No. 16-721

In the Supreme Court of the United States

WEST VIRGINIA, EX REL. PATRICK MORRISEY,
PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
JENNIFER L. UTRECHT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner, the State of West Virginia, lacks Article III standing to challenge a transitional policy temporarily delaying federal enforcement of certain provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

No. 16-721

STATE OF WEST VIRGINIA, EX REL. PATRICK MORRISEY, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 827 F.3d 81. The opinion of the district court (Pet. App. 9a-46a) is reported at 145 F. Supp. 3d 94.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2016. On September 19, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 28, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (ACA or Act), Pub. L. No. 111-148, 124 Stat. 119, im-

posed a number of new requirements on health insurance issuers, including requiring modified community-rated premiums in the individual and small group markets, 42 U.S.C. 300gg, guaranteeing the availability of coverage, 42 U.S.C. 300gg-1, guaranteeing the renewability of coverage, 42 U.S.C. 300gg-2, prohibiting exclusions based on pre-existing conditions, 42 U.S.C. 300gg-3, prohibiting discrimination based on health status, 42 U.S.C. 300gg-4, and requiring coverage of essential health benefits in the individual and small group markets, 42 U.S.C. 300gg-6.

As relevant here, Congress enacted those requirements as amendments to the Public Health Service Act (PHSA), 42 U.S.C. 201 *et seq.* In so doing, Congress preserved the PHSA's division of enforcement authority between the federal government and the States. States have long been the primary regulators of the insurance industry. See *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 499-500 (1993). Consistent with that traditional role, the PHSA provides that States may, at their discretion, choose to enforce the PHSA's provisions governing health insurance issuers. 42 U.S.C. 300gg-22(a)(1). If the Department of Health and Human Services (HHS) determines that a State has substantially failed to enforce one or more of the PHSA's requirements, then HHS is responsible for enforcing the relevant provisions within the State. 42 U.S.C. 300gg-22(a)(2).

Several of the ACA's new requirements were scheduled to take effect for plan years beginning on or after January 1, 2014. 42 U.S.C. 300gg note; see Pet. App. 10a. Before that date, some insurance issuers notified customers that they would be terminating insurance plans that did not comply with the ACA's

requirements. Pet. App. 13a-14a. Many of the affected individuals and small businesses could obtain coverage through the health insurance Exchanges established under the ACA. *Id.* at 183a-184a. But even with the federal premium tax credits available to eligible individuals and the small business health care tax credits available to eligible small employers, some consumers found that new coverage would be more expensive than their existing coverage. *Id.* at 184a. HHS was concerned that those consumers might be dissuaded from transitioning to new coverage, and might instead forgo coverage entirely. *Ibid.*

To avoid that result, HHS announced a transitional policy under which it would not enforce certain ACA requirements against health insurance issuers in the individual and small-group markets that continued to offer coverage that would otherwise have been cancelled because it did not comply with those requirements, provided that the issuers met certain conditions. Pet. App. 183a-187a. HHS encouraged States to adopt the same transitional policy, but each State remained free to decide whether to enforce the relevant ACA requirements. *Id.* at 187a.

HHS announced the transitional policy in November 2013. Pet. App. 183a. That policy has since been extended several times, most recently in February 2017. It now applies to covered insurance policies renewed on or before October 1, 2018, provided that all covered policies end by December 31, 2018.[1]

2. Petitioner, the State of West Virginia, "believes that its citizens should be able to keep their individual

---

[1] HHS, *Extended Transition to ACA-Compliant Policies* (Feb. 23, 2017), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Extension-Transitional-Policy-CY2018.pdf.

health insurance plans if they like them." Pet. App. 117a. Even before HHS announced the transitional policy, petitioner had taken actions that effectively delayed the application of the ACA's market reforms to West Virginia insurance issuers until the end of 2014. *Id.* at 14a, 200a-201a. After HHS extended the transitional policy past the end of 2014, petitioner announced that it would likewise refrain from enforcing the relevant ACA requirements against issuers covered by that policy. *Id.* at 14a; see *id.* at 201a-204a.

