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 PETITIONER

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QUESTION PRESENTED

Petitioner admitted that, after learning that her former best friend was pregnant with her husband's child, she spread toxic chemicals on the woman's car and mailbox, causing the woman to suffer a small chemical burn on her thumb. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' treaty obligations under an international arms-control agreement that prohibits nation-states from producing, stockpiling, or using chemical weapons. Facing a sentence of six years in prison and five years of supervised release, petitioner challenged the statute and her resulting conviction as exceeding Congress's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, the Third Circuit held that, when a State and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 128, and reproduced at Pet. App. 1–24. The unpublished order of the court of appeals denying rehearing and rehearing en banc is reproduced at Pet. App. 25.

The district court's unpublished bench ruling, denying petitioner's motions to suppress and dismiss, is reproduced at Pet. App. 26–35.

JURISDICTION

The court of appeals rendered its decision on September 17, 2009, and denied a timely petition for rehearing and rehearing en banc on December 10, 2009. Pet. App. 25. On March 9, 2010, Justice Alito extended the time for filing a petition for certiorari to and including April 9, 2010. The petition was filed on April 9, 2010, and granted on October 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution states:

> 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.

The legislative powers of Congress are enumerated in Article I, section 8 of the United

States Constitution, but do not include any general police power. *See* U.S. Const. art. I, § 8.

The relevant provisions of the Chemical Weapons Convention are reproduced at Pet. App. 37–42.

The relevant provisions of the implementing legislation for the Chemical Weapons Convention, codified at 18 U.S.C. §§ 229 *et seq.* and 22 U.S.C. §§ 6701 *et seq.*, and other relevant statutory provisions, are reproduced at App. 1a–9a.

STATEMENT OF THE CASE

This case presents the question whether a criminal defendant has standing to challenge her conviction under a federal statute on grounds that, as applied to her, the statute lies beyond Congress's enumerated powers and violates the Tenth Amendment. That issue arises here out of a domestic dispute that occurred when a married woman discovered that her closest friend was pregnant with her husband's child. That revelation prompted the wife to spread chemicals on her former friend's car door handles, front doorknob, and mailbox in an effort to harass and injure, but not kill, her husband's paramour. Instead of referring this domestic dispute to state or local law enforcement authorities, the United States Attorney decided that a federal prosecution, and a novel one at that, was in order and indicted petitioner on the remarkable theory that, because the assault involved chemicals, petitioner had violated a federal statute implementing the United States' treaty obligations under an international arms-control agreement.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 40-year-old woman who, until her incarceration, resided in the small borough of Lansdale, Pennsylvania, her home since 2001. Pet. App. 67. Lansdale is located about 28 miles northwest of Philadelphia and has a population of approximately 17,000 people.

Petitioner has been married to her husband, Clifford Bond, for more than 14 years, and they have an adopted child. Pet. App. 67. Before marrying, petitioner lived most of her life in Barbados, where she was raised by her mother. Pet. App. 66. When petitioner was a young child, her father had multiple affairs and fathered other children outside of marriage. *Id.* Petitioner's parents divorced when she was eleven, and she has not seen her father for more than 17 years. *Id.*

In 1995, petitioner moved with her mother and sister to the United States, where she became very close friends with Myrlinda Haynes, a woman who was also a Barbados native. Pet. App. 66, 68. Haynes owned a home in nearby Norristown, and petitioner came to consider and treat Haynes as a sister. Pet. App. 56, 69.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was excited for her closest friend. Pet. App. 2. Her excitement did not last, however, for petitioner soon discovered that her own husband was the child's father. *Id.* This double betrayal brought back painful memories of her own father's infidelities and caused petitioner to suffer an emotional breakdown. She experienced an "intense

level of anxiety and depression," started to lose her hair, and suffered occasional panic attacks. Pet. App. 72–73.

In the midst of this emotional breakdown, petitioner became fixated on punishing Haynes for her betrayal. Pet. App. 48. Petitioner took a bottle of 10-cholo-10H-phenoxarsine (an arsenic-based chemical) from her employer, the chemical manufacturer Rohm & Haas, and she purchased a vial of potassium dichromate through Amazon.com from a photography equipment supplier. Pet. App. 2. Petitioner knew that the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. Pet. App. 58. Both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal. Pet. App. 2 n.1.

According to the government, petitioner went to Haynes's home on several occasions between November 2006 and June 2007 and spread chemicals on Haynes's car door handle, mailbox, and apartment doorknob. Pet. App. 2. None of these attempted assaults was successful or sophisticated. *Id*. Haynes avoided harm because she noticed the easy-to-spot chemicals, except on one occasion when she sustained a small chemical burn on her thumb, which "required repeated rinsing with water." Pet. App. 54; *see also* Pet. App. 90 ("the victim felt a burning sensation after touching the one toxic chemical placed on her vehicle's door handle"). This one-time "burning sensation" is the *only* physical injury Haynes ever sustained. Pet. App. 54. The undisputed evidence shows that petitioner had no intent to kill Haynes. Pet. App. 57–58, 60–61.

When Haynes complained to the local police and postal inspection service, postal inspectors installed surveillance cameras in and around Haynes's home. Petitioner was later caught on tape opening Haynes's mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes's car. Pet. App. 3. On June 7, 2007, postal inspectors arrested petitioner and executed search warrants on her house and car. In custody, petitioner signed a statement admitting that she had taken chemicals from Rohm & Haas. *Id.*

Petitioner's arrest shocked her friends and family, who believed that the attempted assaults were completely out of character. Pet. App. 68–72. A doctor who performed a mental health evaluation before sentencing concluded that petitioner was "not likely to recidivate." Pet. App. 73. In the doctor's view, petitioner had "committed the crimes [that] resulted in her arrest while suffering from a significantly reduced mental capacity." *Id.* According to the doctor, petitioner "knew what she was doing was wrong" but she was "unable to control behavior she knew was wrongful" due to an "intense level of anxiety and depression," a "response to learning that her husband and 'sister' (*e.g.,* Myrlinda Haynes) ha[d] betrayed her." *Id.*

B. The Federal Indictment

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. While there certainly would be a role for local prosecutors to exercise appropriate prosecutorial discretion, no one would dispute that petitioner's conduct likely violates one or more

Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see id.* § 2702, and harassment. *See id.* § 2709. Indeed, petitioner accepted full responsibility for her actions and was willing to plead guilty and face whatever punishment her community was prepared to mete out. Petitioner's defense counsel accordingly urged the federal authorities to transfer the case to local law enforcement for prosecution and punishment under state law. That request was denied.

