No. 09-1227

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE *AMICUS CURIAE* APPOINTED TO DEFEND THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether an individual has standing to challenge an Act of Congress implementing an exercise of the Treaty Power on the ground that the law violates the States' sovereignty as recognized in the Tenth Amendment to the Constitution.

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STATEMENT

1. Congress enacted 18 U.S.C. § 229 in order to fulfill treaty obligations of the United States under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (Convention). The Convention, which is described in the Brief of the United States (U.S. Br.) at 2-3, was ratified by the Senate in 1997. The Convention and implementing domestic legislation are of worldwide importance.[1] As of August 2010, 188 nations – of the 195 nations that the United Nations officially recognizes – are full signatories to the Chemical Weapons Convention. *See* www.opcw.org/about-opcw. Only Angola, North Korea, Egypt, Somalia and Syria have not signed the treaty; Burma and Israel have signed but not ratified it. *Ibid*. (non-member-states). As of July 2010, the Convention has resulted in about 60% of the declared international stockpile of chemical weapons being destroyed. *Ibid*. (news-publications/publications/facts-and-figures).

a. One of the obligations the United States assumed under the Convention was to enact domestic criminal legislation that prohibits persons anywhere in the United States from engaging in the very activities that the Convention prohibits to the ratifying

[1] The Preamble to the Convention, explaining the goals and purposes of the Convention, is set forth at Pet. App. 37-38.

nations.[2] To fulfill that treaty obligation, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The Act mirrors the prohibitions and definitions of the Convention, and indisputably was enacted to fulfill the United States' treaty obligations under the Convention.

Included in the Act are the provisions at issue in this case. First, the Act makes it a federal crime for a person knowingly to, among other things, "produce, otherwise acquire, . . . receive, . . . retain, own, possess, or use . . . any chemical weapon." 18 U.S.C. § 229(a)(1). Second, "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter" and "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. § 229F(1)(A) and (7). Third, a "toxic chemical" is defined as a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. § 229F(8)(A).

b. It is essentially undisputed that petitioner's campaign against the victim in this case violated the literal terms of 18 U.S.C. § 229. Indeed, petitioner's argument has never been that she did not engage in

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[2] Such an obligation is one that the United States sometimes assumes under international treaties that it ratifies. For other federal criminal statutes enacted at least in part to fulfill treaty obligations, see the Appendix to this brief.

conduct which the statute clearly proscribes. Rather, she challenges the statute solely on the ground that it exceeds the constitutional authority of the United States. Contrary to petitioner's assertions, however, 18 U.S.C. § 229 and the Convention it implements represent far more than the mere "federalization" of state criminal assault law. Although petitioner may not be a professional terrorist and did not, for example, send toxic chemicals through the mail, her challenge to 18 U.S.C. § 229, if successful, could preclude application of the statute in such situations.

2. Petitioner's criminal acts are described in great detail at U.S. Br. 4-6, and this statement will only touch on a few points. First, after learning that her husband had impregnated her best friend, petitioner engaged in a lengthy campaign of vengeance against her then former friend and new mortal enemy. In 2005, petitioner repeatedly threatened the victim by telephone and mail, Pet. App. 2, 65, and ultimately was convicted of criminal charges in state court. *Id*. at 48, 64. Second, apparently undeterred by her state prosecution, petitioner renewed her campaign in late 2006, this time involving at least two dozen different attempts to poison the victim with toxic and potentially lethal chemicals. *Id*. at 2. Third, petitioner was no amateur with chemicals. Indeed, she used her scientific expertise to choose chemicals that she knew could be harmful – even fatal in relatively small amounts – through topical exposure alone, if the victim or her infant child simply touched the powder. *Id*. at 23.

Fourth, petitioner was caught by federal, not state, investigators. After the victim noticed some powder in her mailbox, she notified her letter carrier, who in turn referred her inquiry to the United States Postal Inspection Service. Pet. App. 2-3. After federal postal inspectors installed surveillance cameras around the victim's home, they soon recorded petitioner opening the victim's mailbox, stealing mail, and placing chemicals in and on the victim's car. *Id*. at 3. Federal inspectors then obtained search warrants for petitioner's home and car, which resulted in the discovery of mail stolen from the victim and quantities of two highly toxic chemicals. *Id*. at 3-4.

3. Not surprisingly, a federal grand jury indicted petitioner, charging her with two counts of theft of mail, 18 U.S.C. § 1708, and two counts of possessing and using chemical weapons, 18 U.S.C. § 229(a)(1). J.A. 13-15. Petitioner filed a motion to dismiss the chemical weapons counts of the indictment, arguing that § 229(a)(1) "signals an unwarranted federal intrusion into state law enforcement domain," C.A. App., Vol. I, 42, that could not be justified on the basis of the Commerce Clause, the Treaty Power, or any other authority under the United States Constitution. The government responded that the relevant authority was the Treaty Power, not the Commerce Clause. Government's Response in Opposition to Motion to Dismiss at 7 (Nov. 13, 2007) ("Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties"); C.A. App., Vol. I, 82 (Defendant's Reply in Support of

Motion to Dismiss) ("the government concedes the point that neither . . . 18 U.S.C. § 229, nor this prosecution can be upheld under the Commerce Clause"; instead, the "government relies exclusively on Congress' Article I, Section 8 authority to pass legislation 'necessary and proper' to implement the exercise of [the Treaty Power]").

The district court denied petitioner's motion to dismiss, concluding that 18 U.S.C. § 229 was enacted "under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 28. Thus, the court pointed out that the "commerce clause is not implicated because of the necessary and proper clause." *Id*. Petitioner entered a conditional guilty plea to all counts, reserving her right to challenge the constitutionality of 18 U.S.C. § 229. *Id*. at 5-6.

4.a. On appeal to the Third Circuit, petitioner argued that the federal government cannot enact legislation pursuant to the Treaty Power in the absence of an independent, Article I, § 8 enumerated power basis for such a law. In other words, petitioner argued that the Treaty Power adds nothing to the enumerated powers of Article I, § 8, and that such a conclusion is compelled by the Tenth Amendment. The government countered that § 229 is valid because it was enacted pursuant to the Treaty Power, relying on the Necessary and Proper Clause.

b. Following oral argument, the Third Circuit asked the parties for supplemental briefing on the following question: "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?" J.A. 17-18. The government responded first, taking the position that "the government believes that appellant Carol Bond lacks standing to assert an infringement of state sovereignty in violation of the Tenth Amendment." *Id*. at 19. Petitioner then made clear the nature of her challenge to § 229: "In this case, the federal government has embraced a position and rationale whereby it can enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power. This is the antithesis of federalism expressed in the Tenth Amendment." *Id*. at 31. Thus, she urged the Third Circuit to "recognize her standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment." *Id*. at 32.

c. The Third Circuit concluded that petitioner lacked standing to raise a Tenth Amendment claim. Pet. App. 11-16. In a section of the opinion titled "Federalism Challenge," *id*. at 7, the court first described the parties' substantive arguments regarding the scope of the Treaty Power. *Id*. at 8-10. The court then cautioned that, "before we can reach the merits of these arguments, we must ensure that Bond has standing to raise a Tenth Amendment challenge to § 229." *Id*. at 11.

The court first looked to *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939)

(*TVA*), in which "utility companies chartered in Tennessee argued that the sale of electrical power by the federally chartered Tennessee Valley Authority was an impermissible federal regulation of a local matter in violation of the Tenth Amendment." Pet. App. 11. The Third Circuit observed that the "Supreme Court rejected this argument, concluding that the private companies lacked standing to maintain their claims." *Id*. The court rejected petitioner's suggestion that the language regarding standing in *TVA* was dicta, concluding that the Supreme Court addressed both the merits issue and the standing issue, making the latter an alternative holding, not dicta. *Id*. at 12 n.6.

