No. 09-1227

In The Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE STATES OF ALABAMA, COLORADO, FLORIDA, SOUTH CAROLINA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, contrary to the Court's regular practice, *e.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010), a private party lacks standing to challenge a Federal statute on the ground that it violates the Tenth Amendment by intruding on State sovereignty.

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INTEREST OF AMICI CURIAE

As sovereigns possessing powers denied to the Federal government, the Amici States have a compelling interest in maintaining their full sovereignty and plenary powers against Federal intrusions. The Framers of the Constitution intended that the powers of the Federal government be "few and defined" and that the States retain powers "numerous and indefinite." *The Federalist No. 45* (James Madison). Amici seek to enforce this constitutional order.

The Petitioner seeks to vindicate this same interest, both on her own behalf and to the benefit of the States. It is not unusual that the interests of the States and their citizens will overlap in this way. To the contrary, it was the intention and expectation of the Framers that they do so. *The Federalist No. 51* (James Madison) (In our federalist system, "a double security arises to the rights of the people.").

Respondent, however, seeks to draw a false distinction between the sovereignty interests of the States and the rights of their citizens. Accordingly, Respondent would reserve to the States a large class of legal claims relating to intrusions on State sovereignty.

Amici States disclaim that they alone possess this right. There is no meaningful distinction between enumerated powers claims and sovereignty-oriented claims. Both may serve to safeguard the powers of the States and the rights of their people. Amici States also recognize that private-party suits against the

Federal government for intrusions on State sovereignty reinforce constitutional federalism and thereby advance the States' sovereignty interests. Amici States therefore welcome any and all lawsuits properly asserting federalism-based claims.[1]

SUMMARY OF ARGUMENT

"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." U.S. Const. amend. X. This text draws no distinction between the States and the people with respect to the "powers not delegated" to the Federal government. Nor does the Court's jurisprudence interpreting Article III's case-or-controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–62 (1992).

Neither the Constitution's text, its structure, nor its purpose brooks any exception to the general rules of standing that would deny a hearing to an injured party who otherwise falls within the limits of the courts' jurisdiction, simply because that party challenges an impermissible Federal intrusion on State sovereignty.

[1] State Amici take no position on the underlying merits of this matter.

Respondent offers an untenable, and ultimately illusory, distinction between such "sovereignty" claims and claims challenging *ultra vires* Federal acts, which are regularly entertained by the courts. The two are equivalent, "mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992). To the extent that *Tennessee Electric Power Co. v. Tennessee Valley Auth.,* 306 U.S. 118 (1939), held otherwise (and this is far from clear), it has been abrogated by subsequent cases and should be put to rest.

Finally, there are important reasons why Amici States do not claim for themselves alone the right to challenge Federal intrusions on their sovereignty. First, dual sovereignty is a bulwark against Federal overreaching and a means to enforce governmental accountability. The people are its ultimate beneficiaries. They have no less an interest in preserving State sovereignty under the Constitution than the States themselves.

Second, this interest is especially acute where State officials accept, or improperly consent, to violations of State sovereignty. Such consent does not and cannot nullify the citizens' interest or ability to vindicate their rights. *See New York*, 505 U.S. at 182.

Third, States themselves suffer when their peers submit to unlawful Federal impositions, thereby creating precedent adverse to dual sovereignty.

Fourth, States are simply unable to identify and challenge each of the countless Federal statutes,

provisions, offenses, regulations, and orders that exceed proper Federal powers. Amici, therefore, welcome the efforts of private citizens to protect the Constitution's proper balance between the national government and the States.

Amici States therefore respectfully request that the Court reverse the Third Circuit's ruling below and clarify that private parties may, to the fullest extent of the law, bring claims that vindicate State sovereignty as well as their own rights.

ARGUMENT

I. PRIVATE PARTIES HAVE STANDING TO ASSERT ANY AND ALL TENTH AMENDMENT CLAIMS

Amici agree with Petitioner and Respondent that a private party challenging a statute as beyond Congress's enumerated powers can and must satisfy the "irreducible constitutional minimum" for Article III standing. *Lujan*, 504 U.S. at 560.