An Assistant United States Attorney instead opted for a novel, heavy-handed approach—charging petitioner with violations of 18 U.S.C. § 229(a), a federal statute implementing the United States' obligations under the 1993 Chemical Weapons Convention. Pet. App. 37–42. The Convention—formally entitled the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction—is an international arms-control agreement among nation-states that outlaws the production, stockpiling, and use of chemical weapons. The Convention expressly "reaffirms" and "complement[s]" the Geneva Protocol of 1925, which prohibited the use in wartime of asphyxiating or poisonous gases and bacteriological weapons. Pet. App. 37. The treaty's objective is to move towards "complete disarmament under strict and effective international control" and the "elimination of all types of weapons of mass destruction." *Id.*

Article I sets out the core obligations of signatory states. State parties pledge that they will "never under any circumstances" use, develop, or

stockpile chemical weapons or engage in military preparations to use chemical weapons. Pet. App. 39. Each signatory also commits to destroying any existing chemical weapon stockpiles and submits to a strict regime of inspections to verify compliance. *Id.* Signatories likewise pledge not to employ riot control agents as a method of warfare. *Id.*

Article IV requires state parties to enact domestic legislation prohibiting persons in their territories from engaging in activities "prohibited to a State Party." Pet. App. 40–42. In particular, each signatory is required to extend penal legislation to cover the prohibited activities and to ensure the statute's extraterritorial application to the state's nationals even when they are abroad. *Id.* To avoid differences in interpretation, state parties are required to incorporate the Convention's definition of chemical weapons into national legislation. *See* International Committee of the Red Cross, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), http://www.icrc.org/eng/assets/files/other/1993_chemical_weapons.pdf.

Urging the Senate to ratify the treaty, then-Secretary of State Madeleine Albright noted that the Convention would "make it less likely that our Armed Forces will ever again encounter chemical weapons on the battlefield, less likely that rogue states will have access to the material needed to build chemical arms, and less likely that such arms will fall into the hands of terrorists." 143 Cong. Rec. S3309-02 (daily ed. April 17, 1997). On April 24, 1997, days before the Convention entered into force, the United States Senate ratified the treaty by a vote of 74–26.

Congress then passed implementing legislation, providing statutory authority for domestic compliance with the Convention's provisions. *See* Pub. L. No. 105-277, 112 Stat. 2681-856 (1998); Executive Order 13128, 64 Fed. Reg. 34,702 (June 28, 1999); Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771 (1997). The implementing legislation sets forth procedures for the seizure and destruction of contraband chemical weapons, included detailed record-keeping and reporting requirements, and provides certain protections for confidential business information. In penal legislation codified at 18 U.S.C. §§ 229 *et seq.*, Congress established criminal and civil penalties for statutory violations committed within the United States or by American citizens outside the United States. *See id.* § 229(c).

The statute's criminal provisions render it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." *Id.* § 229(a)(1). Section 229F incorporates the Convention's definition of "chemical weapons" as including: (1) "toxic chemicals" and reactants involved in their production, "*except where intended for a purpose not prohibited under this chapter*"; (2) "munitions or devices" designed to cause harm through toxic chemicals; and (3) "equipment" designed for use in connection with those munitions and devices. *Id.* § 229F(1)(A) (emphasis added). The statute broadly defines "toxic chemicals" to refer to "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or

animals." *Id.* § 229F(8)(A). And the statute defines "purposes not prohibited" to include "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A).

The statute thus sweeps broadly to criminalize any conduct involving a toxic chemical, including widely available chemicals with commercial uses, when used for any non-peaceful purpose. Unlike other federal statutes that address assaults, section 229 includes no requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault have an effect on interstate commerce, that the victim be a person or institution with recognized federal status, or that some other federal interest be involved. *See*, *e.g.*, 18 U.S.C. §§ 111–115, 1951, 2111, 2113, 2114.3, 2332a. The statute also includes no requirement that the government prove a federal interest as an element of the offense. Consistent with its intent to criminalize serious activities implicating a major international treaty, the statute carries substantial penalties and unusual restrictions, such as a prohibition on release pending appeal. *See id.* § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i) (referring to section 229 violations).

Petitioner's assault did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the Assistant United States Attorney prosecuted petitioner under 18 U.S.C. § 229. On September 5, 2007, a grand jury in the Eastern District of Pennsylvania returned an

indictment charging petitioner with two counts of having "knowingly acquired, transferred, received, retained, possessed and used a chemical weapon." JA 14. Potassium dichromate and 10-cholo-10H-phenoxarsine, the indictment explained, were "toxic chemical[s] as defined under 18 U.S.C. § 229F(1)(A) and (8)(A)" and "not intended by defendant Bond to be used for a peaceful purpose." JA 13–14. In addition, the indictment charged petitioner with two counts of mail theft in violation of 18 U.S.C. § 1708. JA 15.

C. The Proceedings Below

Before the U.S. District Court for the Eastern District of Pennsylvania, petitioner moved to suppress certain evidence and to dismiss the two chemical weapons counts under 18 U.S.C. § 229(a)(1). Petitioner argued that the statute, as applied to her, exceeded the federal government's enumerated powers, violated bedrock federalism principles guaranteed under the Tenth Amendment, and impermissibly criminalized conduct that lacked any nexus to a legitimate federal interest. Pet. App. 7. In addition, petitioner argued that the statute should be struck down as unconstitutionally vague and that the affidavits used to support the search warrants failed to establish probable cause. *See* Pet. App. 4, 7.

On November 19, 2007, the district court denied petitioner's motions in rulings from the bench. Pet. App. 36. The district court accepted the government's contention that 18 U.S.C. § 229 "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution … [t]o comply with the provisions of a

treaty" and therefore did not contravene principles of federalism. Pet. App. 28. The district court also ruled that the statute was not impermissibly vague, and held that the search warrants were properly issued. Pet. App. 28–30.

