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

REPLY BRIEF FOR PETITIONER

ROBERT E. GOLDMAN
ROBERT E. GOLDMAN LLP
P.O. Box 239
Fountainville, PA 18923
(215) 249-1213

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioner

*additional counsel listed on inside cover

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Additional counsel:

ERIC E. REED
FOX ROTHSCHILD LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103
(215) 229-2741
Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

This is not a difficult case. Unlike a plaintiff who seeks to inject the judiciary into an abstract dispute or asks a court to adjudicate the rights of third parties, petitioner's interest is far more modest. She would be quite content to leave the federal courthouse doors shut. But having been haled into court by a federal prosecutor, petitioner merely seeks leave to argue that the statute under which she has been deprived of her liberty is beyond Congress's power to pass. Petitioner readily satisfies the ordinary three-part test for Article III standing, and no brief submitted to this Court argues otherwise.

The judgment below that petitioner lacks standing is defended only by the *amicus curiae* appointed for that purpose. And *amicus* does not defend the reasoning of the court of appeals. Indeed, the lengths to which *amicus* must go—advancing novel theories about the justiciability of treaty power issues and arguing that legislation enacted to fulfill treaty obligations is something other than Article I legislation—underscore the indefensibility of the judgment below. The nub of *amicus*'s argument appears to be that *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118 (1939), can be understood as a prudential standing case that prohibits individuals from raising certain Tenth Amendment claims because the individual is asserting interests that belong only to third parties (*i.e.*, the States).

This argument fails because it conflates the long-discarded "legal interest" test and third-party

standing doctrine. *Tennessee Electric* is not a third-party standing case. The entire opinion, including the cryptic statement about Ninth and Tenth Amendment claims, is a product of the then-governing "legal interest" test for standing. The petitioners in *Tennessee Electric* lacked standing not because they asserted the rights of third parties, but because they did not identify a legally protected interest in being free from competition by the Tennessee Valley Authority and so their injury-in-fact was dismissed as *damnum absque injuria* (damage without a legal injury). 306 U.S. at 137–38, 140. That approach to standing has long since been abandoned in favor of the modern three-part test, and *Tennessee Electric* should be dismissed as a relic of the *ancien régime*.

To be sure, the Court continues to apply prudential limitations on third-party standing. But that has nothing to do with *Tennessee Electric* or this case. Petitioner is "championing her own rights"—namely, the right not to be incarcerated for six years under a federal statute that impermissibly exceeds Congress's enumerated powers and violates the Tenth Amendment. In other words, petitioner seeks to vindicate not some abstract right belonging only to States, but her own liberty interest in being free of a federal police power decidedly not granted to Congress by our Constitution.

The efforts of *amicus* (and of the United States) to distinguish between various kinds of enumerated powers and/or Tenth Amendment claims for standing purposes is fundamentally misguided. Indeed, the inability of *amicus* and the United States to agree whether petitioner's claims qualify for

disfavored treatment does not bode well for the whole enterprise. And the nature of the claims petitioner actually has advanced underscores that the proposed dichotomization of claims is not workable.

Throughout this litigation, petitioner has argued that the statute *both* exceeds Congress's enumerated powers *and* violates bedrock federalism principles. *Amicus* seeks to avoid that conclusion by arguing that petitioner's Tenth Amendment challenge "necessarily" must be one that belongs exclusively to the States because, under *Missouri v. Holland*, 252 U.S. 416 (1920), treaty-implementing legislation is not constrained by Congress's enumerated powers. Amicus Br. 42. But that novel theory is misguided. Congressional legislation to implement a treaty remains legislation enacted pursuant to an enumerated power—namely, Article I, Section 8, Clause 18—or the constitutional problems here are even greater than petitioner feared.

The approach of *amicus* and the United States suffers from even more fundamental defects. The radical notion that private parties should be barred from invoking the Tenth Amendment's federalism protections cannot be squared with either the amendment's text or this Court's decisions. The Tenth Amendment expressly safeguards the right of "the people," a phrase this Court has emphasized confers individual rights. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008). Moreover, the Court has recognized that the Tenth Amendment exists "for the protection of individuals" and not to "protect the sovereignty of the States for the benefit of the States." *New York v. United*

States, 505 U.S. 144, 181 (1992). As this Court's decisions confirm, standing poses no obstacle to litigation by individuals to vindicate structural constitutional provisions that ensure the diffusion of governmental power for the purpose of preserving individual liberty. *See, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010).