The Third Circuit next observed that the Circuits have split on the question of private-party standing to raise Tenth Amendment claims, with two Circuits allowing such claims and five rejecting them. Pet. App. 12. The court first considered the arguments in favor of ignoring the *TVA* holding and recognizing such standing, identifying two such arguments: (1) standing barriers have been lowered since 1939, making *TVA* obsolete, and (2) *New York v. United States*, 505 U.S. 144 (1992), stated that federalism protects individuals, which at least one Circuit has interpreted to mean that Tenth Amendment claims should be considered assertions of individual rights. Pet. App. 13.

"Contrary to this reasoning," the five Circuits that have rejected "private party standing for Tenth Amendment claims have focused" on several factors,

including (1) the continuing validity of *TVA*, which has never been overruled or disavowed by the Supreme Court, (2) prudential considerations such as precluding individuals from asserting third-party rights (of the States) and avoiding a potentially substantial increase in Tenth Amendment claims, (3) that *New York v. United States* never addressed the question of standing and the Supreme Court has never held that the Tenth Amendment creates rights enforceable by individuals, (4) that a purported Tenth Amendment plaintiff "does not even attempt to argue that her interests are aligned with those of a state," and (5) that individuals who believe an act of the federal government violates the Tenth Amendment can work through local political processes to persuade their State and state officials to challenge such federal actions. Pet. App. 14-16 & n.8. The Third Circuit was "persuaded by the reasoning advanced by the majority" of its sister Circuits, *id*. at 14, and thus held that "we will not reach the merits of Bond's arguments concerning the constitutionality of § 229 under our federal system of government." *Id*. at 15-16.

SUMMARY OF ARGUMENT

I.A. The Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*), relied on the longstanding and still extant notion that third parties generally lack standing to raise the rights of others to hold that private citizens cannot bring the Tenth Amendment claims of

the States. Consequently, *TVA* should be followed, both as a matter of *stare decisis* and because it reached the correct result. The United States appears to agree with those propositions, but incorrectly and too narrowly defines Tenth Amendment claims in order to conclude that petitioner is not asserting third-party standing here. Properly understood, however, this case does not raise an "Article I, § 8" claim that petitioner has standing to bring; rather, she is making a Tenth Amendment claim.

I.B.1. Petitioner is raising a Tenth Amendment claim because she is challenging a federal statute enacted pursuant to a power – the Treaty Power of Article II, § 2 – which the Court has held for 90 years is not limited by the Article I, § 8 powers. Thus, if petitioner is to find a federalism limitation on the scope of the Treaty Power, her claim necessarily must rely on the kinds of considerations that Tenth Amendment claims contemplate; her claim is not merely the flipside or mirror image of a typical challenge to an exercise of Congress's Article I, § 8 enumerated powers. Indeed, petitioner is challenging a statute – 18 U.S.C. § 229 – that is based *solely and exclusively* on the Article II, § 2 Treaty Power, as implemented by the Necessary and Proper Clause.

Whether petitioner has standing to assert her Tenth Amendment claim with respect to 18 U.S.C. § 229 depends on the source of the power she is challenging and any constitutional limitations on the exercise of that power. Thus, to an extent, petitioner's standing may turn on whether her claim is more like

the Tenth Amendment claims in cases like *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), or more like the Article I, § 8 challenges at issue in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 130 S. Ct. 1949 (2010). The answer, focusing on the scope of the challenged power and the constitutional limitations relevant to the exercise of that power, is that her claim belongs in the *New York-Printz* category, and she thus lacks third-party standing. Reaching that answer, however, requires careful consideration of the nature and scope of the Tenth Amendment, as well as the Constitution's delineation of the Treaty Power.

I.B.2. Actual Tenth Amendment challenges are different than challenges to the Article I, § 8 enumerated powers of Congress. Tenth Amendment claims are characterized by alleged limitations on federal authority even though the subject matter of the law being challenged is indisputably within the powers of the federal government. The Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

The Court's Tenth Amendment cases make clear that the substantive limitations the amendment imposes on federal power depend on considerations

different than whether Congress has the affirmative authority, for example, to regulate interstate commerce or implement Article I, § 8 enumerated powers through the Necessary and Proper Clause. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000); *New York*, *supra*; *Printz*, *supra*.

I.B.3. The constitutional text delegating the Treaty Power to the United States and providing for its implementation through the Necessary and Proper Clause plainly refutes any claim that either provision is limited by the Article I, § 8 enumerated powers. Therefore, petitioner's standing to bring her Tenth Amendment claim in this case must be evaluated in light of the constitutional bases for and the nature of the Treaty Power, not by reference to the Article I, § 8 powers of Congress.

Importantly, the Treaty Power resides exclusively in the federal government – in particular the President and the Senate – with Congress authorized to implement treaties by statute (when required for non-self-executing treaties) through the Necessary and Proper Clause. Moreover, Article I, § 10 expressly prohibits the States from exercising the Treaty Power. In numerous respects, the Treaty Power is markedly different than the Article I, § 8 enumerated powers of Congress. Thus, cases that have not questioned an individual's standing to challenge the exercise of an Article I, § 8 power – cases such as *Lopez*, *Morrison*, *Raich* and *Comstock* – do not establish that petitioner

has standing here in the constitutionally distinct and perhaps unique Treaty Power context.

I.B.4. *Missouri v. Holland*, 252 U.S. 416 (1920), held that treaties made pursuant to the Treaty Power "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal,'" *United States v. Lara*, 541 U.S. 193, 201 (2004), and establishes beyond any dispute that the Article I, § 8 enumerated powers have no relevance to the scope of the Treaty Power. Thus, for 90 years this Court has recognized that the Treaty Power – combined with the Necessary and Proper Clause – permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority.

That conclusion means that there can be no valid claim that the Article I, § 8 enumerated powers of Congress limit the scope of the federal government's exclusive Treaty Power. As a result, petitioner here necessarily must rely on a Tenth Amendment argument, making her claim more like those at issue in *New York* and *Printz*, and less like the Article I, § 8 challenges at issue in *Lopez*, *Morrison*, *Raich* and *Comstock*.

II.A. *Missouri v. Holland* and other Treaty Power cases of the Court also make clear that, in general, a claim that an exercise of the Treaty Power violates the Tenth Amendment – *e.g.*, that a statute implementing treaty obligations invades the States' constitutionally protected prerogatives – is not justiciable. That conclusion flows from the facts that

(1) the Treaty Power is essentially political in nature, as the Founders well recognized, (2) the language delegating the Treaty Power to the federal government is unlimited and there are no explicit constitutional prohibitions on its exercise, and (3) the States are expressly barred from exercising the Treaty Power. The only exception that would allow a Tenth Amendment or federalism challenge to the Treaty Power, an exception arguably implicit in *Missouri v. Holland* itself, is that a State may have standing to bring such a claim.

II.B. In the Treaty Power context, an individual cannot bring a nonjusticiable federalism claim that an exercise of the Treaty Power, or an Act of Congress implementing an exercise of the Treaty Power, intrudes on state sovereignty in violation of the Tenth Amendment; only a State may bring such a claim, if any party can. At most, an individual has standing only to bring a claim that a treaty or its implementing legislation violates individual rights the Constitution expressly guarantees, such as Bill of Rights protections in the Fifth or Sixth Amendments. *Reid v. Covert*, 354 U.S. 1 (1957) (allowing individuals to challenge international executive agreements that purported to abrogate the right to a jury trial for civilians tried in courts martial).

Thus, the Third Circuit correctly addressed the merits of petitioner's claim that 18 U.S.C. § 229 is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. But that court also correctly concluded that petitioner lacks standing to

raise a claim that 18 U.S.C. § 229 violates the Tenth Amendment by intruding on constitutionally protected state sovereignty.