On December 5, 2007, petitioner pleaded guilty to all four counts of the indictment but reserved her right to appeal the denials of her motions to dismiss and suppress. Pet. App. 46–47. The government requested a sentencing enhancement on grounds that, although petitioner was only a low-level technician at Rohm & Haas, she had used a "special skill" in selecting chemicals that were toxic through topical exposure. Petitioner's counsel objected, noting that the statute was "directed at the war on terrorism and dangerous rogue states, groups, and individuals" and thus the sentencing "guideline is really directed at conduct far different from that of Ms. Bond." Bond CA3 Sentencing Mem. 1, 10 (May 30, 2008). The district court nonetheless granted the government's requested enhancement and sentenced petitioner to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and restitution in an amount of $9,902.79. Pet. App. 5. Moreover, because petitioner was convicted under the chemical weapons statute, she was ineligible for release pending appeal. *See* 18 U.S.C. § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i) (referring to violations of 18 U.S.C. § 229). By comparison, had petitioner been convicted under state law for aggravated assault, she likely would have faced a prison sentence of 3–25 months. *See* 18 Pa. Cons. Stat. § 2702(a)(4); 204 Pa. Code § 303.13. And had she been convicted under federal law of mail theft

alone, her guideline range for imprisonment would likely have been 0–6 months rather than 70–87 months. *See* Pet. App. 58–82; U.S.S.G. §§ 2B1.1, 5A (2007).

Petitioner filed a timely appeal with the U.S. Court of Appeals for the Third Circuit. Pet. App. 1. On appeal, petitioner reiterated her constitutional objections, arguing that the application of 18 U.S.C. § 229 reflected a "massive and unjustifiable expansion of federal law enforcement into [a] state-regulated domain." Bond CA3 Br. 10–11. As petitioner explained, Congress should not be permitted to "[u]tiliz[e] the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach." *Id*. at 18.

On August 14, 2009, after briefing and oral argument, the Third Circuit issued a letter *sua sponte* requesting supplemental briefing on a question that had never been raised or argued by any party: "Does appellant, Carol Bond, have standing to assert that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities?" JA 17–18. In response, the government invoked, for the first time, this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), and argued that petitioner lacked standing.

On September 17, 2009, the Third Circuit issued its decision. The court of appeals recognized that petitioner's Tenth Amendment claim raised important issues concerning the scope of Congress's

authority under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 2, to effectuate the federal treaty power. Pet. App. 9–10. Describing the question as an issue of first impression, the Third Circuit acknowledged that it was unclear how far treaty-implementing legislation may intrude into areas over which the States possess primary authority. *See id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). The court of appeals also recognized that petitioner's Tenth Amendment claim would require the court to "wade into the debate over the scope and persuasiveness of" this Court's 1920 decision in *Missouri v. Holland*, 252 U.S. 416 (1920). Pet. App. 10. It noted the "significant scholarly debate" over whether *Holland* was correctly decided and "mounting interest for reconsideration of the rationale for *Holland*'s holding." Pet. App. 10 & n. 4.

The Third Circuit ultimately declined, however, to address the merits of petitioner's constitutional arguments. Instead, it reached the startling conclusion that a criminal defendant convicted under a federal statute lacks standing to challenge that statute as beyond Congress's power to enact or otherwise inconsistent with the Tenth Amendment "absent the involvement of a state or its officers as a party or parties" to the litigation. Pet. App. 14. In reaching this counterintuitive conclusion, the Third Circuit deemed itself bound by this Court's decision in *Tennessee Electric*. In the Third Circuit's view, the "holding of *Tennessee Electric*" directly applies to the facts of petitioner's case and is therefore "binding irrespective" of the Court's more recent precedents. Pet. App. 15.

Petitioner filed a petition for certiorari to this Court on April 9, 2010. In response, the United States confessed error, "agree[ing]" that a "criminal defendant has standing to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact." U.S. Resp. Br. 6. The United States acknowledged that the Third Circuit's contrary conclusion, which the United States had helped procure through its supplemental brief, was erroneous. On October 12, 2010, the Court granted plenary review and subsequently appointed an *amicus* to defend the court of appeals' judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This may be one of the easiest standing cases to reach this Court in some time. Applying the Court's by-now familiar tripartite test for standing, petitioner's standing is unassailable. She is not asserting standing as a taxpayer or as a would-be viewer of endangered flora or fauna, but as a resident of a federal penitentiary who asserts that the statute that brought her there cannot constitutionally be applied to her conduct. She is not asserting an abstract or generalized grievance, but the most concrete and particularized objection imaginable: She should not be locked in federal prison for six years, with five years of supervised release, based on an unconstitutional statute. There can be no dispute that petitioner's deprivation of liberty is directly traceable to her federal conviction, and that a ruling in her favor would redress that injury. Her standing is clear under this Court's

well-settled precedents. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This case comes to the Court only because the court below applied a special standing rule for Tenth Amendment claims that it believed was compelled by this Court's precedent. Based on a single sentence in this Court's 1939 decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), the Third Circuit held that a private party lacks standing to pursue a Tenth Amendment challenge "absent the involvement of a state or its officers as a party or parties" to the litigation. Pet. App. 14.

It is not clear that *Tennessee Electric* ever stood for that counterintuitive proposition. In context, the Court appears to have rejected a special rule *favoring* Tenth Amendment challenges, rather than to have adopted a rule distinctly *disfavoring* such challenges. Moreover, it is unclear whether the critical sentence is holding or dictum. And in all events, the decision does not survive this Court's abandonment of the "legal interest" test for standing on which the opinion as a whole is based.

More broadly, the rule embraced by the decision below is contrary to the entire sweep of the Court's modern standing and federalism jurisprudence. It also fails the test of common sense. The notion that the State that could have prosecuted the individual under its police power—but not the incarcerated individual—has standing to challenge the federal statute borders on the absurd. Whether or not it was ever binding or correct, the time has now come for this Court to inter *Tennessee Electric*'s

troublesome language and make clear that it is no longer good law.