There is no legal basis, however, for Respondent's proposed *sui generis* rule barring standing for other Tenth Amendment claims asserting State sovereignty raised by private parties. It is divorced from the Court's jurisprudence on standing and contrary to the Court's interpretation of the Tenth Amendment.

A. Private-Party Challenges To Intrusions On State Sovereignty Present Justiciable Cases Or Controversies

To meet Article III standing requirements, a party "'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Satisfaction of these requirements renders a case justiciable, unless there are applicable prudential reasons for not adjudicating the case. 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3529 (3d ed. 1998). Because standing "is an essential and unchanging part of the case-or-controversy requirement of Article III," the Federal courts have an independent duty to ensure that standing exists in each putative "case" or "controversy." *Lujan*, 504 U.S. at 560.

While diligently exercising this duty, the Court has decided numerous cases challenging the Federal government's exercise of powers. *E.g., Printz v. United States*, 521 U.S. 898 (1997); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Comstock*, 130 S. Ct. 1949 (2010). By deciding these cases on the merits, rather than dismissing for want of jurisdiction, the Court has strongly suggested that standing exists in each. *See Newdow v. Roberts*, 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J., concurring). *Lopez v. United States*, for example, was decided on the ground that a Federal criminal offense exceeded Congress's commerce power because upholding it

would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. 549, 567 (1995). None of the five opinions in the case, which included two spirited dissents, suggested that standing was in question.

Respondent draws an artificial and illusory distinction between claims that Congress exceeded its enumerated powers, as in *Lopez*, and claims that some Federal act impermissibly encroaches on powers reserved by the Constitution to the States, citing *Tennessee Electric Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939) ("TVA") as exemplifying the latter. Resp. 9. As demonstrated below, however, this distinction is untenable with respect to the substance of a Tenth Amendment claim, and it is irrelevant with respect to standing.

The Tenth Amendment claim at issue in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), illustrates this point. The plaintiff, Gillespie, challenged a provision of the Gun Control Act of 1968 barring him, as a person convicted of a misdemeanor domestic violence offense, from carrying a firearm. *Id*. at 697. As a result, he was terminated from his position as a law enforcement officer. *Id*. at 698. Gillespie argued, *inter alia*, that the Federal offense impermissibly intruded on the State police power by supplanting State domestic violence law and, in effect, forcing

the States to administer or enforce a Federal regulatory program. *Id*. at 699.[2]

As the Seventh Circuit concluded, the plaintiff's standing was "easy to appreciate":

> Practically speaking, the Gun Control Act as amended deprives Gillespie of the ability to carry a gun, and any constitutional defect that he can identify in the statute, including a violation of the Tenth Amendment, paves the way to relief, because it will render the firearms disability imposed upon him void.

Id. at 701.

This is a correct application of this Court's standing jurisprudence. Gillespie suffered an injury that was "concrete and particularized," as well as "actual or imminent." He was denied the right to carry a firearm and, by direct operation of that disability, lost his job. *See Parker v. District of Columbia*, 478 F.3d 370, 376–78 (D.C. Cir. 2007) (finding standing where registration of firearm was denied), *aff'd, District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). This injury was "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560 (internal quotation marks omitted), in unlawfully enacting that provision of the Gun Control Act. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59,

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[2] Gillespie separately argued that the Act exceeded the commerce power, but this claim was dismissed by the district court and was not appealed. *Gillespie*, 185 F.3d at 699.