* * *

Petitioner and her amici (but not the United States) seek to rewrite almost a century of the Court's settled Treaty Power and Tenth Amendment jurisprudence, in part by trying to disguise petitioner's claim here as nothing more than a typical challenge to an exercise of Congress's enumerated powers under Article I, § 8. Ultimately, however, this case is not about the Article I, § 8 enumerated powers; it is about the Treaty Power and two venerable precedents of the Court that implicate and limit standing in the Tenth Amendment context – *Tennessee Electric Power Co. v. Tennessee Valley Authority* and *Missouri v. Holland*. The Third Circuit's judgment, unlike the arguments of petitioner and her amici, is faithful to the Court's precedents and respects the constitutional uniqueness of the Treaty Power.

ARGUMENT

I. PETITIONER LACKS STANDING UNDER THE PRUDENTIAL RULE AGAINST THIRD-PARTY STANDING.

No one is arguing here that petitioner fails to meet the three requirements for Article III standing (injury in fact, causation, and redressability). Rather, her claim implicates a separate and equally

well-settled, prudential doctrine that generally prohibits third parties from asserting the legal rights of others. If the Tenth Amendment has substantive meaning, then it must protect sovereign interests of the States, not private individuals. Accordingly, private individuals lack standing to assert Tenth Amendment claims, as the Court held in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*). *TVA* was correctly decided and directly applies here because petitioner is asserting a Tenth Amendment challenge to 18 U.S.C. § 229.

A. Private Third Parties Lack Standing To Bring The Tenth Amendment Claims Of States.

Both in general and in the specific context of a Tenth Amendment claim the Court long has applied a prudential rule against third-party standing. The situation presented in this case falls squarely within both the general and Tenth Amendment-specific prohibitions on third-party standing.

1. *Tennessee Electric Power Co. v. Tennessee Valley Authority* Was Premised On The Longstanding And Extant Prudential Rule Against Third-Party Standing.

A focal point in this case is the Court's decision in *TVA*. Petitioner devotes much of her brief to attacking *TVA* in its entirety. Pet. Br. 17-29. The United States

devotes much of its brief to rewriting *TVA* in an effort to explain more recent decisions of this Court. U.S. Br. 33-43. Neither approach, however, is completely convincing or correct.

At bottom, *TVA* is a relatively simple case. A group of power companies sued to enjoin the federally-chartered Tennessee Valley Authority from generating and selling electric power in the marketplace. Seeking to justify their claim for injunctive relief, the plaintiffs argued (among other theories) that "the acts of the Authority cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." 306 U.S. at 143. By this, it appears that the plaintiffs meant that the Authority's competition with them for the sale of power would necessarily lower the prices they could charge, thus "regulating" the plaintiffs, which they argued could only be done by their respective States.

The Court rejected this facile claim, characterizing the plaintiffs' argument for standing as "saying that competition by an individual or a state corporation is not regulation but competition by a federal agency is." *Ibid*. The part of the opinion in dispute here is just three sentences after the rejection of the plaintiffs' allegation of cognizable injury. Focusing on the merits, the Court declared that the "sale of government property in competition with others is not a violation of the Tenth Amendment." 306 U.S. at 144. But the Court then went on to rule – in what can

only in fairness be characterized as an "alternative" holding, *see, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) – that because "there is no objection to the Authority's operations by the states," the private-party plaintiffs, "absent the states or their officers, have no standing in this suit to raise any question under the amendment." *Ibid*.

Although the rule is tersely articulated in *TVA*, and *TVA* was decided prior to most of the elaboration of the current law of standing, the *TVA* rule fully comports with the modern prohibition on third-party standing. The federal courts long have disfavored claims premised "on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. The basic reasons for the rule are "the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978). That, in fact, is how the United States has explained *TVA* in a previous filing in this Court. *See* U.S. Brief in Opposition, No. 05-1243, *Medeiros v. Sullivan*, 2005 U.S.S.Ct. Briefs LEXIS 2431, at 5 ("The *TVA* rule both protects state sovereignty and reflects the general principle that a plaintiff 'must assert his own legal rights and interests, and cannot rest his claim to relief on the

legal rights or interests of third parties.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).[3]

That the *TVA* rule is a holding and not dicta is incontrovertible in light of other precedent of this Court. *See, e.g.*, *Woods*, 337 U.S. at 537 ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); *California v. United States*, 438 U.S. 645, 689 n.10 (1978) (White, J., dissenting) ("The usual rule in this Court is that when two independent reasons are given to support a judgment, 'the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other.'") (citations omitted); *see also Medeiros*, U.S. Brief in Opposition, *supra*, 2005 U.S.S.Ct. Briefs LEXIS 2431, at 4 (the *TVA* holding on standing is not dicta).

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[3] Several Circuits have expressly agreed that the *TVA* holding is well within the mainstream of modern standing doctrine as an application of the rule denying third-party standing. *See, e.g.*, *United States v. Hacker*, 565 F.3d 522, 527 (8th Cir. 2009) (denying Tenth Amendment standing to private plaintiffs "comports with [the] prudential standing principle" that a plaintiff generally cannot rest his claim to relief on the rights of others); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980) (rejecting private party's standing to bring a Tenth Amendment claim on the basis of the well-established rule that third parties generally may not sue to enforce the rights of others).

2. *TVA* Should Be Followed As A Matter Of *Stare Decisis* And Because Its Result Is Correct.

a. The Court consistently has recognized that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Duke Power*, 438 U.S. at 80. This important prudential limitation, which the *TVA* Court embraced, protects rights belonging to parties not before the courts: the rule ensures that when such rights are decided, they will have been asserted by the parties most directly affected and thus best situated to advocate their interests and positions before the courts. *Ibid*.

The rule against third-party standing suggests there must be limitations on an individual's standing to raise claims that properly belong to the States. Just as the States generally lack standing to bring claims against the United States on behalf of their citizens on a *parens patriae* basis, *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007),[4] private citizens

[4] *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (a "State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the

(Continued on following page)

should lack standing to bring claims against the United States asserting the sovereign interests of the States.

There is no apparent reason why the prudential standing inquiry in this context should not be a two-way street, with the same considerations applicable to both individual and State plaintiffs. Yet, petitioner and her amici argue expressly for a one-way street that flows only in favor of granting standing to individuals to raise Tenth Amendment claims while denying the States standing to raise any individual's claims. A two-way street, however, is precisely the constitutional principle the Court recognized in *TVA*, even if we may debate today whether the Court's decision in 1939 accurately reflects Tenth Amendment doctrine in 2011. Moreover, the Court has continued to recognize in various settings that private individuals lack standing to effectively step into the shoes of state officials, whether such plaintiffs seek to defend state laws when state officials have

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Federal Government"); *Florida v. Mellon*, 273 U.S. 12, 16-17 (1927); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) ("It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect the citizens of the United States from the operation of statutes thereof"); *cf. Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (state cannot bring even a Tenth Amendment claim where it asserts no injury independent of injury to its private citizens).

chosen not to do so, or to compel the States to enforce their laws or to do so in particular ways.[5]

b. The concerns that animate the general prohibition on third-party standing apply with equal if not greater force in the context of Tenth Amendment claims. The States have strong interests in initiating and controlling litigation that involves constitutional challenges to federal-state relations. Such suits can be highly consequential to the States, and can require significant expenditures of state resources.

Furthermore, it is not apparent that any private citizen plaintiff has ever prevailed on the merits of a Tenth Amendment-type challenge. Given the lack of meritorious private-party claims, it seems unlikely that the States generally are refusing to prosecute valid Tenth Amendment claims. On the other hand, permitting private citizens to bring Tenth Amendment claims with no constraint may lead to negative consequences for the States. For example, even

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[5] *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (expressing "grave doubts whether" private plaintiffs could ever have standing to defend state laws that state officials choose not to defend); *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (denying a private party standing to defend a state law declared unconstitutional or in general to seek to compel state officials to enforce a law or adopt any particular framework for enforcing laws); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) (citizens generally must rely on their elected officials' discretion in determining whether to pursue legal claims).

though a State may not be a party to or intervene in such a private citizen suit, decisions in such cases will have *stare decisis* effect. That fact may well limit the States' future options, both in terms of claims to bring and the forum in which to bring them. Ultimately, a *laissez faire* standing rule that openly welcomes and invites unmeritorious private citizen Tenth Amendment suits hardly furthers the States' sovereign interests.