3. In July 2014, petitioner filed this suit challenging the transitional policy on statutory and constitutional grounds. Petitioner did not, however, seek to vacate the transitional policy or to compel HHS to enforce the ACA's requirements against West Virginia health insurance issuers—a result that petitioner opposes. Instead, petitioner's complaint asked the district court to declare the transitional policy unlawful and "[r]emand" the matter to HHS while leaving that policy in place. Pet. App. 155a-156a; see *id.* at 5a.

The district court dismissed petitioner's suit for lack of Article III standing. Pet. App. 9a-46a. The court explained that "[e]ven a cursory reading of [petitioner's] Complaint reveals that the injuries it asserts are not among the traditional kinds of injuries that the Supreme Court has recognized as sufficient to confer standing on a State that is challenging federal action." *Id.* at 17a. The court emphasized that petitioner does not allege that the transitional policy "has caused it to suffer any financial injury" or that the policy requires it to do, or refrain from doing, anything. *Id.* at 18a. To the contrary, the court explained, the policy presents petitioner with the same choice it has always had under the PHSA as amended

by the ACA: "either enforce the ACA's market requirements or don't." *Id.* at 27a.

Petitioner argued that it was injured by the transitional policy because the policy alters the practical consequences of its choice: If petitioner opts not to enforce the ACA's requirements, the policy means that some of those requirements will not be enforced against certain issuers at all. Pet. App. 18a-19a. Petitioner asserted that this result inflicts an injury in the form of "enhanced 'political accountability' that [it] will suffer at the hands of its citizens who wish to see the ACA's market reforms enforced." *Id.* at 18a.

The district court held that petitioner's asserted injury in the form of increased "political accountability" does not satisfy Article III because it is not "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Pet. App. 23a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court noted that petitioner's "claimed injury, at bottom, involves a general desire to challenge the legality of a federal action, relying on the abstract concept of political accountability to define its alleged harm." *Id.* at 25a. The court observed that this Court has long held that such a claim is "political, and not judicial in character, and therefore [is] not a matter which admits of the exercise of the judicial power." *Id.* at 27a (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 483 (1923)). The court also noted that petitioner "ha[d] not cited any case that recognizes its novel standing theory." *Id.* at 31a.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that "[t]here is simply no support for [petitioner's] extraordinary claim" that a State

suffers an Article III injury when it is given discretion to decide whether or not to enforce a federal statute. *Id.* at 6a. The court observed that "no court has ever recognized political discomfort as an injury-in-fact," and it emphasized that the "[i]ncreased political accountability" on which petitioner relies "is the kind of inherently immeasurable harm that our standing doctrines have been designed to screen out" through the requirement that an Article III injury "must be 'concrete.'" *Id.* at 7a (quoting *Lujan*, 504 U.S. at 560).

ARGUMENT

Petitioner renews its contention (Pet. 12-22) that it has Article III standing to challenge the transitional policy. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The court of appeals correctly held that petitioner lacks standing because it has not suffered a judicially cognizable Article III injury in fact.

a. The doctrine of Article III standing is "rooted in the traditional understanding of a case or controversy" and ensures "that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). By "limit[ing] the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," the standing requirement "'prevent[s] the judicial process from being used to usurp the powers of the political branches' and confines the federal courts to a properly judicial role." *Ibid.* (citations omitted).

To establish the "irreducible constitutional minimum of standing," a plaintiff must have suffered an

"injury in fact" that is fairly traceable to the defendant's action and likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An Article III injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citation and internal quotation marks omitted). To be "particularized," an injury must "affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). To be "concrete," an injury must be "'real,' and not 'abstract.'" *Ibid.* (citation omitted).

b. In this case, petitioner seeks to challenge HHS's transitional policy of refraining from enforcing certain ACA requirements against certain health insurance issuers. That policy does not require petitioner to do—or to refrain from doing—anything. To the contrary, petitioner still has "the very same choice" it had before the policy was announced: "either enforce the ACA's market requirements or don't." Pet. App. 27a. Petitioner nonetheless asserts that it has suffered an Article III injury because that choice now assertedly entails greater or different "political accountability" to its residents. *Id.* at 5a-7a, 18a-20a. In particular, petitioner asserts that because it has chosen not to enforce the relevant ACA requirements, "it will *suffer blame* from those who believe the ACA forwards important policy ends and who wish to see the law fully enforced." *Id.* at 19a (quoting and adding emphasis to petitioner's opposition to the government's motion to dismiss).