Finally, there is no merit to *amicus*'s creative, alternative argument that a Tenth Amendment challenge to treaty-implementing legislation is inherently non-justiciable. As *amicus* acknowledges, it is well-established that a claim that a treaty-implementing statute violates individual constitutional rights is justiciable. *See* Amicus Br. 48. *Amicus*'s argument for carving out Tenth Amendment claims from that settled principle rests on the same false premise as his standing argument—namely, that the Tenth Amendment exists only for the protection of States, not individuals. Moreover, this Court's precedents establish that a federalism-based challenge to treaty-implementing governmental action is justiciable. *See Medellín v. Texas*, 552 U.S. 491 (2008). *Amicus*'s invocation of the political question doctrine underscores the problem here. Petitioner's complaint is that her prosecution has nothing to do with the foreign relations concerns that are the proper subject of federal legislation and the political question doctrine. The proper resolution of this case requires no re-conceptualization of the treaty power or the political question doctrine—just a straightforward application of the Court's modern standing doctrine.

ARGUMENT

I. Petitioner Has Standing To Challenge Her Conviction And Imprisonment.

Petitioner clearly has Article III and prudential standing to challenge the constitutionality of the statute under which her liberty is being deprived. *Amicus*'s position conflates the "legal interest" test with notions of third-party standing, misunderstands the requirements of prudential standing, and mischaracterizes the nature of petitioner's claims.

A. Petitioner Clearly Has Article III And Prudential Standing.

1. No party before this Court has defended either the government's position below or the lower court's reasoning in denying petitioner Article III standing. And no one disputes that petitioner satisfies the three-part test for constitutional standing: injury-in-fact, causation, and redressability. *See* Amicus Br. 14; U.S. Br. 21–23. As described in petitioner's opening brief, the injuries she has suffered—her criminal conviction and imprisonment in a federal penitentiary—are among the most concrete and particularized deprivations of liberty imaginable. Instead of a potential three-month sentence under state law for aggravated assault, petitioner's federal sentence is 24 times longer and accompanied by five years of supervised release, nearly $12,000 in fines and restitution, and statutory ineligibility for release pending appeal. *See* Pet. Br. 11–12. Moreover, there is no dispute that this deprivation of liberty is directly traceable to her conviction under a federal

statute that she contends exceeds Congress's lawful authority, or that a ruling in petitioner's favor would redress that injury. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

2. *Amicus* attempts to defend the judgment below and resuscitate *Tennessee Electric* by conjuring up a novel standing argument never embraced by the lower courts or argued by the government. In particular, *amicus* suggests that petitioner lacks prudential standing. According to *amicus*, petitioner's claim is a pure Tenth Amendment "commandeering-type claim" that, unlike an "enumerated powers" claim, asserts third-party rights that belong only to the States. *See* Amicus Br. 35–42. This argument has no grounding in *Tennessee Electric* and fails in any event: petitioner seeks to vindicate her own rights and satisfies any test for prudential standing.

Neither *Tennessee Electric* nor the decision below rested on principles of third-party or prudential standing. As explained in petitioner's opening brief, the entirety of *Tennessee Electric*'s standing analysis, including the confounding statement about standing to raise Ninth and Tenth Amendment claims, was a product of the long-discarded "legal interest" test. Pet. Br. 17–21. Under that test, it was not enough to suffer injury-in-fact (and show traceability and redressability); the plaintiff's injury needed to correspond to a legally protected interest, otherwise it was dismissed as *damnum absque injuria*. The Supreme Court rejected all of the plaintiffs' claims—under the Fifth, Ninth, and Tenth Amendments—as *damnum absque injuria* because plaintiffs failed to point to a legal

right to be free from competition. *Tenn. Elec.*, 306 U.S. at 137–38. The Court then addressed the Ninth and Tenth Amendment claims separately, not because it was announcing a special rule *disfavoring* Ninth and Tenth Amendment claims, but because plaintiffs had argued that they had standing to raise such claims even if they lacked standing to raise their other claims. *See Tenn. Elec.*, Reply Br. 93–94, 100.* In other words, the Court rejected plaintiffs' plea for a special rule *favoring* Ninth and Tenth Amendment claims, and did so applying the same legal interest test it applied elsewhere in its opinion and has long since discarded. Concerns about federal litigation encroaching on areas of traditional state legislative authority did not implicate the plaintiffs' legally protected interests.