The Circuits, including the Third Circuit in this case, have identified at least four other reasons for maintaining the rule that individuals lack third-party standing to raise Tenth Amendment claims.

First, one reason for denying standing here is part of the justification for the general rule against third-party standing: the prudential consideration of limiting the number of lawsuits and litigants in already burdened federal courts. Allowing individuals to raise Tenth Amendment claims necessarily will increase the number of such claims brought to the federal courts, and perhaps significantly so. *Medeiros v. Vincent*, 431 F.3d 25, 36 (1st Cir. 2005) ("if private citizens possess standing to prosecute Tenth Amendment claims, it is not difficult to envision a substantial increase in such litigation before the federal courts"). In a related vein, private third-party standing could lead to actual frustration of the very state sovereignty such plaintiffs claim standing to assert, including intrusive *and* disruptive discovery regarding the policy decisions of state officials. *Ibid*. It would be ironic to grant private citizens standing to raise claims asserting the prerogatives of the States

only to have the litigation of those very claims disrupt the operation of state and local governments.

Second, several Circuits have disagreed with the Seventh Circuit's conclusion that *New York v. United States*, 505 U.S. 144 (1992), effectively held that federalism rights are individual rights that individuals have standing to enforce. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999) (*New York* limited *TVA* by establishing that "in making Tenth Amendment claims, [an individual] actually is asserting his own rights"). To the contrary, other Circuits have pointed out that this Court never addressed the question of standing in *New York v. United States*. *See, e.g.*, *Brooklyn Legal Servs.*, 462 F.3d 219, 236 (2d Cir. 2006) ("Further, *New York* does not support overruling *Tenn. Elec.* The issue of Tenth Amendment standing is not even indirectly addressed in *New York*"); *Medeiros*, 431 F.3d at 34 ("since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed the word 'standing' was never mentioned").

But, perhaps more importantly, the language in *New York* on which the Seventh Circuit relied was a discussion relating to an issue completely separate and distinct from standing: whether a *State's* previous acquiescence in a federal program prohibits that State from later challenging the federal program on Tenth Amendment grounds, *i.e.*, a question of waiver of rights. *See New York*, 505 U.S. at 181-182; *Brooklyn Legal Servs.*, 462 F.3d at 236 ("The quoted passage

upon which the district court relied concerns the *states'* ability to *waive* Tenth Amendment violations and has nothing to do with standing"); *Medeiros*, 431 F.3d at 35 (the "specific focus" of the discussion in *New York* was whether a State could assert a Tenth Amendment claim "where a previous administration of that state had initially acquiesced in the commandeering, *or* whether the Tenth Amendment claim had been waived").

Third, some Circuits have opined that granting individuals third-party standing to assert the interests of the States would make the most sense, if ever, in cases where the third-party plaintiff's interests are aligned with the States' sovereign interests. *See, e.g.*, *Hacker,* 565 F.3d at 527 ("Hacker has not even argued that his interests are aligned with those of a state"); *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) ("private plaintiffs do not have standing to bring Tenth Amendment claims when their interests are not aligned with the state's interests"). It would be counterproductive to allow plaintiffs to claim standing on the ground that a State's sovereign interests are being violated when the State itself may be opposed to the plaintiff's claim. Such a result would not square with traditional notions of appropriate third-party standing situations.

Finally, some Circuits have pointed out that not all potential constitutional violations are necessarily cognizable in a lawsuit by private citizens, and other

processes may be available to address such potential violations. In fact, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence. If the Tenth Amendment is not waivable, individuals could petition state officials for redress at any time." *Medeiros*, 431 F.3d at 35.

Indeed, the *New York* non-waiver rule enhances the States' ability to protect their sovereign interests, while an expansive rule allowing private third-party standing to assert such claims could weaken state prerogatives. Particularly when the private party's interests are not aligned with those of the State, as may well be true in this very case (Pennsylvania did, after all, prosecute petitioner once, but that effort failed to stop her), private party suits have the potential to frustrate and undermine state policies and decisions. *New York* itself is an example of a State changing course, presumably as a result of activity through traditional political processes, to cease its acquiescence in a Tenth Amendment violation and instead bring a lawsuit.

Furthermore, even on the merits, the *New York* proposition – that federalism protects individual rights – does not answer the standing question. It is certainly arguable that *all* constitutional provisions protect individual rights in some metaphysical sense, but the Court has never held that individuals can enforce all constitutional provisions. In fact, some

provisions cannot be enforced by individuals or the States, such as the guarantee to the States of a republican form of government in Article IV, § 4. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1, 42 (1849); *Taylor v. Beckham*, 178 U.S. 548, 578 (1900); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149-52 (1912). Thus, the proposition that a constitutional provision in some sense protects individual rights does not in and of itself answer the question whether a particular plaintiff has standing to bring a claim under that provision. *Cf. Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (rejecting a taxpayer's claim of standing to bring an Establishment Clause challenge to a presidential initiative).

Thus, it is critically important to evaluate the nature and basis of petitioner's actual claim in this case in order to determine whether she has standing. As the next section explains, petitioner actually is raising an unusual challenge to the constitutionally unique Treaty Power, not a typical "Article I" claim as petitioner and the United States assert.

B. Petitioner Is Asserting A Tenth Amendment Claim That Is Barred By The Prudential Rule Against Third-Party Standing.

1. Determining The Nature Of Petitioner's Claim Requires Consideration Of The Source Of The Challenged Power And Any Constitutional Limitations On The Exercise Of That Power.

Once *TVA* is correctly understood as an instance of the prudential rule against third-party standing, the critical question becomes defining a "Tenth Amendment" claim for purposes of applying the rule. Petitioner argues that there is no difference between Tenth Amendment claims and challenges to congressional power under Article I, § 8, with the result that the rule against third-party standing would no longer apply in this context, ever. Pet. Br. 27-29. The United States distinguishes between Tenth Amendment and Article I claims, but defines the former category very narrowly to include only the Court's decisions in *New York* and *Printz*. U.S. Br. 14-16, 33-42.

a. Petitioner's approach fails even to explain the rationales of *New York* and *Printz*, because in both instances Congress clearly had the Article I subject-matter power to legislate regarding the disposal of hazardous wastes and commercial transactions involving firearms. What thwarted the federal legislation in

both instances was something separate and apart from the limits of Article I, § 8 – it was the Tenth Amendment. Furthermore, as explained below, this case does not even involve the direct exercise of delegated Article I powers. Instead, the statute challenged here was enacted solely and exclusively on the basis of the Treaty Power, an Article II power, as implemented by the Necessary and Proper Clause.

Finally, although neither *New York* nor *Printz* addressed standing, or even so much as hinted at the question raised in this case, it is notable that both cases involved state or local government parties as plaintiffs, precisely the entities or persons in the best position to advocate sovereign interests. Ultimately, petitioner's "mirror image" theory has two fundamental flaws: (1) as explained below, this is a Treaty Power case, not an Article I, § 8 enumerated powers case; and (2) if there is no difference between Article I and Tenth Amendment claims, then petitioner's theory suggests that *New York* and *Printz* were really Article I cases, and the Tenth Amendment has no substantive significance.

b. The position the United States takes in this case also suffers from the first flaw (failing to regard the Treaty Power as any different than the Article I, § 8 enumerated powers of Congress), but the United States grudgingly gives the Tenth Amendment a little substance. In particular, the United States argues that Tenth Amendment claims are only those that allege the federal government "has intruded upon a specific aspect of state sovereignty by, for example,

directing the conduct of state legislators or executives." U.S. Br. 14. The United States argues that *TVA* is consistent with this view of the Tenth Amendment, U.S. Br. 37, asserting that the unfair competition claim by the plaintiffs in that case "alleged interference with a specific aspect of state sovereignty." *Id*. at 37 n.14.

