No. 09-1227

# In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES SUPPORTING PETITIONER

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The question in this case is whether petitioner, a criminal defendant convicted under 18 U.S.C. 229, has standing to argue that Congress exceeded its Article I authority in enacting that statute. The answer is yes. And that answer can be reached without resolving many of the provocative questions raised by petitioner and the court-appointed amicus.

No one disputes that petitioner has Article III standing to raise her claim. Petitioner's conviction and sentence constitute a concrete and particularized injury, directly traceable to the government's prosecution of her under Section 229, and a decision in her favor would redress her injury.

The amicus appointed to defend the judgment below, however, contends that petitioner should be denied standing on prudential grounds. In his view, petitioner raises a

Tenth Amendment claim of intrusion on rights of the States, and such a claim is barred by *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939). Amicus is correct that *TVA* reflects the long-recognized prudential limitation on third-party standing. Amicus also is correct that although this Court's standing and Tenth Amendment doctrines have evolved since *TVA*, the prudential standing principle underlying *TVA* is fully consistent with this Court's modern standing jurisprudence.

The court-appointed amicus errs, however, in contending that the prudential limitation on third-party standing bars petitioner's claim. Amicus contends that challenges to statutes implementing treaties are unique, because any claim that Congress exceeded its Article I authority in implementing a treaty must fail on the merits under *Missouri* v. *Holland*, 252 U.S. 416 (1920). Amicus therefore concludes that, because petitioner cannot challenge Congress's authority to enact Section 229, she instead must be arguing that the Tenth Amendment places external limits on Congress's ability to implement treaties.

This Court should reject amicus's characterization of petitioner's argument and the conclusion amicus draws. As an initial matter, Congress's authority to implement treaties is not the only source of authority supporting Section 229—the statute is easily and independently justified as an exercise of the Commerce Clause authority—and thus courts can resolve petitioner's challenge to Section 229 without considering any of amicus's arguments about the uniqueness of statutes that implement treaties. In any event, amicus incorrectly characterizes petitioner's treaty-based argument. Petitioner has never questioned the validity of the Chemical Weapons Convention, only Congress's implementation of it.

Moreover, contrary to amicus's view of the Tenth Amendment aspect of petitioner's claim, petitioner has argued throughout this litigation that Congress lacks the Article I authority to enact Section 229, and, for that reason alone, Section 229 intrudes on areas reserved to the States. Petitioner has not argued that, although Congress has the authority to enact Section 229, the statute nonetheless improperly commandeers state officials or otherwise regulates core aspects of state sovereignty. Because petitioner is raising her own claim, not the claim of an absent State, the prudential third-party standing barrier is not at issue. *TVA*'s standing limitation is therefore not implicated here, and the Court need not reconsider it.

Aside from the decision below, the government is not aware of any decision by this Court or a federal appellate court holding that a criminal defendant lacks standing to argue that Congress exceeded its Article I authority in enacting the statute under which she was convicted. Prudential principles should not be utilized to deny petitioner standing here.

Finally, the court-appointed amicus suggests that petitioner's claim raises a non-justiciable political question: a challenge to the exercise of the Treaty Power. That issue need not be addressed in order to resolve the standing issue before the Court, and no court may need to address it if the statute can be upheld on other constitutional grounds. In any event, petitioner's claim does not implicate a non-justiciable political question. Her assertion that Section 229 exceeds Congress's authority mirrors the type of claim already considered in *Missouri* v. *Holland*, *supra*, and is analogous to Article I challenges routinely adjudicated by the courts. Other, direct challenges to the treaty-making process may well raise political questions that are not suitable for judicial determination. But this case provides no

occasion to consider such claims, because petitioner does not challenge the validity of the Chemical Weapons Convention itself or any other exercise of foreign-affairs powers.

### A. The Only Disputed Issue Is The Prudential Limitation On Third-Party Standing

1. This case should be resolved using ordinary standing principles. Under those principles, a litigant must demonstrate that she meets the irreducible constitutional minimum to establish Article III standing (injury in fact, causation, and redressability), and her claim must not be barred by prudential considerations (such as the limitations on third-party standing and the adjudication of generalized grievances). See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004); see also U.S. Br. 21-25.