In its place, this Court should decline the government's invitation to save half of a bad idea and adopt a special rule that would attempt to distinguish between state-sovereignty-oriented Tenth Amendment claims and claims based on the scope of Congress's Article I authority. Instead, the Court should reaffirm that the ordinary principles of standing apply to Tenth Amendment claims no differently from any other constitutional or statutory claim. There may be Tenth Amendment claims that are too abstract or generalized to be the basis for an Article III case or controversy. But the same rules that root out overly abstract and general claims under all manner of legal theories—from the First Amendment to the Endangered Species Act—are more than up to the task in the Tenth Amendment context. Applying those ordinary rules, this is an easy case: Petitioner has standing to contend that the federal statute under which she is currently being deprived of her liberty violates the Tenth Amendment and exceeds Congress's enumerated powers.

ARGUMENT

I. Ordinary Principles of Standing Apply To Tenth Amendment Claims Challenging A Federal Statute As In Excess Of Congress's Enumerated Powers.

Because petitioner plainly and indisputably satisfies the ordinary requirements for constitutional and prudential standing, there should be no impediment to her challenging her conviction

under a federal statute that, as applied to her, exceeds Congress's enumerated powers. The lower court's attempt to engraft additional standing requirements solely because she is advancing a Tenth Amendment claim cannot be squared with either the modern understanding of standing or the essential liberty-protecting safeguards embodied in the Constitution.

A. There Is No Legal Basis For Applying Special Standing Rules To Tenth Amendment Challenges.

Instead of applying traditional standing requirements, the Third Circuit invoked this Court's 71-year-old decision in *Tennessee Electric* as binding and controlling authority. Pet. App. 15 (citing *Rodriguez de Qiuijas v. Shearson*, 490 U.S. 477 (1989)). According to the court of appeals, *Tennessee Electric* holds that a private party lacks standing to challenge a federal statute under the Tenth Amendment unless the State or its officials participate in the litigation. But that interpretation misreads *Tennessee Electric* and, in any event, cannot be reconciled with this Court's more recent precedents.

1. In *Tennessee Electric*, local public utilities sought to enjoin the Tennessee Valley Authority ("TVA"), an instrumentality of the federal government, from competing against them in the sale of electricity. 306 U.S. at 136. The utilities asserted claims under the Fifth, Ninth, and Tenth Amendments, and the injuries they asserted were from competition introduced by the newly created TVA. *Id.* The Court looked at those asserted injuries with skepticism because, even if there were

a legal problem with the statute that authorized the TVA's competing activities, the competition itself was not unlawful (*e.g.*, in violation of the antitrust laws). In doing so, the Court applied the long-since-repudiated "legal interest" test for standing and held that even directly injured individuals do not have standing unless "the right invaded is a *legal right*—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137 (emphasis added); *see also Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970) (recognizing Article III standing for injured competitors and distinguishing *Tennessee Electric* as a product of the "legal interest" test). Stressing that there is nothing "illegal" about the TVA's competition, the Court dismissed all of the utilities' claims, whether based on the Fifth, Ninth, or Tenth Amendments, as "*damnum absque injuria*." 306 U.S. at 137–38, 140.

The Court then, somewhat puzzlingly, went on to consider the Ninth and Tenth Amendment claims separately, which were "said to rest" on a "distinct ground" of standing. *Id.* at 143. The Court first rejected those claims on the merits. *See id.* at 144 ("The sale of government property in competition with others is not a violation of the Tenth Amendment."). The Court then added a final confounding sentence addressing standing. That order of proceeding is jarring to the modern eye, which is used to seeing jurisdictional issues addressed before the merits. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). But that order of proceeding was likely a product of the tendency of the "legal interest" test to

conflate standing and the merits. In all events, that sentence is far from a model of clarity. It reads in its entirety: "As we have seen there is no objection to the [TVA'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 [Tenth] amendment." *Tenn. Elec.*, 306 U.S. at 144.

That single sentence has confounded courts and commentators ever since. It is not clear that any of the standing analysis in *Tennessee Electric* survives the abandonment of the then-current "legal interest" test for standing. *See infra* 22–27. Nor read in context is it clear that the passage imposes a special *disability* on Tenth (and Ninth) Amendment claims, so much as it rejects a special rule *favoring* Tenth (and Ninth) Amendment claims that would allow them to proceed under circumstances where other claims (like the Fifth Amendment claim) could not go forward under the prevailing standing principles of the day. Finally, it is not clear whether this puzzling sentence was "essential to" the holding and "thus binding," *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234–35 (2d Cir. 2006), or merely "confusing dicta" that has clearly been overtaken by subsequent decisions. Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 Colum. L. Rev. 1065, 1073 (2000).

When read in the context of the opinion as a whole, the better view is that the Court applied its general "legal interest" test to all of the constitutional claims and then simply rejected the argument that, at least absent state participation,

there would be any special rule allowing the Ninth and Tenth Amendment claims to go forward when the Fifth Amendment claims would not. There is certainly little reason to read that one sentence as inflicting special disabilities on Tenth Amendment claims. And there is absolutely no reason to assume that the Court intended to preclude criminal defendants from challenging the constitutionality of federal statutes under which they are convicted.[1] Instead, the puzzling sentence is of a piece with the Court's general hostility to the utilities' effort to recover their injuries from competition, when the competition itself—as opposed to the legal authority of the would-be competitor—was in no way unlawful.

Contemporaneous Supreme Court decisions likewise suggest that the Court did not intend to impose a broad new constitutional rule of standing for Tenth Amendment claims in such a backhanded and understated way. This Court, no less than Congress, should not be presumed to "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 468 (2001); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Only two years earlier, in 1937, the Court confronted two separate, private-party Tenth Amendment challenges to the federal Social Security Act, addressing whether the federal program unduly

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[1] Even under the old, discarded "legal interest" test, it is far from clear that a court would have deemed a conviction or prison time "*damnum absque injuria*" or otherwise have applied the "legal interest" test to deny standing to an individual seeking to challenge her conviction.

interfered with state unemployment compensation schemes, *see Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937), and whether it exceeded Congress's power to spend for the general welfare. *See Helvering v. Davis*, 301 U.S. 619, 640 (1937). Although in both cases the state and federal defendants, both of whom defended the federal program as constitutional, questioned the private parties' standing to challenge the program, the Court resolved the Tenth Amendment claim on the merits without suggesting that there was any special standing rule that applied to private-party Tenth Amendment claims. *See Atlanta Gas Light Co. v. U.S. Dep't. of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982). If the Court meant to adopt a broad new rule that cast doubt on those two recent rulings, it could have been expected to say as much.