Amicus's effort to salvage *Tennessee Electric* by re-conceptualizing it as a third-party prudential standing case does not work. Standing was rejected there not because plaintiffs were asserting the rights of others, but because plaintiffs could not identify a violation of a legally protected interest, and so their own injuries—not someone else's—were dismissed as *damnum absque injuria*. In this case, the lower court did not rest its decision on principles of prudential standing because it is crystal clear that the liberty interest petitioner seeks to protect is her own.

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* It is worth noting that Solicitor General Jackson made no distinct argument concerning the Ninth and Tenth Amendments but argued only that all of the plaintiffs' claims failed the legal interest test. This omission was not due to page limits; there were none and he filed a 261-page brief.

3. Prudential limits on third-party standing are designed to "assur[e] that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 80 (1978). In this respect, the prudential standing doctrine has a "close relationship to the policies reflected in the Article III requirement of actual or threatened injury amenable to judicial remedy." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982). The doctrine's purpose is to prevent federal courts from deciding "abstract questions of wide public significance" when "judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

The third-party standing doctrine is not "absolute," *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004), and does not apply "to all cases as a matter of course." *Duke Power*, 438 U.S. at 80. This Court has thus "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 129–30 (citations and quotations omitted) (emphasis added). Moreover, where, as here, a party "champions [her] own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied." *Duke Power*, 438 U.S. at 80–81; *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264

(1977) (no prudential bar because "one individual plaintiff" has standing "to assert these rights as his own").

As the government concedes, petitioner readily satisfies the prerequisites for prudential standing. *See* U.S. Br. 11. This Court's third-party standing cases "are not on point" because petitioner is "asserting first-party, not third-party, legal rights." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008). Petitioner is not seeking to litigate someone else's due process rights, *see Tileston v. Ullman*, 318 U.S. 44, 46 (1943); she is not complaining about a zoning ordinance that might indirectly harm other town residents, *see Warth*, 422 U.S. at 514; she is not asserting the rights of other hypothetical criminal defendants, *see Kowalski*, 543 U.S. at 130–31; and she is not asserting a quasi-legislative interest in defending the constitutionality of a state statute. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 65–66 (1997). Nor is she seeking to litigate an abstract question or a generalized grievance. *See Duke Power*, 438 U.S. at 80. To the contrary, she is asserting an individualized claim that relies on her own rights—namely, the right not to be unlawfully imprisoned for violating a statute (18 U.S.C. § 229) that, at least as applied to her, exceeds Congress's enumerated powers and is inconsistent with the Tenth Amendment. Petitioner, not some state official or other third party, sits in federal prison and is the "most directly affected and thus best situated to advocate" her interest and position. Amicus Br. 19.

B. *Amicus* Mischaracterizes Petitioner's Claims And Improperly Conflates Standing With The Merits.

1. To support his novel standing theory, *amicus* not only must re-conceptualize *Tennessee Electric* as a prudential standing decision, he also must recast petitioner's claims. *Amicus* thus contends that, instead of challenging the statute under which she was convicted as in excess of Congress's enumerated powers, petitioner has limited her challenge to a Tenth Amendment claim akin to a "commandeering-type claim." *See* Amicus Br. 42. This attempt to posit a dichotomy between enumerated powers and Tenth Amendment claims and then to force petitioner's claims into the latter camp does not work. Even if there were some valid distinction between these types of claims, the record confirms that petitioner has challenged the statute as *both* exceeding Congress's enumerated powers *and* violating the federalism principles embodied in the Tenth Amendment. Because the two inquiries are "mirror images of each other," *New York,* 505 U.S. at 156, they are both properly part and parcel of petitioner's "right to be free from punishment under a statute that is invalid, either facially or as applied to her, because it exceeds Congress's legislative authority." U.S. Br. 11.

As the government recognizes, petitioner argued in the district court that "'[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution'" and that 18 U.S.C. § 229 did not satisfy this basic requirement. *Id*. at 16–17 (quoting CA3 App. 46, 52). She likewise argued before the court of appeals that "the Treaty

Power and the Necessary and Proper Clause were insufficient to confer authority" on Congress to enact section 229 "without 'another basis in the Constitution,'" and that the statute lacked a "'federal nexus.'" *Id.* at 17–18 (quoting CA3 App. 11, 19). Petitioner framed the "essential question" as whether Congress "can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." Pet. C.A. Br. 17; *see also* U.S. Br. 18 (describing petitioner's petition for rehearing *en banc*). And she argued that the federal statute, and its definition of "chemical weapon," must be construed narrowly to avoid serious constitutional problems. *See* Pet. C.A. Br. 28–29, 32.