It is not clear whether the United States' proposed standard – that a Tenth Amendment claim is characterized by federal "interference with a specific aspect of state sovereignty" – would ever limit Tenth Amendment standing to state or local governments and their officials in contexts not deemed by this Court to involve "commandeering" of state sovereignty. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Nor is it clear that the United States' proposed standard really explains several Court of Appeals decisions finding no Tenth Amendment standing, cases that the United States attempts to justify as correctly decided. U.S. Br. 39 n.16. In any event, the real question remains: what is a Tenth Amendment claim?

c. *Amicus Curiae* appointed to defend the judgment below respectfully suggests that the answer most consistent with all of the Court's decisions depends on identifying (1) the precise federal power being challenged and (2) the express or structural constitutional limits, if any, on that power. The source of the power matters because it identifies the nature and purpose of the power being exercised, and also

may suggest limits on the power, if any. Even more clearly, an explicit constitutional limit on federal power can define the nature of a plaintiff's claim that the scope of federal power has been exceeded.

If the source of federal power is one of the Article I, § 8 enumerated powers and the claim is that the enumerated power is not broad enough to authorize the particular statute, the claim is a true Article I, § 8 claim. The very nature of the source of power and the absence of any explicit constitutional limits tell us that the claim involves the scope of Article I, § 8 itself. Thus, the plaintiff need only satisfy the usual Article III standing requirements. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005). Similarly, if the claim is that Congress is exceeding the scope of its Article I, § 8 enumerated powers when it relies on the Necessary and Proper Clause, the challenge is a true Article I claim. *See, e.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010).

But when the federal power derives from a source other than Article I – as is true in this case – it is not appropriate to label the claim as an "Article I" challenge. Nor do the same standing considerations necessarily apply in evaluating the scope of a non-Article I, § 8 power. The power at issue in this case – the Treaty Power – is an excellent example of this proposition. As explained below, the Court has made clear for 90 years that the Treaty Power is not limited by the scope of the Article I, § 8 powers, making it

implausible to argue that a challenge to the Treaty Power is really an Article I challenge. *Missouri v. Holland*, 252 U.S. 416 (1920). Yet, that is precisely the argument that the United States makes in this case, and effectively the argument that petitioner makes.

Furthermore, the source(s) of any limits on a federal power naturally affect the characterization of the claim. Thus, if an asserted limitation derives from a separate constitutional source (*i.e.*, a constitutional provision distinct from the power-granting provision), then that prohibition or limitation necessarily also defines the claim. For instance, if Congress used the commerce power to regulate commercial speech and a business challenged the law as infringing on freedom of speech, such a claim would not be characterized as an "Article I" claim. Rather, the courts would treat it as a First Amendment claim.

The same is true of Tenth Amendment claims. If the alleged limitation on federal power is derived from a constitutional provision other than the one granting the power – as it necessarily must be in the Treaty Power context, as explained below – then the claim is characterized by the provision limiting the power, not the provision granting power. Here, petitioner has expressly argued that 18 U.S.C. § 229 violates the interests of the States, expressly relying on the Tenth Amendment as a limitation on the Treaty Power.

This analysis explains the results in *New York* and *Printz*, and is directly supported by the Court's treatment of the Taxing and Spending Powers, which are Article I, § 8 powers. The Court has made clear that the Spending Power, which is an Article I, § 8 power, is limited only by express prohibitions in the Constitution, not by other Article I, § 8 enumerated powers. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (spending power limited only by an "independent [constitutional] bar");[6] *Sabri v. United States*, 541 U.S. 600, 607-08 (2004) (Spending Power laws need not satisfy the requirements of *United States v. Lopez*, *United States v. Morrison*, or other commerce power cases). This demonstrates that even some challenges to Article I powers are really based on non-Article I limitations, not on any limit inherent in Article I, § 8.

Similarly, so long as Congress is actually imposing a "tax" and not a "penalty," the Taxing Power is unconstrained by other Article I, § 8 powers. *See, e.g.*,

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[6] Chief Justice Rehnquist, writing for the Court, explained that "[t]he 'independent constitutional bar' limitation on the spending power is not [as South Dakota argued] a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *South Dakota*, 483 U.S. at 203-04. Rather, the independent constitutional bar limitation means that the spending power "may not be used to induce the states to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress's broad spending power." *Id*. at 210.

United States v. Kahriger, 345 U.S. 22, 31 (1953) ("Unless there are [penalty provisions], courts are without authority to limit the exercise of [Congress's] taxing power"), *overruled on other grounds in Marchetti v. United States*, 390 U.S. 39 (1968); John E. Nowak & Ronald D. Rotunda, *Principles of Constitutional Law* 113 (4th ed. 2010) ("If there is a theoretical possibility that the federal statute might produce some income for the federal government, the Court should find the statute to be within the federal taxing power"); *cf. Flast v. Cohen*, 392 U.S. 83, 105 (1968) (explaining a taxpayer's lack of standing in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) as follows: "In essence, [the plaintiff] was attempting to assert the States' interest in their legislative prerogatives and not [her] interests in being free of . . . specific constitutional limitations imposed upon Congress' taxing and spending power."). Again, the Taxing and Spending Powers cases demonstrate that even some "Article I" claims – as the United States and others here style them – actually depend on non-Article I limitations, and thus it is not really accurate to label such challenges as "Article I" claims.

As explained below, applying this analysis to petitioner's challenge to 18 U.S.C. § 229, it is difficult to conclude that petitioner is raising anything other than a Tenth Amendment claim here.

2. Petitioner Is Making A Tenth Amendment Challenge To The Treaty Power.

a. In a case like this, the inquiry into petitioner's third-party standing necessarily implicates the merits of her claim. "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Because "'standing and the merits are inextricably intertwined'" in many third-party standing situations, *e.g.*, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (quoting *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973)), the Court has made clear that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. Thus, the remainder of this brief addresses petitioner's claim of standing in light of the nature of her challenge to the constitutionality of 18 U.S.C. § 229.

b. Petitioner, unlike the United States and her amici, at least acknowledges both that she is challenging 18 U.S.C. § 229 on Tenth Amendment grounds and that the statute is based on a non-Article I power – the Treaty Power. *See* Pet. Br. 12 ("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.' . . . 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.'") (internal citations omitted). Thus, according to petitioner's own characterization of her claim in the Third Circuit, this case is not just another example of a typical challenge to a federal statute on the ground that the law exceeds the scope of Congress's enumerated powers under Article I, § 8.

In contrast to petitioner's characterization, however, the United States somewhat vaguely and perhaps inaccurately asserts that "[p]etitioner appealed her conviction and sentence on numerous grounds, including that Congress exceeded its authority under Article I of the Constitution. . . ." U.S. Br. 2. Petitioner's amici make similar claims about the nature of this case. *See, e.g.*, Brief for the Six Amici States 13-16 (arguing that all Article I and Tenth Amendment claims are "mirror images" of each other); Brief of Amicus Curiae Center for Constitutional Jurisprudence and the Cato Institute 4 ("The Tenth Amendment Argument is Simply the Flip Side of the Enumerated Powers Coin.").

c. Characterizing this case as involving a challenge to the Article I, § 8 enumerated powers of Congress, however, fails to describe precisely and accurately the arguments made in the lower courts and the grounds on which this case was resolved in those courts. Beginning with petitioner's motion to dismiss the indictment, this case effectively has been argued and resolved as a Tenth Amendment challenge

to a statute that the government defended *solely* on the basis of the Treaty Power, as implemented by Congress in reliance on the Necessary and Proper Clause.[7] Petitioner herself made that clear in her supplemental brief filed at the Third Circuit's request after oral argument: "In this case, the federal government has embraced a position and rationale whereby it can enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power. This is the antithesis of federalism expressed in the Tenth Amendment." J.A. at 31. Thus, petitioner urged the Third Circuit to "recognize her standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment." *Id*. at 32.