78–81 (1978) (finding causation where plaintiffs would have "likely" suffered no injury "but for" the challenged statute, even where there was no causal "nexus" between "the injuries they claim and the constitutional rights being asserted"). Finally, Gillespie's injury would "likely" be "redressed by a favorable decision," *Lujan*, 504 U.S. at 561; the bar on firearms possession would be lifted. *See Duke*, 438 U.S. at 75 (finding a "substantial likelihood" that the relief requested, invalidation of a statutory provision, "will redress the injury claimed").[3]

The crux of Gillespie's challenge, no less than in *Lopez*, *Morrison*, and *Raich*, was that he suffered an injury because of Federal intrusion on State sovereignty, and that this injury would be relieved by cure of the constitutional defect. This is true despite his challenge being framed as an intrusion on State sovereignty, rather than a case of Congress exceeding

[3] While causation and redressability may be contested in certain "sovereignty" claims where the private party's injury is an indirect result of Federal action, the Court has held that this circumstance alone does not bar standing. *Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded. . . ."). *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181–83 (2000) (finding Article III standing for environmental group to bring citizen suit to enforce Clean Water Act).

its limited powers. It follows that his claim satisfied the Court's usual test for standing.[4]

The Court's "prudential" standing requirement that "a litigant must normally assert his own legal interests rather than those of third parties," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citing *Craig v. Boren*, 429 U.S. 190 (1976)), may be similarly satisfied in such cases.[5] A private party challenging a Tenth Amendment violation that caused it injury, in fact, sues to assert his own legal

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[4] This result is not altered simply because Gillespie's interests were aligned with State sovereignty interests. The doctrine of standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (internal quotation marks and citation omitted). In the usual case, this inquiry and the three-factor test above "are flip sides of the same coin," interchangeable formulations of the same rule. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008). That a party to a suit and third parties may share a common interest therefore does not, in general, bar standing and is, in fact, hardly unusual. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

[5] In its Brief Respecting Certiorari, Respondent does not identify on what basis standing for such a claim would fail. Specifically, it does not assert that a "sovereignty" claim would be unsupported by Article III standing or which, if any, of the three prongs necessary to establish standing would be unsatisfied. Nor does it state whether standing should be denied prudentially and, if so, on what basis.

interests.[6] Accordingly, prudential standing is no bar to a Tenth Amendment challenge so long as the challenged Federal act additionally threatens to violate third-party States' sovereignty rights.[7]

There is also no inherent characteristic of "sovereignty" claims that puts them outside the "zone of interests" prudential limitation on standing.[8] In applying this doctrine, "[t]he proper inquiry is simply 'whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected . . . by the statute.'" *Nat'l Credit*

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[6] Even were this not the case, a party may "establish[ ] independently her claim to assert *jus tertii* standing . . . to assert those concomitant rights of third parties that would be diluted or adversely affected should her constitutional challenge fail. . . ." *Craig*, 429 U.S. at 194–95 (internal quotation marks omitted). Thus, in *Craig*, a beer vendor was able to assert the rights of males 18-20 years old to purchase beer on equal footing with females of the same age where "enforcement of the challenged [statute] . . . would result indirectly in the violation of third parties' rights." *Id*. at 195. *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 805 (1985); *Singleton v. Wulff*, 428 U.S. 106 (1976).

[7] This presupposes, of course, that the private party possesses Article III standing.

[8] This discussion assumes, *arguendo*, that the "zone of interests" limitation applies to claims raised outside of the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and other administrative procedure statutes. Recent decisions suggest that it does not. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 488 (1998) ("We have interpreted § 10(a) of the APA to impose a prudential standing requirement. . . ."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (Federal Election Campaign Act).

Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (emphasis in original). Rather than a statute, a private party asserting that Congress has violated the Constitution's dual sovereignty principles relies on the Tenth Amendment. The text of the amendment, as well as this Court's interpretation of it, demonstrate unambiguously that the interests of individuals complaining of Federal intrusions on State sovereignty are more than "arguably . . . to be protected" by it. *See* U.S. Const. amend. X (" . . . are reserved . . . to the people"); *New York*, 505 U.S. at 181 (structural limitations on federal power are "for the protection of individuals").