2. Although *Tennessee Electric*'s single-sentence statement can and should be construed narrowly and some lower courts have done so, the more prudent course for this Court is to inter that part of the decision once and for all. *Cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (repudiating language in prior opinion that had "puzzled the profession" long enough). The single sentence is not entitled to any *stare decisis* respect because there are no relevant reliance interests, *see Dickerson v. United States*, 530 U.S. 428, 442 (2000), and that portion of the decision is neither supported by reasoning nor workable in practice, as evidenced by the difficulty lower courts have had understanding and applying it. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion). Perhaps most importantly, whatever doctrinal underpinnings may have existed for *Tennessee*

Electric's single-sentence gloss on then-accepted standing doctrine, they have been wholly undermined and eroded by subsequent precedent. *See Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (citing *Dickerson*, 530 U.S. at 443; *State Oil Co. v. Kahn*, 522 U.S. 3, 21 (1997)). In particular, any suggestion that private citizens lack standing to assert the liberty-protecting structural guarantees embodied in the Tenth Amendment has long since been overtaken by developments in this Court's standing and Tenth Amendment jurisprudence.

First, as noted above, this Court has long since abandoned the "legal interest" test of standing in favor of the modern tripartite focus on injury-in-fact, traceability, and redressability. *See Camp*, 397 U.S. at 153–54; *Federation for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 907 n.6 (D.C. Cir. 1996) (*Tennessee Electric*'s "legal-interest test" was "laid to rest by the Supreme Court in 1970"). A special rule that only States can pursue Tenth Amendment claims cannot survive that jurisprudential change. *See Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (precedent not entitled to *stare decisis* effect when it is "no more than a remnant of abandoned doctrine"). As the Court explained in *Camp*, the "legal interest" test conflated the merits and standing questions in a way that meant that only certain parties could bring only certain claims based on only certain injuries. 397 U.S. at 153. Under that now-defunct test, the disgruntled utilities in *Tennessee Electric* might have had a legally protected interest in recovering for their competitive injuries if they were bringing an unfair competition

claim, but not for constitutional claims that did not challenge the legality of the competition as such.

Modern standing doctrine has abandoned that approach. *Camp* squarely overruled the "legal interest" test, *id.* at 153–54, and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), explicitly rejected the suggestion that private parties must demonstrate an abstract nexus between an injury that establishes standing and the nature of the constitutional right asserted. *Id.* at 79, 98. What matters now is whether there is an injury-in-fact that is fairly traceable to the allegedly unlawful government action and would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560. Those requirements are self-evidently satisfied here where the injury-in-fact is a deprivation of liberty that could hardly be more directly traceable to the questioned federal statute and where redressability is straightforward. *See Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("conflict between [government] officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III").

To the extent there remains an inquiry into whether the plaintiffs' injuries are to the kind of interests the law seeks to protect, or whether the plaintiffs are the proper plaintiffs to bring their claims, that is addressed by the prudential "zone-of-interests" test. *See Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C. Cir. 1983) (legal interest test "had currency at one time … but it has been replaced by the more expansive 'zone of interests' test"). And petitioner's

claim falls comfortably within the zone-of-interests of Tenth Amendment protection. *See New York v. United States*, 505 U.S. 144, 181 (1992); *cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (zone-of-interest test may not apply to *ultra vires* challenges).

Second, conceptions of the Tenth Amendment's proper role in the constitutional structure have changed just as dramatically over the past seven decades. *Tennessee Electric* was decided in 1939, in an era when the court was removing all manner of judicial obstacles to the assertion of federal power over areas that were traditionally the exclusive province of the States. This is the same era in which the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). The combined effect of these decisions caused many to conclude that there were no judicially-enforceable limits on federal power and to dismiss the Tenth Amendment as nothing more than "a truism." *Darby*, 312 U.S. at 124; *see also* Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism*, 14 Wm. & Mary Bill Rts. J. 711, 739 (2005) ("With all economic activity understood as 'commerce,' the truism became a dead letter."). Indeed, in the wake of these decisions, it was widely understood that limits on the scope of the federal government would have to be enforced by the States politically, rather than by the People or the States through litigation. *See, e.g.*, Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 Yale L. J. 1552 (1977).

That view has changed in more recent decades, as the Court has vindicated both the Tenth Amendment and limits on Congress's enumerated powers. Importantly, that reassertion of the constitutional limits on federal power has come in significant part through suits brought by aggrieved individuals without a mention of *Tennessee Electric* or any other limit on the ability of individuals to assert the essential structural guarantees of the Constitution to protect their individual interests.

In particular, the Court has reasserted the critical role of judicial review in addressing the proper balance of authority between federal and state government to ensure that all levels of government represent and remain accountable to the People. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 920–21 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Reflecting "one of the Constitution's structural protections of liberty," the Tenth Amendment thus serves to "reduce the risk of tyranny and abuse" from either the States or the federal government. *Gregory*, 501 U.S. at 458.

In *New York v. United States*, the Court addressed the Tenth Amendment's substantive role in greater detail, holding that a statutory radioactive waste "take title" provision violated the Tenth Amendment because it "commandeered" States into either taking ownership of the waste or implementing the legislation. 505 U.S. at 181–82. As the Court explained, the Tenth Amendment is not designed to "protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities." *Id.* at 181. Instead, the Tenth Amendment exists "for the protection of

individuals." *Id.*; *see also* The Federalist No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961) ("power surrendered by the people is first divided between two distinct governments and … [h]ence a double security arises to the rights of the people"). Accordingly, "[w]here Congress exceeds its authority relative to the States … the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S. at 182 (the "constitutional authority of Congress cannot be expanded by the 'consent' of the government unit whose domain is thereby narrowed"). As with the division of powers among the three coordinate branches of government, the "separation of powers does not depend on … whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting *New York*, 505 U.S. at 182).

The bedrock constitutional principles recognized in *New York* have been reaffirmed in other decisions. In 1995, for the first time since the era of *Tennessee Electric*, the Court imposed limits on Congress's legislative powers under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 567–68 (1995); *id.* at 589 (Thomas, J., concurring) (expressing concern that broad "construction[s] of the scope of congressional authority … com[e] close to turning the Tenth Amendment on its head"); *see also United States v. Morrison*, 529 U.S. 598, 617 (2000). And in 1998, the Court invoked *New York* in *Printz v. United States* to strike down, on Tenth Amendment grounds, a federal law that required local police chiefs to support federal regulation of handgun sales

by administering background checks. 521 U.S. at 919.