It is correct that in the lower courts petitioner at times invoked Article I, § 8 enumerated powers in arguing her Tenth Amendment challenge to 18 U.S.C. § 229, for example by arguing that the statute is

[7] *See* C.A. App., Vol. I, 42 (Defendant's Motion to Dismiss, ¶ 4) ("As indicated by its application to this case, the virtually unbounded scope of 18 U.S.C. § 229 . . . signals an unwarranted federal intrusion into state law enforcement domain."); Government's Response in Opposition to Motion to Dismiss at 7 (Nov. 13, 2007) ("Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties"); C.A. App., Vol. I, 82 (Defendant's Reply in Support of Motion to Dismiss) ("the government concedes the point that neither . . . 18 U.S.C. § 229, nor this prosecution can be upheld under the Commerce Clause"; instead, the "government relies exclusively on Congress' Article I, Section 8 authority to pass legislation 'necessary and proper' to implement the exercise of [the Treaty Power]").

unconstitutional because it does not require proof of a nexus to interstate commerce. But even petitioner recognized that the federal government expressly disavowed *any* reliance on Article I, § 8 enumerated powers in defending the statute. *See* n.7, *supra*. Furthermore, the District Court upheld the statute by relying *solely* on the Treaty Power and the Necessary and Proper Clause. Pet. App. 28 (It is clear that the statute was enacted to "comply with the provisions of a treaty. . . . The commerce clause is not implicated. . . . Congress does not purport to enact the statute pursuant to the commerce clause.").

The government's defense of the statute in the Third Circuit also relied solely on the Treaty Power – not the commerce power or any other Article I, § 8 enumerated power. *See* U.S. Br. in No. 08-2677, *United States v. Bond*, at 23-32. Thus, any suggestion or implication that petitioner's challenge here is the same as the Article I, § 8 enumerated powers challenges raised and decided in cases such as *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich* is inaccurate and misleading.

d. Nor is this case analogous to the Court's recent decision in *United States v. Comstock*, which decided an Article I, § 8 challenge in a setting where the individual argued that, because Congress could not accomplish the law's purposes based on any Article I, § 8 enumerated power, it could not rely upon the Necessary and Proper Clause to do so. Here, the case before the Court involves a Tenth Amendment challenge to the Treaty Power and the second half of

the Necessary and Proper Clause which expressly provides authority to implement non-Article I powers like the Treaty Power. Thus, this case does not involve either a *Comstock* situation, or a commerce power challenge like in *Lopez*, *Morrison*, or *Raich*, as further explained below.

3. The Treaty Power Is Unique And Implicates Different Standing Considerations Than Article I, § 8 Enumerated Powers.

The Treaty Power is unique under the Constitution in ways that bear on the standing inquiry. Unlike the Article I, § 8 powers, "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.' But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Lara*, 541 U.S. at 201 (quoting *Missouri*, 252 U.S. at 433).

a. The affirmative Treaty Power appears in Article II, § 2, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present concur." But importantly, and unlike the Article I, § 8 enumerated powers, the Constitution also expressly imposes a

prohibition *on the States regarding the Treaty Power*: "No State shall enter into any Treaty, Alliance, or Confederation." Art. I, § 10, cl. 1.

This prohibition ties directly into the Tenth Amendment, which declares that "[t]he powers not delegated to the United States, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). Thus, when it comes to the Treaty Power, the constitutional text of these several provisions plainly suggests that there is no Treaty Power to be "reserved to the States." *Missouri v. Holland*, 252 U.S. 416 (1920); *see also* Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996) ("Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states"). Thus, the essential nature of the Treaty Power alone distinguishes this case from an Article I challenge in the style of *Lopez*, *Morrison*, or *Raich*.

b. Constitutional text also distinguishes petitioner's challenge from the situation the Court recently addressed in *United States v. Comstock*. The Necessary and Proper Clause makes clear that the Treaty Power is distinct from and different than the Article I, § 8 enumerated powers. That clause expressly distinguishes these powers, declaring that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Article I, § 8] Powers, *and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer*

thereof." Art. I, § 8, cl. 18 (emphasis added). Were confirmation of the plain meaning of the Clause's text required, such is provided by direct evidence of the Founders' intent: "The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but [that language] was stricken as superfluous." Henkin, *Foreign Affairs*, *supra*, 204 & n.111 (citing 2 M. Farrand, *The Records of the Convention of 1787*, at 382 (rev. 1966)).

Inescapably, the plain text of the Necessary and Proper Clause refutes petitioner's contention that when Congress relies on that clause to implement the Treaty Power such enactments are limited by the scope of Congress's enumerated powers under Article I, § 8. Such an argument cannot be squared with the second half of the Clause, and no academic commentary or wishful thinking can amend the clear language of the Clause. Thus, not only does the Constitution not say what petitioner and her amici suggest in this regard; it expressly refutes their position.

c. One other constitutional provision further suggests the uniqueness of the Treaty Power: the Supremacy Clause, which expressly recognizes and emphasizes the Treaty Power as a power distinct from the enumerated powers of Congress. That Clause declares that the Constitution, laws of the United States, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

d. In light of these explicit and clear constitutional provisions, it is no surprise that the Court's decisions for more than 200 years have recognized the unique nature of the Treaty Power. Indeed, "[n]o treaty has ever been struck down on federalism grounds." Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 413 (2003).

Ultimately, the constitutional uniqueness of the Treaty Power counsels against widely available standing. Hindrance of the Treaty Power threatens uniquely national interests, including powers of both the President and the Senate to guide foreign policy and interactions on the world stage, as well as the authority of Congress to implement the obligations the nation undertakes pursuant to treaties. In many respects, the Treaty Power more closely resembles the Article IV, § 4 guarantee to the States of a republican form of government than it does any Article I, § 8 enumerated power.

In fact, there are plausible arguments – based on constitutional text and history, as well as 200 years of the Court's Treaty Power cases – that the scope of the Treaty Power is not a justiciable question. Consequently, the scope of Congress's authority to implement that power may also be a nonjusticiable question, as discussed in Part II of this brief. At a minimum, the scope of that congressional power must be evaluated

very differently and with different considerations than challenges to the Article I, § 8 enumerated powers.

Consequently, standing to challenge exercises of the Treaty Power is more limited than in the Article I, § 8 context. In fact, if Treaty Power questions are nonjusticiable, then perhaps not even the States have standing to challenge the scope of the Treaty Power. But if any party has standing to raise a Tenth Amendment claim regarding the Treaty Power, it is the States, not individual citizens.

4. The Treaty Power Is Not Limited By The Enumerated Powers Of Congress, And Thus A Tenth Amendment Challenge To The Treaty Power Is Not Simply The "Flipside" Of An Article I, § 8 Claim.

a. A Tenth Amendment challenge to a treaty or its implementing legislation is not the "flipside" or "mirror image" of an enumerated power (Article I, § 8) challenge. Rather, a challenge to the Treaty Power necessarily is a Tenth Amendment sovereignty claim, more akin to the commandeering claims asserted in *New York* and *Printz* than to the Article I, § 8 claims advanced in *Lopez*, *Morrison*, *Raich*, and *Comstock*.

The Court has recognized that treaties "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Lara*, 541 U.S. at 201 (quoting *Missouri*, 252 U.S. at 433). Thus, the

Article I, § 8 enumerated powers of Congress simply do not limit the scope of the Treaty Power. *See United States v. Belmont*, 301 U.S. 324, 331-32 (1937); *De Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890). *See also United States v. Pink*, 315 U.S. 203, 230-31, 242 (1942) (Frankfurter, J., concurring) ("In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states"). In fact, the Court "frequently has held that cases presenting issues related to the conduct of foreign affairs pose political questions." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 140 (3d ed. 2006).

