacity to remedy certain types of ills. *Id.* at 519. Given the federal agency's legal obligation to protect the States' interests, and the States' strong stake in protecting their citizens and resources, the federal government's alleged failure to abide by the requirements of federal law inflicted a legally cognizable injury. *Id.* at 521.[5]

Meanwhile, several district courts have allowed States to litigate as parens patriae against the federal government, where, as in *EPA*, the State seeks to *enforce* federal statutes. *See*, *e.g.*, *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 326 (D.P.R. 1999); *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990); *Abrams*, 582 F. Supp. at 1159; *City of New York v. Heckler*, 578 F. Supp. 1109, 1122-25 (E.D.N.Y. 1984).

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[5] In *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 337 (2d Cir. 2009), the Second Circuit complained that *EPA* "arguably muddled state . . . parens patriae standing," but this Court, without elaboration, affirmed by an equal division, thus averting further discussion of parens patriae standing. *Am. Elec. Power Co. Inc. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

Other courts, however, have relied on *Mellon* to reject State parens patriae standing to enforce federal law. *See*, *e.g.*, *Kleppe*, 533 F.2d at 677; *Illinois ex rel. Scott v. Landrieu*, 500 F. Supp. 826, 828 (N.D. Ill. 1980). And still other courts have expressed confusion over the effect of *Mellon*'s parens patriae language. *See*, *e.g.*, *Texas v. Mosbacher*, 783 F. Supp. 308, 316 (S.D. Tex. 1992) (observing, without deciding, that Texas may have parens patriae standing notwithstanding *Mellon*'s dicta); *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 245-46 (D. Conn. 2005) (noting conflicting precedents regarding State parens patriae suits). In *Government of Guam v. Fed. Maritime Comm'n*, 329 F.2d 251, 252-53 (D.C. Cir. 1964), *cert. denied*, 385 U.S. 1002 (1967), the court distinguished *Mellon* by simply saying that the rules are different "in utility cases."

Allowing States to act as parens patriae to compel enforcement of federal laws is irreconcilable with *Mellon*'s dictum that American citizens must look solely to the federal government to vindicate their interests *vis-à-vis* the federal government. And to distinguish cases in which States act as parens patriae to *enforce* federal statutes from those in which States act to *challenge* federal statutes is unprincipled. Thus, even assuming the Fourth Circuit was correct to characterize this as a parens patriae case, certiorari is necessary to iron out the conflicting precedents regarding parens patriae standing.

## CONCLUSION

The framers expected States to keep the federal government within its limits "[i]n part by mutual jealousy and monitoring." Akhil Reed Amar, *The Bill of Rights* 123 (1998). States' ability to defend their autonomy in federal court is critical to the federalist structure. This petition therefore raises crucial questions even aside from the merits of the underlying claims. The writ of certiorari should be *granted*.

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Respectfully submitted,

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