This Court's modern jurisprudence, consistent with constitutional requirements, thus views the Tenth Amendment as designed to protect individuals and as a substantive check on Congress's exercise of legislative power. It also views standing as governed by basic requirements of injury-in-fact, traceability, and redressability, without requiring an affront to the plaintiff's "legally-protected interest" or any special rules disfavoring particular legal theories. These significant jurisprudential developments render the Court's single sentence in *Tennessee Electric* a complete anachronism. That sentence has "puzzled the profession" for more than "50 years" and it has "earned its retirement" once and for all. *Twombly*, 550 U.S. at 563.

B. The Court Should Not Create Any Other Special Rule For Tenth Amendment Claims.

This Court should not attempt to salvage *Tennessee Electric* or a portion of it by accepting the government's invitation to draw an arbitrary distinction between different types of Tenth Amendment claims. At the petition stage, the government posited that private parties should have standing to bring claims challenging statutes as exceeding Congress's enumerated Article I powers but should *not* have standing, absent state participation, to bring claims challenging commandeering-type intrusions into state sovereignty or dignity. *See* U.S. Resp. Br. 6. There is no need or basis for this distinction.

Ordinary principles of standing are perfectly adequate to eliminate truly abstract or generalized grievances, no matter what the statutory or constitutional provision invoked. No matter what the legal theory—Tenth Amendment or otherwise—a plaintiff who raises "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 601 (2007) (plurality opinion) (quoting *Lujan*, 504 U.S. at 573–74); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). There is no reason for a special rule for the Tenth Amendment, especially given the confusion that *Tennessee Electric* has sown.

Indeed, if, as the government suggests, the "confusion over the meaning of" *Tennessee Electric* truly boils down to the fact that "the 'Tenth Amendment' label [is] now applied to both types of claims," U.S. Resp. Br. 9, the government has thus far been among the only ones to recognize that. The distinction has not been acknowledged, much less relied on, by any of the lower courts in their standing decisions. *See* Pet. Reply 7–8. Leaving *Tennessee Electric* intact for one category of Tenth Amendment claims would thus not resolve the fundamental confusion that has plagued the lower courts.

More fundamentally, a bifurcated legal test could generate new uncertainties by engrafting a

needless threshold inquiry about the nature of the Tenth Amendment claim. The exact boundaries that divide "enumerated powers" claims from "commandeering" claims are far from self-evident or self-executing. Nor can a bifurcated legal test be squared with *New York*, which took pains to disavow any meaningful distinction between an "enumerated powers" claim and a "commandeering" claim. This Court concluded that "*[w]hether* one views the take title provision as lying outside Congress's enumerated powers, *or* as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the" Tenth Amendment. 505 U.S. at 177 (emphases added). *New York* itself involved a "commandeering" claim, and *New York* emphasized that the Tenth Amendment did not exist just for the benefit of States, but to protect individual liberty as well.

Accordingly, rather than tackle the problems created by the existing line of inquiry by superimposing an additional line of inquiry atop the faulty edifice, the Court should take this opportunity to inter *Tennessee Electric* altogether and establish that Tenth Amendment claims of every stripe are subject to ordinary standing rules. That approach has the benefit of being clear and administrable and of harmonizing Tenth Amendment standing with the broader fabric of this Court's standing jurisprudence.

II. The Decision Below Would Vitiate Vital Checks On Federal Overreaching And Leave Important Questions Unaddressed.

When a private party challenges a statute as being beyond Congress's enumerated powers, the party not only appropriately seeks redress for his or her individual injury, but also reinforces the proper constitutional allocation of powers between the federal and state systems. Private-party suits thus not only vindicate individual liberty interests but also serve as a vital constitutional check on federal incursions into the state domain that States may lack the incentive or resources to challenge themselves.

A. States Often Lack The Resources Or Will To Challenge Federal Encroachment On State Interests.

The decision below erroneously assumes that where the federal government has intruded on state sovereign interests, the State can be relied on to object. In its view, the State's participation is critical because it gives credence to the claim that there has been a Tenth Amendment violation. In fact, as this Court has recognized, the "interests of public officials … may not coincide with the Constitution's intergovernmental allocation of authority." *New York*, 505 U.S. at 183; *see also Printz*, 521 U.S. at 936 (O'Connor, J., concurring); *cf. Free Enter. Fund*, 130 S. Ct. at 3155 (correcting an intrusion into the President's removal authority to which the executive branch did not object).

1. For a host of reasons, state officials can and do opt to enforce potentially unconstitutional federal

laws. For example, States with strapped budgets and short staff may not be aware of the constitutional concerns, or wish to "conserve resources," or prefer to "avoid antagonizing the federal government." Gershengorn, 100 Colum. L. Rev. at 1066. Similarly, States have few incentives to object to federal laws that relieve them of responsibilities or accountability for difficult decisions. For instance, States may well acknowledge that "'preventing and dealing with crime is … the business of the States,'" *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (citation omitted), but be more than happy for the federal government to assume those often-costly duties. Similarly, state officials might "approve of" encroaching federal legislation because they do "not want to face the political ramifications of enacting the statutory scheme themselves." Gershengorn, 100 Colum. L. Rev. at 1067. In all these situations, "[w]here state officials purport to submit to the direction of Congress" because it permits them to shift responsibility or otherwise furthers their interests, "federalism is hardly being advanced." *New York*, 505 U.S. at 183.

2. Just as courts should not overestimate the extent to which States' interests "coincide with the Constitution's intergovernmental allocation of authority," *id.*, courts also should not overestimate the extent to which States' interests coincide with the interests of their citizens. The Third Circuit suggested that "the State represents the interests of its citizens in general" and that individuals opposed to their "'state's policy of acquiescence'" to a federal encroachment may change that policy through "local political processes." Pet. App. 16 n.8 (quoting

Medeiros v. Vincent, 431 F.3d 25, 35 (1st Cir. 2005)). But it is one thing to ask States to fashion reasonable policies to address local concerns and another thing to expect local governments to object to the federal government solving those problems for them. The Constitution protects individual liberty by limiting the federal government to its enumerated powers and giving a citizen a fair chance to influence policy at the state or local level. The Constitution does not put a unique burden on citizens to force the State to object to federal overreaching.