Further, the Court's cases are replete with instances where subjects traditionally reserved to the States are trumped by a treaty or its implementing legislation. *See*, *e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (state inheritance statutes must cede to foreign policy); *Belmont*, 301 U.S. at 331 (property rights); *Asakura v. City of Seattle*, 265 U.S. 332, 341-43 (1924) (licensing of pawn brokers); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (creditor's rights).[8] Such case law follows from (1) the delegation of the

[8] *See also De Geofroy*, 133 U.S. at 270-72 (property inheritance); *Hauenstein v. Lynham*, 100 U.S. 483, 486-87 (1879) (state laws on property inheritance). *Cf. El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999) (this country's "home-centered preemption analysis . . . should not be applied, mechanically, in construing our international obligations.").

entire Treaty Power to the national government, (2) the Article I, § 10 express prohibition on the States exercising the Treaty Power, and (3) the Tenth Amendment's explicit disclaimer of any reservation of power regarding subjects that the Constitution expressly prohibits the States from exercising, like the Treaty Power. Art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation"); U.S. Const. amend. X ("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.").

b. *Missouri v. Holland* is key to properly framing petitioner's claim in this case. In 1916, the President entered a treaty with Great Britain concerning migratory birds in North America.[9] To implement the treaty, Congress enacted the Migratory Bird Treaty Act, a federal law that prohibited the hunting of migratory birds covered by the treaty except as permitted by the regulations of the Secretary of Agriculture. After two Missouri residents were indicted for violating the Act, the State of Missouri interceded and challenged the Act on the ground that it invaded the sovereign rights of the State in violation of the Tenth Amendment. 252 U.S. at 430-31; *United States v. Samples (Missouri v. Holland)*, 258 F. 479, 479-80 (W.D. Mo. 1919).

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[9] Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Br., Aug. 16, 1916, 39 Stat. 1702.

The Court emphatically rejected the Tenth Amendment argument, declaring that, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. Acknowledging that a prior act regulating the hunting of migratory birds was held to be outside of Congress's enumerated powers under Article I, § 8, the Court directly rejected the proposition that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* To the contrary, as the Court explained:

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

Id. at 433, 434 (citation omitted).[10]

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[10] Constitutional scholars across the spectrum view *Missouri v. Holland* as meaning precisely what it says. *See, e.g.*, Chemerinsky, *Constitutional Law: Principles and Policies* 371 ("treaties cannot be challenged as violating the Tenth Amendment and

(Continued on following page)

Thus, the Chemical Weapons Convention and its implementing legislation, 18 U.S.C. § 229, are not subject to any reserved authority of the States, or to the Article I, § 8 enumerated powers of Congress. That conclusion necessarily implicates petitioner's standing to challenge these laws, because her claim cannot be an Article I, § 8 challenge, meaning that the standing of individuals in cases such as *Lopez*, *Morrison*, *Raich*, and *Comstock* provide no comfort to her. Those cases are all readily distinguishable.

c. Reliance on the Necessary and Proper Clause as the vehicle for Congress to enact 18 U.S.C. § 229 is of no moment. As explained above, the text of the Clause makes clear that Congress has the power to make laws necessary and proper to execute "the foregoing Powers" of Article I, § 8, such as the power to regulate interstate commerce, *and* "all other Powers vested by this Constitution in the Government of the United States," such as the power to make treaties. Art. I, § 8, cl. 18. Thus, the plain language of the Clause refutes any notion that a statute enacted to implement a treaty must also be necessary and

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infringing state sovereignty. *Missouri v. Holland* was decided in 1920, during an era when the Court aggressively used the Tenth Amendment to safeguard states from federal encroachment."); John E. Nowak & Ronald D. Rotunda, *Principles of Constitutional Law* 125 (4th ed. 2010) (describing *Missouri v. Holland* as holding that "the treaty power is specifically delegated to the federal governments [sic] and the Tenth Amendment only purports to apply to nondelegated powers. Thus, the Tenth Amendment does not limit the treaty power.").

proper to regulate interstate commerce. *Cf. Sabri*, 541 U.S. at 607-08 (rejecting claim that a Spending Power statute must satisfy the commerce power test of *Lopez* and *Morrison*).

Moreover, petitioner has not and cannot plausibly argue that 18 U.S.C. § 229 is not rationally related to implementing the Chemical Weapons Convention. Thus, the statute cannot exceed the scope of the Necessary and Proper Clause. *Cf. Comstock*, 130 S. Ct. at 1956 (citing *Sabri*, 541 U.S. at 605).

d. For 90 years the Court has recognized that the Treaty Power – combined with the Necessary and Proper Clause – permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority. That conclusion means that there can be no valid claim that the Article I, § 8 enumerated powers of Congress limit the scope of the federal government's exclusive Treaty Power.[11] Thus, petitioner's challenge to an Article II power cannot be simply the "flipside" of an Article I, § 8 claim. Further, if there is any Tenth Amendment claim on behalf of the States in this context, petitioner lacks standing to bring such a claim.

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[11] *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("a suit may be dismissed for want of jurisdiction where the alleged claim under the Constitution . . . is wholly insubstantial and frivolous."); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (quoting *Bell v. Hood* and noting that a decision by the Court can render previously debatable constitutional claims "wholly insubstantial and frivolous").

II. PETITIONER'S TENTH AMENDMENT CLAIM ALSO WAS PROPERLY DISMISSED BECAUSE IT IS NONJUSTICIABLE.

A. Treaty Power Claims In General Are Nonjusticiable.

Ultimately, petitioner's Tenth Amendment claim presents a nonjusticiable question. Although an individual may challenge a treaty or an implementing statute on the grounds that it violates a constitutional prohibition guaranteeing individual rights, at most only a State has standing to assert a Tenth Amendment challenge to the Treaty Power.

1. The Court long has recognized the nonjusticiable character of challenges to the exercise of foreign relations powers by the political branches of the national government. *See Marbury v. Madison*, 5 U.S. 137, 165-66 (1803) ("the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience").[12] Accordingly,

[12] *See also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("even if courts could require full disclosure [of secret intelligence], the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a

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challenges to the Treaty Power generally present political questions. *Eyde v. Robertson*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.").[13]

2. The general political nature of foreign affairs and the exercise of the Treaty Power were acknowledged in *Baker v. Carr*, 369 U.S. 186, 211-13 (1962), where the Court identified the characteristics

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political rather than a judicial question. . . ."); *Ting v. United States*, 149 U.S. 698, 705-07, 712-13 (1893) (matters concerning immigration are concerns of the political departments of the government, not the judicial branch).

[13] *See also United States v. Pink*, 315 U.S. 203, 229 (1942) (which government is to be recognized under a treaty as a foreign sovereignty); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (issues concerning treaties with Indian tribes); *United States v. Sandoval*, 167 U.S. 278, 290-91, 293-94 (1897) (resolution of disputes over private property by U.S.-Mexican treaty); *Ping v. United States*, 130 U.S. 581, 602-03 (1889) (congressional repeal of a treaty); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888) (congressional repeal of a treaty); *Doe v. Braden*, 57 U.S. 635, 657-58 (1853) (whether King of Spain was authorized to enter into treaty regarding Florida territory); *see also Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (plurality) (authority of President to terminate a treaty).