Contrary to petitioner's repeated suggestion (Br. 16, 17, 20, 21, 22, 27, 28, 29), the United States does not suggest that the Court use any special standing rules to resolve this case. As explained previously (U.S. Br. 20-21), standing to raise a Tenth Amendment claim turns on settled Article III and prudential standing principles. Although those principles may lead to different conclusions for different types of Tenth Amendment claims, see *ibid.*, that does not mean that the legal standard differs from claim to claim.

2. The parties and the court-appointed amicus agree that petitioner satisfies the Article III requirements for establishing standing to challenge her conviction under 18 U.S.C. 229. Pet. Br. 14-15; U.S. Br. 22-23; Amicus Br. 14. Petitioner's criminal conviction constitutes an injury in fact; that injury is directly traceable to the government's prosecution of her under Section 229; and that injury would be redressed if a court accepted her argument that Section

229 is unconstitutional. See U.S. Br. 22-23; see also, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Indeed, it is difficult to imagine a situation in which "[a]n incarcerated convict's * * * challenge to the validity of h[er] conviction" would not "satisf[y] the case-or-controversy requirement, because the incarceration * * * constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Accordingly, the only issue in this case is whether petitioner should be precluded from challenging her conviction for prudential reasons.

3. The court-appointed amicus contends (Br. 14-15) that petitioner lacks standing because of the "prudential doctrine that generally prohibits third parties from asserting the legal rights of others." Invoking *Tennessee Electric Power Co.* v. *TVA*, *supra*, amicus contends that petitioner challenges Section 229 on the ground that it intrudes on the rights of States in violation of the Tenth Amendment, and the States, not petitioner, should bring that claim. Amicus Br. 14-47. The court-appointed amicus is correct that this Court's decision in *TVA* reflects the prudential limitation on third-party standing. But amicus errs in concluding that petitioner is asserting third-party rights, rather than her own rights. Petitioner's claim is that Congress exceeded its authority in enacting Section 229, a statute that directly regulates her own conduct, not that Congress has impermissibly intruded on state sovereign affairs.

### B. *TVA* Reflects The Prudential Limitation On Third-Party Standing

1. As the court-appointed amicus correctly explains (Br. 16-18), *TVA* reflects the "modern prohibition on third-party standing." In that case, private utility companies

challenged the TVA's sale of electricity to municipalities and cooperatives with stipulated resale rates. One of the utilities' claims was that, even if Congress had the authority to create the TVA, the TVA's rate-setting impermissibly intruded on state prerogatives by regulating "purely local matters reserved to the states or the people by the Tenth Amendment." 306 U.S. at 143; see *id.* at 136, 140-142. This Court not only rejected the claim by stating that TVA's competition did not amount to regulation; it also held that the utilities "have no standing in this suit to raise any question under the [Tenth] [A]mendment," because the States had not joined the lawsuit or even "object[ed] to the [TVA's] operations." *Id.* at 144. See *Tennessee Elec. Power Co.* v. *TVA*, 21 F. Supp. 947, 960 (E.D. Tenn. 1938) (district court's holding that "[q]uestions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court"), aff'd, 306 U.S. 118 (1939); see also U.S. Br. 33-35.

The *TVA* Court signaled that its Tenth Amendment standing holding followed from the principle that a "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." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). To support its holding, the Court invited comparison to *Georgia Power Co.* v. *TVA*, 14 F. Supp. 673, 676 (N.D. Ga. 1936), in which the district court rejected a utility's objection to the location of TVA's power lines, on the ground that the State had not consented, by saying: "But Georgia is not objecting, and the Georgia Power Company cannot object for it." See *TVA*, 306 U.S. at 144 n.27. The limitation on third-party standing was well-established by the time of the Court's decision in *TVA*. See, *e.g.*, *Heald* v. *District of Columbia*, 259 U.S. 114, 122 (1922); *Blair* v. *United States*, 250 U.S. 273, 279 (1919); *People of State of*

*New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 160-161 (1907); *Davis & Farnum Mfg. Co.* v. *City of Los Angeles*, 189 U.S. 207, 218-219 (1903).