Nor is a "sovereignty" claim necessarily a "generalized grievance" subject to a prudential bar. Parties "have no standing to complain simply that their Government is violating the law," *Allen v. Wright*, 468 U.S. 737, 755 (1984), but *Gillespie* demonstrates that a private party may assert a particularized harm, above and beyond abstract unlawfulness, in a Tenth Amendment "sovereignty" claim. This injury is indistinguishable from the types of harm that support standing in other contexts. *E.g., District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). By contrast, a party merely aggrieved by an unlawful intrusion on State sovereignty, but who had not suffered any personal injury as a result, would lack standing. Far from "generalized," the injuries that result from intrusions

on State sovereignty can be quite personal, no less so than those recognized in other contexts.

Finally, a private party's Tenth Amendment claim premised on State sovereignty need not involve a political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). To the contrary, the Court has seen fit to adjudicate even sensitive disputes touching on the relationship of the States and the Federal government. *E.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *New York*, 505 U.S. at 156; *Printz v. United States*, 521 U.S. 898 (1997). Whether a claim presents a non-justiciable political question does not turn on the identity of the party asserting it. *Cf. Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (holding, in private litigation, that recognition of foreign states is a "political question" committed to the political branches); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 160 (2000) (barring enforcement of lease contract on ground that apportionment of liabilities among successors to Yugoslavia presented a non-justiciable political question).

For all of these reasons, this Court and others have, for example, had no trouble finding standing where police officers, rather than a State itself, have brought Tenth Amendment "sovereignty" claims. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (county sheriff/coroner); *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994) (same). *See also Steward Machine Co. v. Davis*, 301 U.S. 548, 585–90

(1937) (considering merits of private-party challenge to Federal law allegedly "involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our Federal form of government"). In these cases, the injury to the plaintiff was a clear result of an unlawful imposition on the State – a "commandeering." Respondent argues, however, that it is *precisely* this type of claim that a private party lacks standing to bring. Resp. 10.

In sum, under the relevant standing doctrines, a private party that has suffered a concrete injury, attributable to a Federal intrusion on State sovereignty and redressable by a favorable judgment, has standing to assert that claim against the Federal government, or its officers and agencies. This Court has never suggested otherwise.

B. Respondent's Distinction Between *Ultra Vires* And State Sovereignty Challenges Is Untenable

Respondent cannot distinguish between claims that Congress exceeded its enumerated powers (where private litigants have standing) and claims that Congress has impermissibly invaded State sovereignty (where they allegedly do not) as "two types of Tenth Amendment claim." Resp. 16. Such claims are two sides of the same coin and indistinguishable.

As this Court explained in *New York*: "If a power is delegated to Congress in the Constitution, the

Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Put most succinctly, "the two inquiries are mirror images of each other." *Id*. As a matter of law and precedent, this should be the end of the inquiry.

The Tenth Amendment's history confirms this "mirror image[ ]" analysis. It was included in the Bill of Rights in reaction to Anti-federalist claims that the Constitution conferred general police powers on Congress or at least, through provisions like the Necessary and Proper Clause, "opened the door to dangerous (if erroneous) interpretations of enumerated federal authority." Kurt Lash, *The Original Meaning of an Omission*, 83 Notre Dame L. Rev. 1889, 1915 (2008) [hereinafter Lash].

Virginia Governor Edmund Randolph stated his concern that the "sweepings clause" was "ambiguous, and that ambiguity may injure the States. My fear is, that it will by gradual accessions gather to a dangerous length." *Id*. (quoting Edmund Randolph, Debate in the Virginia Convention (June 17, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution* 1353 (John P. Kaminski et al. eds., 1993)). Randolph therefore proposed an amendment clarifying the limits of Federal power. *Id*. James Madison responded positively: "The observations by [Randolph], on that subject, correspond precisely with my

opinion. . . . [E]very thing not granted is reserved." *Id*. at 1919. Madison later explained, after the amendment had been drafted, that it denies to the Federal government any "source of power not within the constitution itself." James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in James Madison, Writings* 480, 489 (Jack N. Rakove ed., 1999).

That description applies equally regardless of whether Congress invades a State's sovereignty interests through commandeering its resources and officials, imposing coercive conditions, or by enacting laws in excess of its enumerated powers. In each case, such action violates the Tenth Amendment *because* it exceeds Congress's enumerated powers.