"[p]rominent on the surface of any case held to involve a political question. . . ." *Id.* at 217. Petitioner's challenge to 18 U.S.C. § 229 implicates several of those characteristics.

a. First, with respect to the Treaty Power, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* The "conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). *See also Medellin v. Texas*, 552 U.S. 491, 511 (2008). The President "'manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.'" *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 8 U.S. Sen. Reports, Committee on Foreign Relations (Feb. 15, 1816)).

b. Second, there are not "judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, for determining the scope of the Treaty Power, which "extends to all proper subjects of negotiation between our government and the governments of other nations." *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890). The sensitive negotiations with the other 187 nations that are party to the Chemical Weapons Convention spanned several Presidential administrations and

culminated in an extensive compact aimed at "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction," by means of disarmament, free trade of chemicals, and, "for the sake of all mankind, [excluding] completely the possibility of the use of chemical weapons. . . ." Chemical Weapons Convention Preamble, Pet. App. 37-38. Such matters clearly involve "decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility. . . ." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). In fact, the Senate ratification process included secret sessions and review of classified information,[14] underscoring the practical difficulties of even attempting to develop judicial standards. *See Curtiss-Wright*, 299 U.S. at 320-21 ("'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in

[14] *See* S. Rep. No. 104-4, Committee Activities of the Select Comm. on Intelligence, at 9-15 (Jan. 18, 1995), *available at* http://intelligence.senate.gov/pdfs/1044.pdf; Mildred Amer, *Secret Sessions of Congress: A Brief Historical Overview*, p. 6 (Congressional Research Service May 30, 2007), *available at* http://www.rules.house.gov/archives/RS20145.pdf.

relation to other powers.'") (quoting President George Washington, 1 Messages and Papers of the Presidents, p. 194).

c. Third, it may be difficult for the courts to resolve petitioner's challenge "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Policy decisions concerning the regulation of weapons – particularly in the age of biological and chemical terrorism – are undoubtedly beyond the realm of the judiciary. *Cf. Coleman v. Miller*, 307 U.S. 433, 455 (1939) ("There are many illustrations in the field of our conduct of foreign relations, where there are 'considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.'") (quoting *Ware v. Hylton*, 3 U.S. 199, 260 (1796)).

d. Finally, the President and Congress determined that the interests of the nation favored entering a treaty with 187 other nations to end the use of chemical weapons on all levels, a prohibition that infringes no individual rights guaranteed in the Bill of Rights or elsewhere in the Constitution. Judicial review of those presidential and senatorial determinations could result in the Court "expressing lack of the respect due coordinate branches of government" and give rise to "the potentiality of embarrassment from multifarious pronouncements by various departments." *Baker*, 369 U.S. at 217.

B. If A Tenth Amendment Challenge To The Treaty Power Is Justiciable, Only A State Has Standing To Assert That Claim.

1. At a minimum, if a Tenth Amendment challenge to the Treaty Power is justiciable, only a State would have standing to assert such a claim. To the extent this exception exists, it is arguably implicit in *Missouri v. Holland*.

The Court in *Missouri v. Holland* considered a statute enacted pursuant to a treaty with Great Britain concerning migratory birds. The State of Missouri asserted that the statute interfered with its sovereign rights reserved by the Tenth Amendment. 252 U.S. at 431. The Court rejected that claim, concluding that the Treaty Power is vested exclusively in the federal government, which may accomplish by treaty what it might not through legislation alone. *Id.* at 432-35. Indeed, the State interceded after two of its residents were indicted under the statute implementing the treaty, and the State pursued the Tenth Amendment claim alone on appeal. *Id.*

The nature of treaties aligns with the conclusion that only a State would have standing. A treaty is a contract between two sovereign nations; individuals are not parties to a treaty. *Eyde*, 112 U.S. at 598. "No nation treats with a citizen of another nation except through his government." *Frelinghuysen v. Key*, 110 U.S. 63, 71 (1884) ("[t]he citizens of the United States having claims against Mexico were not parties to this

Convention"). *See also* The Federalist No. 75 (Alexander Hamilton) ("The power of making treaties . . . Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.").

2. Certainly, an individual may challenge the constitutionality of a treaty and its implementing legislation if there is a violation of individual rights expressly guaranteed by the Constitution. *All* acts of Congress are subject to the *prohibitions* of the Constitution. *Comstock*, 130 S. Ct. at 1957 ("Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution") (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819)). This principle is fundamental and applies equally to the Treaty Power, as the Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), demonstrates.

In *Reid*, the Court never discussed standing, but it permitted the spouses of members of the U.S. armed forces to argue that executive agreements with Great Britain effectively abrogated their right to a jury trial.[15] *Reid* is consistent both with statements in

[15] *See also Downes v. Bidwell*, 182 U.S. 244, 294, 312 (1901) (White, J., concurring) (recognizing that whether a treaty acquiring property is accompanied by a promise of statehood is a political question, but that "[t]he treaty-making power vested in our government extends to all proper subjects of negotiation

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other Treaty Power cases and with the Court's general rule that the federal government cannot exercise its delegated powers in ways that violate express constitutional prohibitions. *See Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.") (citing *De Geofroy*, 133 U.S. at 266, 267; *Missouri*, 252 U.S. at 416); *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (a Spending Power statute cannot validly require the States to violate an "independent [constitutional] bar").

3. Consistent with these principles, the Third Circuit below addressed the merits of petitioner's claim that 18 U.S.C. § 229 is unconstitutionally vague in violation of the Fifth Amendment's Due Process

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with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. . . . Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.").

Clause. But that court also correctly concluded that petitioner lacked standing to raise her nonjusticiable claim that 18 U.S.C. § 229 violates the Tenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix

1. Federal Criminal Statutes Implementing Treaties

Statute	Year	Treaty and Ratification Date	Case(s)
Suppression of the Financing of Terrorism Convention Implementation Act of 2002, 18 U.S.C. § 2331 et seq.	2002	Convention for the Suppression of the Financing of Terrorism	
Terrorist Bombings Convention Implementation Act of 2002, 18 U.S.C. § 2331 et seq.	2002	Terrorist Bombings Convention Treaty	
International Antibribery and Fair Competition Act of 1998	1998	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	
Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229	1998	Chemical Weapons Convention (1997)	*U.S. v. Bond*, 581 F.3d 128 (3rd Cir. 2009)

Statute	Year	Treaty and Ratification Date	Case(s)
War Crimes Act of 1996, 18 U.S.C. § 2441	1996	Article 129 of Third Geneva Convention (1955)	
Torture Act, 18 U.S.C. § 2340A	1994	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990)	*U.S. v. Belfast*, 611 F.3d 783 (11th Cir. 2010)
Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93	1988	International Convention on the Prevention and Punishment of the Crime of Genocide (1986)	
18 U.S.C. § 2280	1988	1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	*U.S. v. Lei Shi*, 525 F.3d 709 (9th Cir. 2008)

Statute	Year	Treaty and Ratification Date	Case(s)
Hostage Taking Act, 18 U.S.C. § 1203	1984	International Convention Against the Taking of Hostages (1981)	*U.S. v. Lue*, 134 F.3d 79 (2d Cir. 1998); *U.S. v. Rodriguez*, 587 F.3d 573 (2d Cir. 2009)
Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, 18 U.S.C. § 831	1980	1980 Convention on the Physical Protection of Nuclear Material	
The Psychotropic Substances Act of 1978, 21 U.S.C. § 801a	1978	The Convention on Psychotropic Substance	
Endangered Species Act of 1973, 16 U.S.C. § 1540(b)	1973	Migratory and Endangered Bird Treaty with Japan; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1973)	*U.S. v. Kepler*, 531 F.2d 796 (6th Cir. 1976)

Statute	Year	Treaty and Ratification Date	Case(s)
Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1)	1970	Multilateral Narcotics Drugs Convention; Single Convention on Narcotic Drugs (1967)	*United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972)
Obscene Publications, 18 U.S.C. § 1461	1948	Agreement for the Suppression of the Circulation of Obscene Publications (1911)	*U.S. v. Landham*, 251 F.3d 1072 (6th Cir. 2001)
Migratory Bird Treaty Act of 1918, (as amended), 16 U.S.C. §§ 703-712	1918	Convention for the Protection of Migratory Birds; Migratory Bird Treaty (1916)	*U.S. v. Ray*, 488 F.2d 15 (10th Cir. 1973); *U.S. v. Smith*, 29 F.3d 270 (7th Cir. 1994); *U.S. v. Kornwolf*, 276 F.3d 1014 (8th Cir. 2002)
White Slave Traffic Act (Mann Act), 36 Stat. 825; codified as amended at 18 U.S.C. §§ 2421-2424	1910	Agreement for Repression of Trade in White Women (1901)	