In addition, petitioner paired these allegations with the mirror-image allegations that Congress has violated basic principles of federalism. Petitioner thus asserted that section 229 "'signals an unwarranted federal intrusion into [the] state law enforcement domain.'" Amicus Br. 4 (quoting CA3 App. 42). As she explained, the government's position means it could "'enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power … the antithesis of federalism expressed in the Tenth Amendment.'" *Id.* at 36 (quoting JA 31).

2. *Amicus*'s position suffers the further defect of improperly importing the merits into the threshold standing question. Perhaps this is an inevitable byproduct of *amicus*'s attempt to preserve a role for *Tennessee Electric*, which was based on a "legal interest" test that was discarded in part because of its tendency to conflate standing and the

merits. In any event, rather than allow petitioner to be master of her claims or acknowledge that she has made both enumerated powers and Tenth Amendment claims, *amicus* argues that her challenge "*necessarily*" must be a "commandeering-type" claim because it is "*implausible* to argue that a challenge to the Treaty Power is really an Article I challenge." *Id.* at 31, 42 (emphasis added). According to *amicus,* because *Missouri v. Holland* "recognized that the Treaty Power … permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority," that decision means there can be "no valid claim" that Congress has exceeded the limits of its Article I, § 8 enumerated powers. *Id.* at 12; *see also id.* at 44 ("*Holland* is key" to the "framing [of] petitioner's claim").

But petitioner's position is very much that *Holland* does *not* mean that Congress has police power as long as its legislation is arguably germane to a treaty. And if *Holland* really does stand for that remarkable proposition, there is no reason the decision is sacrosanct and should not be re-examined. As the Third Circuit recognized, there is "significant scholarly debate" over the proper interpretation of *Holland* and whether *Holland* warrants "reconsideration." Pet. App. 10 & n.4; *see also* Ctr. for Const'l Juris. Br. 10–22. Moreover, if there are two plausible constructions of the statute, only one of which depends on an extreme reading of *Holland* and engenders the grave constitutional doubts raised by that reading, the courts should be free to adopt the saving construction. In any event, as this Court has emphasized, standing is "a

threshold inquiry that in no way depends on the merits of the case." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (per curiam) (internal quotation marks omitted). If this case presents one of the rare circumstances where standing and the merits are inextricably intertwined, as *amicus* suggests, Amicus Br. 34, the proper course is to order supplemental briefing on the merits, not to reject standing on a novel basis that improperly injects a not-fully-briefed merits question into the fully-briefed standing question.

II. This Court Should Not Create A Special Standing Rule For Tenth Amendment Claims.

The court of appeals interpreted a single, cryptic sentence from *Tennessee Electric* to mean that private parties categorically lack standing to raise Tenth Amendment claims absent the participation of the State or state officials in the litigation. As explained in petitioner's opening brief, it is not at all clear that *Tennessee Electric* ever stood for that proposition but, in all events, the time is nigh for this Court to inter its troublesome language. *See* Pet. Br. 21–27. Moreover, the suggestion of *amicus* and the government that *Tennessee Electric* should be preserved for certain Tenth Amendment claims is contrary to precedent and unworkable as a practical matter—a point vividly illustrated by *amicus* and the government's disagreement over which Tenth Amendment claims are special enough for the special rule.

A. The Court Should Not Adopt A Bifurcated Test.

The government and *amicus* both urge the Court to adopt a new bifurcated test for Tenth Amendment standing that would distinguish between "enumerated powers" claims and other Tenth Amendment claims more akin to "commandeering-type" challenges. In particular, they would apply the ordinary prerequisites of standing to private-party claims of the first type, while retaining *Tennessee Electric*'s categorical bar on private-party standing absent State participation for claims of the second type. *See* U.S. Br. 45; Amicus Br. 30. As explained in petitioner's opening brief, these artificial distinctions are both improper and unnecessary. *See* Pet. Br. 27–29. Ordinary principles of standing are more than up to the task of filtering out abstract or generalized grievances, no matter the underlying constitutional provision.