In this way, although the "mirror image[ ]" of the powers enumerated in Article I of the Constitution, the Tenth Amendment is not a nullity. *New York* stated and applied this proposition correctly. 505 U.S. at 155–56.

Respondent rejects *New York's* approach to the Tenth Amendment, characterizing it as a "sovereignty" case where "an enumerated power may give Congress authority over a subject, but the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly intrudes on State sovereignty." Resp. 10. This, Respondent claims, stands opposed to "a separate category" of Tenth Amendment claims that concern solely whether a

statute is authorized by Congress's enumerated powers. Resp. 10.

But *New York* itself, as well as the amendment's text and history, repudiates this distinction. Respondent effectively acknowledges as much by employing the above-quoted language from *New York* to define its supposed class of "enumerated powers" claims, even while excepting *New York* from that class. Resp. 10. The two are, in fact, the same and cannot be distinguished. *New York*, 505 U.S. at 156.

Finally, Respondent's proposed classification of Tenth Amendment cases for standing purposes is to be found nowhere in the history of the amendment or this Court's jurisprudence.[9] It is incompatible with both.

C. The Government's Reading Of *TVA* Is Contrary To Court Precedent Allowing Private Parties To Challenge Federal Intrusions On States' Plenary Police Power

Because there is no difference between claims that are stated in "sovereignty" terms and those that

[9] It is not, however, entirely novel, having made an appearance in the academic literature, as a means to accomplishing other constitutional policies. *See* Nelson Lund, *Fig Leaf Federalism and Tenth Amendment Exceptionalism*, 22 Const. Commentary 11, 20-23 (surveying case law and proposing a distinction between states and private parties with respect to commerce power claims).

are stated in terms of "enumerated powers," Respondent's reading of *TVA* is also incompatible with this Court's standing jurisprudence.

The Court regularly exercises its jurisdiction to adjudicate Tenth Amendment claims raised by private parties asserting that Federal laws, facially or in their application, exceeded Congress's enumerated powers or, put conversely, invaded States' sovereign interests. In *Lopez*, for example, the basis of the respondent's claim for invalidating the Gun Free School Zones Act was that "the Constitution did not vest in Congress a general police power." Brief of Respondent, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 396915. Similarly, in *Morrison*, the respondent challenged the government's invocation of its commerce power to support the constitutionality of a Federal criminal offense on the ground that (put most directly in a heading) "Petitioners' Rationale Would Lead To A General Police Power For Congress Inconsistent With The Doctrine Of Enumerated Powers." Brief for Respondent, *United States v. Morrison*, 529 U.S. 598 (2000), 1999 WL 1146894.

The respondent in *Raich* stated a "sovereignty" claim even more directly: "In this case, the issue is whether the Federal Government may criminalize wholly intrastate, noncommercial conduct that is *expressly authorized and supervised by a State exercising its core police powers* to preserve the lives of its citizens and reduce their pain and suffering." Brief for Respondents, *Gonzales v. Raich*, 545 U.S. 1 (2005),

2004 WL 2308766 (emphasis added).[10] And, most recently, the Court considered a private litigant's claim that a Federal civil commitment statute "violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control." *United States v. Comstock*, 130 S. Ct. 1949, 1962 (2010) (internal quotation marks omitted)).

That the Court asserted jurisdiction in, and decided, so many cases over a period of decades strongly suggests it found standing for the parties' Tenth Amendment claims.[11]

Despite the authority of these cases, Respondent argues that *TVA* bars Tenth Amendment claims stated in terms of "state sovereignty" rather than "enumerated powers," Resp. 9–10, a reading of the case endorsed by no court. This assertion is plainly

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[10] The same is true of *Printz*, which was not brought by a State, though asserting State interests. Brief of Petitioners, *Printz v. United States*, 521 U.S. 898 (1997), 1996 WL 464182 (petitioner "sought a declaratory judgment that [the challenged provision] is inconsistent with Art. I, § 8 and the Tenth Amendment to the United States Constitution").