The court of appeals correctly held that the prospect of such political blame does not qualify as a

concrete injury sufficient to confer Article III standing. Pet. App. 7a. Such increased political accountability is abstract and "inherently immeasurable." *Ibid.* Virtually any decision by the federal government to regulate (or refrain from regulating) in a particular area, or to spend (or refrain from spending) on a particular domestic program could also be cast as altering the "political terrain" facing States. *Ibid.*; cf. Pet. 4. Unlike traditional Article III injuries, such political harms are not readily subject to judicial assessment. In this case, for example, "[h]ow would [a] court measure whether, as a consequence of the [transitional policy], West Virginia's citizens, in fact, hold the State, as opposed to the federal government, responsible for the non-enforcement of the ACA's market requirements?" Pet. App. 28a.

History, too, counsels decisively against treating an asserted increase in "political accountability" as a cognizable Article III injury. This Court has "often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008); see, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("We have always taken [Article III's reference to 'cases' and 'controversies'] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."). Petitioner's asserted political-accountability injury bears no resemblance to any traditional basis for a suit in an Article III court. To the contrary, petitioner "has not cited any case that recognizes its novel standing theory," Pet. App. 31a, and the court of appeals rightly deemed that theory "extraordinary," *id.* at 6a. The

absence of historical precedent for this suit confirms that petitioner's claimed injury is "political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." *Massachusetts* v. *Mellon*, 262 U.S. 447, 483 (1923).

As the court of appeals observed, moreover, petitioner's "requested remedy * * * further suggests that [its] claim is basically a policy-based dispute" rather than a matter fit for judicial resolution. Pet. App. 8a n.5. Petitioner does not seek an order enjoining the transitional policy, and it does not want HHS to begin enforcing the relevant ACA requirements in West Virginia. *Id.* at 8a. Instead, petitioner seeks "remand without vacatur," apparently in the hope that such a decision would prompt "a statutory fix from Congress." *Id.* at 5a, 8a n.5.

2. Petitioner does not cite any decision, by any court, finding Article III standing in a case like this one. Rather than arguing that the result reached below conflicts with any decision of this Court or another court of appeals, petitioner asserts (Pet. 12-18) that aspects of the court of appeals' rationale are inconsistent with this Court's precedents. Even if that were correct, such conflicts would not warrant this Court's review. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (citation omitted). In any event, petitioner is mistaken.

a. Petitioner first contends (Pet. 12-13) that the court of appeals' decision conflicts with *Spokeo*'s observation that a harm may qualify as a concrete injury even if it is "intangible." 136 S. Ct. at 1549. But the court of appeals did not state, much less hold, that intangible harms can never confer standing. Instead,

it concluded only that the particular type of intangible harm asserted here does not satisfy Article III, explaining that "no court has ever recognized political discomfort as injury in fact." Pet. App. 7a. *Spokeo*, which emphasized the crucial role of history and tradition "[i]n determining whether an intangible harm constitutes injury-in-fact," 136 S. Ct. at 1549, only reinforces the correctness of that conclusion.

Petitioner also asserts (Pet. 13) that the court of appeals committed a version of a mistake this Court corrected in *Spokeo* by "elid[ing]" the distinction between the requirements of concreteness and particularity. 136 S. Ct. at 1548. In *Spokeo*, the Ninth Circuit had deemed an injury sufficient because it was particularized, without considering whether it was concrete. *Ibid.* That was error because "an injury in fact must be both concrete *and* particularized." *Ibid.* Petitioner asserts that the court of appeals committed a similar error here by "conclud[ing] that [petitioner] 'lacks a *concrete* injury-in-fact' because 'its injury is not particular.'" Pet. 13 (quoting Pet. App. 6a-7a).