1. *Amicus*'s and the government's arguments, to one extent or another, all depend on the view that certain federalism or Tenth Amendment claims should be treated as distinct from enumerated powers claims and subjected to a unique standing rule. *See* Amicus Br. 47; U.S. Br. 45. For example, *amicus* argues that this case differs from an enumerated powers claim because the statute petitioner challenges "is based on a non-Article I power—the Treaty Power." Amicus Br. 34. But this argument disintegrates on examination. Although the Chemical Weapons Convention was adopted pursuant to the Article II treaty power, its implementing legislation was enacted pursuant to the Necessary and Proper Clause of Article I,

Section 8, and it is that exercise of Article I authority to which petitioner objects. Petitioner is not imprisoned for violating the treaty, but for violating the federal statute. And the question is not whether the Convention itself was proper, but whether the implementing legislation exceeds Congress's enumerated powers. As the brief filed by the Center for Constitutional Jurisprudence explains, "Congress cannot 'validly' exceed its enumerated powers by the simple expedient of relying on a treaty rather than Article I." Ctr. for Const'l Juris. Br. 18; *see also id.* at 11–22. These principles apply with special force where, as here, Congress's treaty power and the limits on its enumerated powers are easily reconciled by properly interpreting the meaning of "chemical weapon" in the federal statute in a way that simultaneously discharges our treaty obligations and preserves our basic federalist structure.

2. *Amicus*'s and the federal government's suggestion that only States, not private parties, have standing to invoke the structural protections of the Tenth Amendment cannot be reconciled with the Amendment's text or with this Court's cases. The Tenth Amendment provides that "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 (emphasis added). As historians have shown, the words "to the people" were intentionally and conspicuously added to the Tenth Amendment. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 37, 41 n.23 (Helen E. Veit, et al., eds. 1991); *see also* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale

L.J. 1425, 1456 (1987). Moreover, the phrase "the people," as the Court has recently emphasized, distinctly confers individual rights. *See, e.g.*, *Heller*, 554 U.S. at 579 (Second Amendment "right of the people" to keep and bear arms is an individual right); *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990) ("the people" is a "term of art employed in select parts of the Constitution"); *see also Parker v. District of Columbia*, 478 F.3d 370, 381–82 (D.C. Cir. 2007) (Silberman, J.). Indeed, these words may supply the answer to the question whether the Tenth Amendment is more than a mere truism: at a minimum, it provides an explicit individual right to enforce the structural guarantees implicit in enumerated and limited federal power.

This Court has thus expressly recognized that the Tenth Amendment exists "for the protection of individuals," not "for the benefit of the States or state governments as abstract political entities." *New York*, 505 U.S. at 181. This point was recently confirmed in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, where the Court relied on *New York* to reaffirm that the "separation of powers," whether horizontal or vertical, "does not depend on … whether 'the encroached-upon branch approves the encroachment.'" 130 S. Ct. at 3155 (quoting *New York*, 505 U.S. at 182). Even as the Court acknowledged that the executive branch did not object to the alleged intrusion into its authority and, indeed, appeared in court to defend it, the Court found no obstacle to standing. *Id*. at 3151 n.2, 3155.

3. *Amicus* and the government have no meaningful response to these cases. *Amicus* asserts

that, even if federalism protects individual rights, that "does not answer the standing question" because, "in some metaphysical sense," all constitutional provisions protect individual rights. Amicus Br. 25. But that does not take into account the Tenth Amendment's text or this Court's precedents. Although it might be said that even the non-justiciable Republican Form of Government Clause protects individual rights "in some metaphysical sense," the Tenth Amendment protects individual rights far more directly, as its text and *New York* make clear.

This Court has long recognized that private individuals with concrete injuries have standing to enforce the Constitution's structural protections, with or without the support of the unit of government alleged to have suffered the unconstitutional encroachment. *See, e.g.*, *Free Enter.*, 130 S. Ct. at 3151 n.2, 3155; *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (federal employee had standing to challenge legislative intrusion "into the executive function"); *INS v. Chadha*, 462 U.S. 919, 935–36 (1983) (private party had standing to argue that legislative veto violated structural requirements of bicameralism and presentment); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (private party permitted to argue that statute removed "essential attributes of the judicial power" from Article III courts). Indeed, if anything, this Court has expressed an affirmative preference for individual litigants over institutional ones. *Compare Clinton v. New York*, 524 U.S. 417, 428–36 (1998) (private party has standing to vindicate structural requirements of bicameralism and

presentment), *with Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (denying standing to legislators objecting to the same law in their official capacities).