[11] *See Newdow*, 603 F.3d at 1014 (Kavanaugh, J., concurring) ("[T]the Supreme Court's consistent adjudication of religious display and speech cases over a span of decades suggests that the Court has thought it obvious that the plaintiffs in those matters had standing. . . . To ignore the import of those cases for the standing analysis, one would have to believe the Supreme Court repeatedly overlooked a major standing problem and decided a plethora of highly controversial and divisive Establishment Clause cases unnecessarily and inappropriately.")

contrary to the Court's exercise of jurisdiction over expressly stated "sovereignty" claims. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Comstock*, 130 S. Ct. 1949 (2010). Even were these cases otherwise classified, or distinguished on some other basis, Respondent's assertion still runs afoul of the Court's exercise of jurisdiction over any and all Tenth Amendment claims; all are "sovereignty" claims as much as "enumerated powers" claims.

Rather than stating an absolute bar on certain Tenth Amendment claims as Respondent suggests, *TVA* more easily bears a narrow reading that is consistent with the Court's contemporaneous and subsequent case law. The *TVA* plaintiffs, private electricity producers, challenged the operations of the Federal Tennessee Valley Authority on various constitutional grounds claiming, among other things, that TVA's wholesale electricity supply contracts (which stipulated the rates at which local utilities could *resell* electricity), amounted to actual rate regulation. 306 U.S. at 143. This, they argued, "cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id*.

The Court rejected this contention on the ground that a price maintenance contract, rather than a regulation, "is nothing more than an incident of competition." *Id*. at 144. It then noted, with respect to plaintiffs' standing to bring this particular claim:

> As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.

Id.

Read in context, this text simply reaffirms the ordinary rule that private litigants cannot challenge Federal actions in gross, as simply being unlawful, without also showing some particularized injury, and confirms that this ordinary rule applies equally in challenges to invasion of States' sovereign interests. The sole injury petitioners asserted in *TVA* was to their bottom line – that is, TVA's tactics had forced them to lower their own rates and, accordingly, suffer a diminution in profits. *Id*. at 137–38. Mere competitive injury is not a legally protected interest,[12] and this was well established at the time. *See Louisiana v. McAdoo*, 234 U.S. 627, 631–32 (1914) (dismissing a claim by Louisiana challenging a tariff rate reduction on Cuban sugar, which competed with that sold by the State).[13] *TVA's* discussion of legally cognizable

[12] Petitioners did not allege, for example, that TVA had engaged in unfair competition or monopoly behavior. *See TVA*, 306 U.S. at 139.

[13] Indeed, *TVA* discusses this point in some detail, 306 U.S. at 139, and within months after it issued, and for years following, was widely cited in support of it. *See, e.g., Porto Rico Ry., Light & Power Co. v. Colom*, 106 F.2d 345 (1st Cir. 1939); *Sw. Gas & Elec. Co. v. City of Texarkana*, 104 F.2d 847 (5th Cir.

(Continued on following page)

injury illuminates its otherwise cryptic passage on standing,[14] transforming a stray remark with severe consequences into a sensible holding. Where this holding has been taken out of context and misapplied, the lower courts (like Respondents) have done so in plain conflict with this Court's consistent and more recent precedent.

1939); *Lukens Steel Co. v. Perkins*, 70 App. D.C. 354, 107 F.2d 627 (D.C. Cir. 1939) ("one cannot complain of or prevent damage by lawful competition, even though the competition or its damaging character may be due to the action by officers of the United States which is attacked as lawless"), *rev'd, Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Arkansas-Missouri Power Corp. v. City of Kennett*, 113 F.2d 595 (8th Cir. 1940); *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 701 (2d Cir. 1943) ("[F]inancial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy.").