Petitioner's argument rests on a misunderstanding of the court of appeals' opinion. The court first held that petitioner's alleged injury based on "political accountability" was not "concrete." Pet. App. 6a-7a. In the paragraph on which petitioner relies, the court then considered petitioner's argument that the court was required to "assume the merits of its claim when determining whether standing exists" and that the court thus had to presume that the transitional policy "encroach[es] into the State's sovereignty" in violation of the Tenth Amendment. *Id.* at 7a. The court concluded that even assuming that the transitional policy

violates the Constitution, petitioner's injury from that violation is *neither* concrete *nor* particularized:

> [E]ven assuming that the administration's action created a theoretical breach of State sovereignty, [petitioner] nevertheless lacks a *concrete* injury-in-fact. The case is analogous to those in which the government's actions are asserted to be unconstitutional but the plaintiff raises only a "generally available grievance;" its injury is not particular.

Ibid. (quoting *Lujan*, 504 U.S. at 573-574). Unlike the Ninth Circuit in *Spokeo*, therefore, the court did not omit one of the essential elements of an Article III injury in fact—instead, it found two such elements lacking. And that conclusion is consistent with this Court's decisions rejecting other claims of standing based on generalized interests in compliance with the law, which have likewise discussed both the concreteness and particularity requirements. See *Lujan*, 504 U.S. at 573-578 (collecting cases).

b. Petitioner next contends (Pet. 14-16) that the court of appeals' opinion conflicts with *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). But that decision did not suggest that a State has Article III standing whenever it asserts a violation of the Tenth Amendment or another abstract invasion of state sovereignty. Instead, it addressed the *parens patriae* doctrine, which allows a sovereign to sue on behalf of its citizens in a representative capacity. *Id.* at 599-601. Petitioner has not purported to "bring[] this action in its capacity as *parens patriae*." Pet. App. 18a. And in any event, States cannot bring *parens patriae* suits against the federal government. See *Mellon*, 262 U.S. at 485-486. Petitioner's other examples of decisions authorizing suits by States (Pet.

15-16) are likewise distinguishable because they involved far more concrete injuries than the one petitioner asserts here.[2]

c. Finally, petitioner asserts (Pet. 16-18) that the court of appeals' decision "undermines" the nondelegation holding of *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). But "standing was never discussed" in *Carter*. Pet. App. 8a. And even if this Court's decision could be taken to include an implicit holding on the issue, but see *Steel Co.*, 523 U.S. at 91, the injury suffered by the plaintiff coal companies in *Carter* was not, as petitioner suggests (Pet. 17), the fact that they had been delegated regulatory authority. Instead, it was that the challenged statute inflicted concrete economic injuries by compelling all coal producers to adhere to wage and hour standards set by a majority. See *Carter*, 298 U.S. at 311 ("The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority."). The court of appeals' decision erects no obstacle to such a suit, or to any other challenge to an assertedly unconstitutional delegation of authority brought by a party who suffers a concrete and particularized injury as a result. The court simply held that a State does not suffer such an injury merely because it is given the op-

---

[2] See *Massachusetts* v. *EPA*, 549 U.S. 497, 522 (2007) (finding that Massachusetts had alleged a "particularized injury in its capacity as a landowner" due to the threatened loss of its land); *Maine* v. *Taylor*, 477 U.S. 131, 136 (1986) (finding that Maine had an interest "in the continued enforceability of its own statutes," which were alleged to be unconstitutional); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (allowing South Carolina to challenge the provisions of the Voting Rights Act of 1965 that restricted the State's ability to alter its voting laws).

tion to enforce or refrain from enforcing federal law in its discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
JENNIFER L. UTRECHT
Attorneys

MARCH 2017