4. The artificial distinctions that *amicus* and the government seek to draw are unworkable. Indeed, the practical difficulties of attempting to carve out a special class of Tenth Amendment claims as exempt from ordinary standing requirements are highlighted by the different arguments made by *amicus* and the government, and their inability to agree on the nature of petitioner's claims. *Amicus* would distinguish between "true Article I, § 8 claim[s] … that the enumerated power is not broad enough to authorize the particular statute" and "Tenth Amendment claims" encompassing challenges to Article I powers that entail non-Article I limits on federal power. Amicus Br. 30–32. In contrast, the government would distinguish between "claims that the federal government has intruded upon a specific aspect of state sovereignty" and "claims that Congress lacks the authority to legislate in a certain area." U.S. Br. 14–15.

Tellingly, *amicus* and the government do not agree about the nature of petitioner's claims. *Amicus* deems petitioner's claims analogous to "commandeering-type" claims; the government declares them more akin to "enumerated powers" claims. Those diametrically opposed conclusions only crystallize the concern that the "exact boundaries that divide 'enumerated powers' claims from 'commandeering' claims are far from self-evident or self-executing." Pet. Br. 29. Moreover, petitioner's own claims illustrate the tendency of

actual litigants to raise claims that span both categories. *See* U.S. Br. 41–42.

All of this is as novel as it is confusing. Just as few courts have addressed the government's distinction, *see* Pet. Br. 28, even fewer have discerned the source-of-power divide posited by *amicus*. Indeed, neither *amicus* nor the government can account for the "Tenth Amendment" claim brought in *Tennessee Electric*. Although plaintiffs there did not self-identify their claim as an "enumerated powers" versus "commandeering-type" challenge, it appears to have been a challenge that the federal government lacked the authority to authorize the Tennessee Valley Authority's intra-state activities. Thus, in addition to its other flaws, the attempted bifurcation of Tenth Amendment claims fails to explain even *Tennessee Electric* itself.

B. The Court Should Inter *Tennessee Electric*.

The time has come for this Court to disavow *Tennessee Electric*'s single confusing sentence. To the extent it has been interpreted as a special rule disfavoring private party standing for Tenth Amendment claims, the sentence is out of step with this Court's modern standing jurisprudence and Tenth Amendment case law. A straightforward application of traditional *stare decisis* considerations favors interring that language once and for all.

1. Neither *amicus* nor the government can dispute that *Tennessee Electric* is a product of the now-defunct "legal interest" test, or that contemporaneous decisions confirm that the Court did not intend to create a broad new constitutional

rule of standing for Tenth Amendment claims. *See, e.g.*, U.S. Br. 38 n.15. Indeed, the sentence is best read as rejecting a special rule favoring Ninth Amendment and Tenth Amendment claims. It is telling in that regard that Solicitor General Jackson never argued for a special rule disfavoring Ninth and Tenth Amendment claims. *See supra* at 7 n.*. But to the extent the sentence has been read as a rule disfavoring standing to raise Tenth Amendment claims, the rule is a relic of a discarded standing regime. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970).

2. Contrary to *amicus*'s suggestions, jettisoning *Tennessee Electric*'s single sentence fully comports with the "prudential and pragmatic considerations" that underlie *stare decisis*. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). As this Court has emphasized, *stare decisis* is not an "inexorable command" in constitutional cases, especially where (as here) there is no reliance interest that weighs in favor of preserving the relevant language, nor any "special hardship" that weighs against overruling it. *Id.* The courts of appeals that have relied on *Tennessee Electric* to bar private-party standing have almost uniformly done so grudgingly with the caveat that, under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), only this Court has the prerogative to overrule the decision. *See* Pet. App. 15; *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 236 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005). This case is thus a fitting example of a situation where

"principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

III. Petitioner's Tenth Amendment Claim Is Justiciable.

Amicus argues in the alternative that, even assuming petitioner has standing, this Court should decline to entertain her challenge to 18 U.S.C. § 229 because the statute's validity is a non-justiciable political question. That argument is not within the question presented and has never been advanced by the government. It is, in all events, without merit.

1. *Amicus*'s concerns with private parties challenging legislation enacted to implement treaties do not translate into a valid non-justiciability argument. At the outset, *amicus* is forced to concede that "an individual may challenge a treaty or an implementing statute on the grounds that it violates a constitutional prohibition guaranteeing individual rights." Amicus Br. 48; *see also Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion). The only reason a Tenth Amendment claim does not come within that statement is because *amicus* does not view the Tenth Amendment as protecting individual rights. But that only underscores that his non-justiciability argument is no different from his standing argument and is equally flawed. *Amicus*'s narrow conception of the Tenth Amendment is inconsistent with both the amendment's text and this Court's precedents. *See supra* at 15–18.