More broadly, the Third Circuit's blithe view underestimates the extent to which the incentives of States and private parties can diverge. Because States often willingly (and even enthusiastically) "submit to the direction of Congress" even when the government exceeds its enumerated powers, many private parties find that local democratic processes offer little comfort as a realistic and practical matter.

That is nowhere more true than in cases where the federal government's Tenth Amendment violation directly and concretely injures a single individual. Notwithstanding the manifest incongruence between petitioner's conduct and her conviction under a federal statute enacted to implement the United States' treaty obligations under the Chemical Weapons Convention, it would be unrealistic to expect a State or even fellow citizens to rise up to challenge the constitutionality of petitioner's conviction. However intrusively the treaty-implementing legislation might sweep in matters traditionally handled by local officials under

state law, neither the State nor its officials are likely to join petitioner's constitutional challenge where the most concrete and tangible stakes of a suit would pertain to only one woman's conviction.

B. Checks On Federal Overreach Are Especially Critical In Matters Of Criminal Prosecution.

Maintaining the federal-state balance takes on heightened importance and sensitivity where (as here) criminal law enforcement authority is concerned. In *Patterson v. New York*, 432 U.S. 197 (1977), this Court noted that "preventing and dealing with crime is much more the business of the States than it is of the Federal government." *Id.* at 201. The Framers envisioned that the ordinary administration of "private justice between the citizens of the same State" would fall within the "province of the State governments." The Federalist No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under that system "devised by our founders and maintained until recently, federal prosecutors [did] not s[eek] to displace the state systems of criminal justice in routine cases." *United States v. Crawford*, 982 F.2d 199, 205 (6th Cir. 1993) (Merritt, C.J., concurring).

1. In recent decades, however, the rampant federalization of traditional state and local crimes has upended the federal-state balance. In a seminal 1998 report, the American Bar Association's Task Force on Federalization of Criminal Law estimated that a staggering 40% of the thousands of federal crimes were created *after 1970*. *See* ABA, Report on the Federalization of Criminal Law (1998); *see also* Edwin Meese, III, *Big Brother on the Beat: The*

Expanding Federalization of Crime, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995). As then-Senator Joseph Biden lamented, Congress "federalize[s] everything that walks, talks, and moves." Edwin Meese III, *The Dangerous Federalization of Crime*, Wall St. J., Feb. 22, 1999.

Significantly, the majority of new federal crimes seek to prosecute conduct that is simultaneously subject to prosecution under state laws that have been on the books for years. *Cf. Lopez*, 514 U.S. at 551. Federal laws notably extend even to routine drug and firearms offenses and garden-variety infractions like carjacking. *See* 18 U.S.C. § 2119. And where "Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *United States v. Enmons*, 410 U.S. 396, 411–12 (1973)).

The federalization trend has also taken an administrative toll on the federal judicial system. In response to swelling federal criminal dockets, the Judicial Conference of the United States urged in its 1995 Long Range Plan that "criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters." Judicial Conference of the United States, Long Range Plan for the Federal Courts (1995), *reprinted in* 166 F.R.D. 49, 83 (1995). To that end, the plan narrowly set forth five types of crimes appropriate

for federal enforcement: (1) offenses against the federal government or its inherent interests; (2) criminal activity with substantial multi-state or international aspects; (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (4) serious high-level or widespread state or local government corruption; and (5) criminal cases raising highly sensitive local issues viewed as more objectively prosecuted in the federal system. *Id.* at 84–85.

Cognizant of such concerns, this Court has resisted the federal assumption of plenary police power in areas that have traditionally and historically fallen under state or local control. In *Lopez*, this Court invalidated a statute that made it a federal crime to possess a firearm within 1,000 feet of a school. In holding that the statute exceeded Congress's power to regulate commerce, the "Court stressed that the area was one of traditional state concern." *Jones v. United States*, 529 U.S. 848, 858 (2000); *see also Lopez*, 514 U.S. at 561 n.3; *id.* at 564; *id.* at 577 (Kennedy, J., concurring). That decision later informed the Court's reasoning in *Jones*, in which it declined to read a federal statute "as encompassing the arson of an owner-occupied private home." 529 U.S. at 858. The Court explained that, in light of the "concerns brought to the fore in *Lopez*," the statute should be read to avoid "render[ing] the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement,'" lest it "'change[] the federal-state balance.'" *Id.*; *see also Morrison*, 529 U.S. at 636 n.10 (2000) (Souter, J., dissenting) ("I and other Members of this Court appearing before

Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so.").

The fact that this Court has been willing to apply rules of construction and constitutional avoidance principles in cases like *Jones* underscores the oddity of precluding a defendant from raising the Tenth Amendment issue itself. A criminal defendant surely has standing to urge a narrow construction of a statute to avoid a Tenth Amendment problem or even grave doubts about a problem. It makes little sense not to allow the defendant to raise the problem itself squarely.

2. The growing overlap of federal and state criminal laws also promotes sentencing disparities among defendants and abuses of prosecutorial "discretion." A wide spectrum of criminal conduct is now potentially subject to either federal or state prosecution. The choice between the two, however, can generate dramatically different results. Offenders often fare significantly worse under a federal-law prosecution than under a state-law prosecution for identical conduct. "If convicted, a federally prosecuted defendant is likely to receive a longer sentence and to serve far more of that sentence than he would if sentenced in state court." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 647–48 (1997); *see also id.* at 668 (disparities "are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions"). Many federal laws,

moreover, allow greater maximum sentences than their state law analogs and trigger harsh statutory minimum sentences that exceed the maximum permitted under state law. *See id.* at 674. Accordingly, even "routine street crime cases ... are brought in federal court in order to insure longer sentences ... and mandatory minimum sentenc[es]." *Crawford*, 982 F.2d at 206 (Merritt, C.J., concurring).

This case is a dramatic illustration of the gross disparity between local and federal prosecution. Conduct that might have merited a modest sentence under Pennsylvania law was greeted with the kind of stiff sentence that one would expect for the use of a true chemical weapon. And, of course, the consequential nature of the choice between federal and state prosecution means that federal prosecutors have assumed enormous and essentially unreviewable power to charge quintessentially local offenses in vastly disparate ways. This case is a stunning illustration of the truth that prosecutorial discretion is not always wisely exercised.