[14] As the passage additionally explains, the States are unaffected by the electric producers' failure of standing, remaining able to assert an injury to their sovereign rights. It is, as a whole, an unexceptional application of the Article III bar on predicating standing wholly on the rights of third parties. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

II. PRIVATE PARTY STANDING TO ASSERT STATE SOVEREIGNTY IS NECESSARY TO PRESERVE DUAL SOVEREIGNTY AND PROTECT PRIVATE PARTIES AGAINST FEDERAL OVERREACHING

"In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

Our system of dual sovereignty exists for the ultimate benefit of the people as citizens of the States, not for the States *qua* States. For that reason in particular, private parties should not be denied the opportunity to vindicate their rights and interests when these are infringed by federal usurpation of powers reserved to the States and the people.

A. Our System Of Dual Sovereignty Exists To Safeguard The Rights Of The People

For the Constitution's Framers, federalism as a means to "preserving the individual sovereignty of the 'peoples' of the several states." Lash, at 1925. They intended, and the careful enumeration of Federal powers reflects, that the States and the Federal government would each check the other's abuses. This would work in conjunction with the division of Federal powers between the branches of government to "secure" the people's rights:

> In the compound republic of America, the power *surrendered* by the people is first

> divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51 (James Madison) (emphasis added). *See also The Federalist No. 28* (Alexander Hamilton) ("Power being almost always the rival of power . . . .")

The use of the word "surrendered" was not incidental. The Framers' Constitution embodies the principle of popular sovereignty – that all power derives from the people. Lash, *supra*, at 1922–24. This was a direct repudiation of contemporary political systems in which sovereignty inured only in the state (or prince). As the Court has explained, this fundamental principle underlies the very structure of the Constitution and the rights that it reserves. *See e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964) ("[Madison's] premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty' . . . This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects.") (internal citations omitted).

It would be incongruous if the States alone could challenge Federal actions upsetting this critical

balance, because its purpose was and is to guard and vindicate the rights of individual citizens.

B. A State's Consent Or Acquiescence To Unconstitutional Intrusions On Its Sovereignty Does Not Nullify Its Citizens' Rights As Against The Federal Government

Moreover, the States may not waive their rights, or those of their citizens, by consent or acquiescence in unconstitutional Federal intrusions on their legitimate authority. Because the Federal government is one of limited powers, its *ultra vires* acts, even if ratified by a State, remain *ultra vires* and unlawful. "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *New York*, 505 U.S. at 182.

Indeed, as the Court explained in addressing the similar inability of the Federal government's three branches to cede their constitutional prerogatives, such actions vitiate the accountability of government to the people. When separated powers are muddled, "the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3155 (2010) (rejecting that presidential

acquiescence might immunize from challenge otherwise impermissible intrusions on executive power).

Indeed, as the Court observed in *New York*, public officials may, to avoid such blame, favor this state of affairs. That case concerned a provision that required States to either enact legislation providing for the disposal of nuclear waste or to take title to and possession of the waste and become liable for any damages resulting from the failure to provide for disposal of the waste. 505 U.S. at 152–54. Though accountability would have been clear had the Federal government acted on the waste itself, or had a State accepted a Federal grant to do so, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the Federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id*. at 169.[15]

The ability of private litigants to raise State sovereignty claims in Tenth Amendment challenges is a necessary and effective check on such tendencies on both the Federal and State levels.

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[15] This is a real and practical concern. In *Gillespie*, for example, the State government could maintain that it neither deprived the plaintiff of his right to possess a firearm nor was responsible for his dismissal from the police force. *See* 185 F.3d at 698–99. The Federal government could, in turn, maintain that the State had defined its own domestic violence law and that it exercised no control over the State's personnel decisions. In this way, authority, and thereby accountability, were diffused.

C. "Consensual Commandeering" Injures States That Resist Intrusions On Their Sovereignty And Those States' Citizens

In addition, of course, States also are harmed by the unchallenged acquiescence of their sister States in unlawful Federal encroachments. Such consent or acquiescence creates precedent against the proper assertion of State sovereignty and increases political incentives for further unconstitutional intrusions. Thus, for example, the Federal government has relied on the acquiescence of some States to justify the commandeering of State instrumentalities generally under the Clean Air Act. *See, e.g., District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975) (holding that, while Federal government could regulate directly, it may not "compel[ ] the states to enforce federal regulatory programs"), *vacated and remanded for consideration of mootness sub nom, EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

In other instances, States that have consented to the commandeering of their officials and instrumentalities have cited that experience in support of arguments for upholding challenged Federal statutes. *See, e.g.,* Brief of The States Of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, And Wisconsin Amici Curiae In Support Of Respondent, *Printz v. United States*, 521 U.S. 898 (1997), 1996 WL 590921 (arguing, *inter alia*, that the Brady Act's imposition on law enforcement officers is minimal).