Amicus also must concede, in light of *Holland*, that States may bring justiciable Tenth Amendment

claims against legislation enacted to implement a treaty. *See* Amicus Br. 53. After all, the Court rejected Missouri's challenge *on the merits*. This concession is fatal to *amicus*'s non-justiciability argument. Justiciability is about *whether* certain legal disputes are suitable for judicial resolution; it is not about *who* can sue. The latter issue is the subject of standing law. If petitioner has standing to raise, *inter alia*, a *Holland* claim—and she does, *see supra* at 5–9—there is nothing non-justiciable about the claim.

In any event, precedent establishes that courts will examine whether treaty-implementing governmental action comports with the structural requirements of federalism. In *Medellín v. Texas*, this Court held that a presidential memorandum directing state courts to implement the United States' acknowledged treaty obligations by giving effect to a decision of the International Court of Justice was not binding on the courts. *See* 552 U.S. at 523–32. The Court's holding indicates that the domestic implementation of the United States' treaty obligations by the political branches must be done in compliance with the Constitution, and that there is a role for the judiciary in ensuring that constitutional limits on treaty-implementing action are not transgressed. *See id.* at 515. If a constitutional challenge to treaty-implementing action by the Executive—the branch most responsible for day-to-day treaty compliance—was justiciable in *Medellín*, then *a fortiori* there is no reason a similar challenge to treaty-implementing action by the Legislature should be non-justiciable here.

2. *Amicus*'s reliance on political-question principles only highlights the troubling consequences that flow from petitioner's federal prosecution. The prospect that a domestic dispute arising from marital infidelities and culminating in a thumb burn could be deemed a non-justiciable controversy impacting U.S. foreign affairs and diplomatic relations suggests that something—quite possibly the federal-state balance—has gone horribly awry. If *amicus* were correct that courts may not review claims that treaty-implementing legislation exceeds Congress's power, then Congress would have an unreviewable police power on any subject arguably germane to a treaty. Given the breadth of subjects comprehended by modern treaties, the realm of unchecked Congressional power would be vast.

At most, *amicus* would concede a role for States to bring such challenges. But it is cold comfort to ask citizens—especially one facing six years in a federal penitentiary—to rely on one sovereign with a legitimate claim of police power to check another sovereign asserting nearly plenary power. Some States will guard their monopoly over plenary power more jealously than others, but unless the limits on enumerated powers exist only for the benefit of the States, there is no reason a citizen must rely on her own State to vindicate her distinct liberty interests. *Cf. Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause"). Moreover, as the government points out, even a State that wishes to push back against overreaching federal criminal laws will generally not have *parens patriae* standing to challenge such laws on behalf of one citizen. U.S.

Br. 26. *Amicus*'s approach thus confirms the dangers of the over-federalization of state crimes and the importance of judicial checks on federal overreaching. As in the Commerce Clause context, *see United States v. Morrison*, 529 U.S. 598, 617–19 (2000), the judiciary has an obligation to ensure that the treaty power does not become the wellspring of a plenary federal police power.

Any legal theory that would reserve to the States alone the power to challenge federal encroachments, like this one, will virtually guarantee that important constitutional questions will go unaddressed. And impeding private parties from bringing Tenth Amendment challenges to statutes that they have been personally, directly, and tangibly injured by—whether under the rubric of justiciability or standing—would eviscerate a vital and liberty-enhancing check on federal overreaching. The road to avoiding all that is straightforward: simply apply this Court's modern, three-part standing test to allow petitioner to raise issues that are no less justiciable in the hands of a citizen than in those of a state official.

CONCLUSION

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

Respectfully submitted,

Paul D. Clement
Counsel of Record
Ashley C. Parrish
Candice Chiu
Paul A. Mezzina
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, D.C. 20006
pclement@kslaw.com
(202) 737-0500

ROBERT E. GOLDMAN
ROBERT E.
GOLDMAN LLP
P.O. Box 239
FOUNTAINVILLE, PA 18923
(215) 249-1213

ERIC E. REED
FOX ROTHSCHILD LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103
(215) 229-2741

Counsel for Petitioner

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