C. The Third Circuit's Approach Would Leave Important Constitutional Questions Unanswered.

1. The vital check of private-party suits not only helps to maintain the constitutionally mandated division of federal-state powers, but serves more practical purposes—generating doctrinal guidance and ensuring the full airing of important questions of law before the courts. Petitioner's challenge to 18 U.S.C. § 229 exemplifies the often thorny and unsettling issues about the constitutional reach of federal statutes that would go

unaddressed under the Third Circuit's cramped approach to private-party standing.

As petitioner argued before the Third Circuit, the reach of section 229 is remarkably broad on its face. Federal statutes addressing assaultive conduct generally require proof of a federal interest as an element of the offense—requiring, for example, that the assault occur within the special jurisdiction of the United States, have an effect on interstate commerce, involve a victim with recognized federal status or protection, or otherwise relate to a federal interest. *See, e.g.*, 18 U.S.C. §§ 111–115, 1951, 2111, 2113, 2114.3. Unlike those statutes, however, section 229 contains no federal-interest element at all. Moreover, the government's theory of what constitutes a "chemical weapon" is almost limitless: seemingly any chemical that is used in a criminal act would qualify. The federal indictment against petitioner embraces a broad definition and contains no allegations of federal jurisdictional authority other than the mere invocation of the statute. And the absence of any jurisdictional element only underscores the troubling extent to which section 229 over-extends to address conduct lacking any nexus to a legitimate federal interest.

2. As the Third Circuit acknowledged, petitioner's challenge to the reach of section 229 raised an "issue[] of first impression" over "how far" federal treaty-implementing legislation "may reach into an area over which states possess primary authority." Pet. App. 9–10 & n.4. The federal government below justified section 229 and petitioner's prosecution on grounds that the Constitution's treaty power permits the enactment

of federal criminal statutes and prosecutions under such statutes without regard to bedrock constitutional federalism principles that would otherwise apply. In its view, section 229 was immune from ordinary constitutional scrutiny because it was enacted pursuant to Congress's Article I, § 8 authority to pass legislation "necessary and proper" to implement the Treaty Power. That sweeping position, however, would mean that any federal criminal statute passed to effectuate the terms of an international treaty necessarily expands the constitutional scope of Congress's authority. It is not at all clear that the Framers who conceived of an alternative method of amending the Constitution, *see* U.S. Const. art. V, intended to allow this kind of self-aggrandizement.

As the Third Circuit recognized, the question of whether the Tenth Amendment limits Congress's Treaty Power has generated "significant scholarly debate." Pet. App. 9 n.4. This Court's decision nearly a century ago in *Missouri v. Holland*, 252 U.S. 416 (1920), has generated significant confusion, criticism, and calls for overruling. *Holland* involved a federal statute passed to implement a U.S. treaty with Great Britain regulating the hunting of migratory birds. This Court stated that "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432. But that statement lies "in deep tension with the fundamental constitutional principle of enumerated legislative powers" and requires fundamental reassessment in light of modern limitations on Congress's legislative authority and the proliferation

of U.S. treaty commitments. *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005). Scholars have therefore argued that to the extent *Holland* suggests that Congress may violate bedrock principles of federalism when it enacts treaty-implementing legislation, it should be limited or overruled. *See id.* at 1938; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II,* 99 Mich. L. Rev. 98, 100 (2000).

The uncertainties about the intersection of treaty law and federalism are at their apex in matters of criminal punishment—a growing subject of treaty-making. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 400 (1998). The legislation implementing the International Convention Against the Taking of Hostages, 18 U.S.C. § 1203, for example, federalizes garden-variety kidnappings in the United States whenever a foreign citizen is involved.

The Third Circuit ducked these serious questions over the constitutionality of 18 U.S.C. § 229(a) and petitioner's resulting conviction, however, by barring her at the threshold on standing grounds. *See* Pet. App. 9–10. That result only underscores the extent to which the Third Circuit's bar on private-party standing to raise Tenth Amendment challenges absent state participation stifles private parties' capacity to bring important constitutional issues to the courts' attention. The holding below, if left uncorrected, would leave important issues of law unaired and unconstitutional applications of statutes unresolved.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

18 U.S.C. § 229

Prohibited activities.

(a) Unlawful Conduct.— Except as provided in subsection (b), it shall be unlawful for any person knowingly—

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) Exempted Agencies and Persons.—

(1) In general.— Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) Exempted persons.— A person referred to in paragraph (1) is—

(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) Jurisdiction.— Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

18 U.S.C. § 229A

Penalties.

(a) Criminal Penalties.—

(1) In general.— Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

(2) Death penalty.— Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

(b) Civil Penalties.—

(1) In general.— The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

(2) Relation to other proceedings.— The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

* * *

18 U.S.C. § 229F

Definitions.

In this chapter:

(1) Chemical weapon.— The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under

this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

* * *

(7) Purposes not prohibited by this chapter.— The term "purposes not prohibited by this chapter" means the following:

(A) Peaceful purposes.— Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) Protective purposes.— Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) Unrelated military purposes.— Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) Law enforcement purposes.— Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(8) Toxic chemical.—

(A) In general.— The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(B) List of toxic chemicals.— Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

* * *

18 U.S.C. § 2332b(g)

Acts of terrorism transcending national boundaries.

(g) Definitions.— As used in this section—

* * *

(5) the term "Federal crime of terrorism" means an offense that—

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 2 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death) [...]

* * *

18 U.S.C. § 3142(f)

Release or detention of a defendant pending trial.

(f) Detention Hearing.— The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

> (1) upon motion of the attorney for the Government, in a case that involves—
>
> > (A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

* * *

18 U.S.C. § 3143(b)

Release or detention of a defendant pending sentence or appeal.

(b) Release or Detention Pending Appeal by the Defendant.—

* * *

> (2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

22 U.S.C. § 6701

Definitions.

In this chapter:

(1) Chemical weapon

The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

* * *

(8) Purposes not prohibited by this chapter

The term "purposes not prohibited by this chapter" means the following:

(A) Peaceful purposes

Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) Protective purposes

Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) Unrelated military purposes

Any military purpose of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) Law enforcement purposes

Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

* * *

(13) Toxic chemical

(A) In general

The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

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