State Amici face a similar detriment when challenging Federal programs that rely on the spending power to "coerce" State action. Coercion can be a highly fact-specific test, requiring a party challenging a Federal program to demonstrate that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

States that consent to unlawfully compulsive Federal programs – for example, those that may be popular within the State – create precedent in favor of those programs' constitutionality that can then be employed against legitimate challenges to those programs by States that resist intrusions on their sovereignty or where the program is unpopular. This same kind of "consensual commandeering" can also skew political incentives at the Federal level.

The willingness of private litigants in such States to raise these issues under the Tenth Amendment serves as a critical check on State officials who would surrender their States' long-term interests in the cause of short-term political goals.

D. States Lack The Resources To Challenge Every Intrusion On Their Sovereign Rights

Finally, no State has the resources or ability to challenge every act of the Federal government that

intrudes on its sovereignty and injures its citizens. Indeed, the set of Federal acts that potentially run afoul of State sovereignty is so large as to resist enumeration. In 2009, for example, Congress passed, and the President signed, 125 bills; Federal regulatory agencies issued 3,503 final rules, for a total of nearly 60,000 final rules since 1995; and 68,598 pages of regulatory materials were published in the Federal Register. Clyde Wayne Crews, Jr., *Ten Thousand Commandments* 2010 2, 27 (2010) (citing agency self-reports). Of the 3,503 final rules, 514 affected the operation of State governments, and 328 affected local governments. *Id*. at 27.

No State has the capability to follow all of this lawmaking activity, much less at the level of detail that would be required to identify every encroachment on State interests. This is particularly so in the current economic environment, when States face unprecedented strains on their budgets and strong pressure to reduce expenditures.[16]

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[16] The economic slowdown of recent years "has caused the steepest decline in state tax receipts on record," with overall State revenues declining 8.4 percent in the 2009 fiscal year. Elizabeth McNichol, Phil Oliff, and Nicholas Johnson, *States Continue To Feel Recession's Impact*, Center for Budget and Policy Priorities, Oct. 7, 2010, p. 1. In 2009, 46 of the 50 States had to close significant budget gaps, on average amounting to 19 percent of their budgets. *Id*. Given the slow rate of economic recovery, and future strains on State budgets due to the recent enactment of the Patient Protection and Affordable Care Act,

(Continued on following page)

Nor do States have the capability to identify every lawsuit that implicates State interests. In the period from October 2008 through September 2009, nearly 190,000 civil cases were filed in the U.S. district courts, and nearly 12,000 in the Federal courts of appeal. Federal Judicial Center, Judicial Business of the United States Courts 8, 11 (2009) (excluding prosecutions and prisoner petitions). Tens of thousands of these cases potentially affect State governments or touch on areas of power traditionally left to the States. *See id*. at 86–90 (case statistics by subject matter).

And even if a State were able to identify each litigation potentially touching on State interests, it may lack the resources to intervene in each case. In all, the States are simply incapable of policing every act of the Federal government that exceeds its limited, enumerated powers.

For that reason and the others identified above, State Amici welcome private-party challenges under the Tenth Amendment, whether classified as resting on "enumerated powers" or "state sovereignty."

CONCLUSION

The judgment of the Third Circuit denying a private party standing to challenge a Federal statute

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Pub. L. No. 111-48, 124 Stat. 119 (2010), State budgets will continue to be tight for the foreseeable future.

on grounds that it is inconsistent with the Tenth Amendment should be reversed.

Respectfully submitted,

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