2. The prudential limitation on third-party standing does not apply to petitioner's claim. As explained (U.S. Br. 14-16), Tenth Amendment claims come in two forms: (1) claims that Congress exceeded its constitutional authority in enacting a certain statute, thereby intruding on the areas reserved to the States, see, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010); *Gonzales* v. *Raich*, 545 U.S. 1 (2005); *Sabri* v. *United States*, 541 U.S. 600 (2004); *United States* v. *Lopez*, 514 U.S. 549 (1995), and (2) claims that, even though Congress concededly has the authority to regulate in a certain area, Congress has directly regulated the States in a manner that impermissibly intrudes on state sovereignty in violation of the Tenth Amendment, see, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). Several decisions of this Court reflect that distinction. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 186-187 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010); *Pierce County* v. *Guillen*, 537 U.S. 129, 146-148 (2003); *Reno* v. *Condon*, 528 U.S. 141, 149-150 (2000).[1]

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[1] The court-appointed amicus appears to accept this distinction. Amicus Br. 27-29. Petitioner would not distinguish (Br. 27-29) between different types of Tenth Amendment claims, instead urging that private parties have standing to raise any claim that invokes the Tenth Amendment. But courts must assess standing with a "careful" analysis of "the particular claim[] asserted." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). The invocation of the words "Tenth Amendment" does not make all claims alike. Nor does this Court's statement in *New York* v. *United States* that the Tenth Amendment ultimately "protect[s] the sovereignty of States * * * for the protection of individuals," 505 U.S. at 181, establish that individuals, as opposed to States, are the appropriate parties to raise any and all Tenth Amendment claims. See U.S. Br. 44-

In *TVA*, the essence of the utilities' Tenth Amendment claim was that Congress had impermissibly regulated the States' "internal affairs" by "substituting federal regulation for state regulation" of electricity rates. 306 U.S. at 135-136, 140-143. Because the utilities asserted usurpation of state authority, and the States had not objected, the Court concluded that the utilities lacked standing to bring the claim. *Id.* at 144.[2] Significantly, the Court distinguished between what it perceived as the utilities' state-sovereignty claim, which it rejected on the merits and on standing grounds, and the utilities' argument that Congress lacked the Article I authority to create the TVA in the first place, which it separately rejected by holding that utilities could not claim damage from otherwise-lawful competition. *TVA*, 306 U.S. at 136-140; see U.S. Br. 35.

Because the Court understood the utilities' Tenth Amendment claim to be premised on the rights of the States, rather than of the utilities themselves, the Court found that claim barred by third-party standing limitations. See U.S. Br. 44; Amicus Br. 17 (citing U.S. Br. in Opp. at 13, *Medeiros* v. *Sullivan*, 548 U.S. 904 (2006) (No. 05-1243) (reaching same conclusion)). That reasoning accords with

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45 (observing that *New York*'s language addresses different issue of prior state acquiescence). In any event, all the Court need decide in this case is that petitioner has standing to raise her specific Tenth Amendment claim, which asserts that Congress exceeded its enumerated powers in enacting Section 229.

[2] Petitioner's claim differs from the utilities' claim in *TVA* in that Section 229 does not even arguably prevent the States from regulating petitioner's conduct. Instead, Section 229 vindicates the United States' sovereign interests while leaving the sovereign interests of the States intact. Cf. *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985) ("Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty." (internal quotation marks omitted)).

the Court's post-*TVA* Tenth Amendment decisions, which have entertained claims of commandeering or other asserted intrusions on a specific aspect of state sovereignty only at the behest of States or state officials. See U.S. Br. 43 n.17 (citing cases).[3] And it makes sense: a claim that a State was commandeered, for example, must rest on a state objection to the assertedly invalid federal command; States and their officers may "voluntarily * * * participate in the federal program." *Printz*, 521 U.S. at 936 (O'Connor, J., concurring). A state objection, therefore, is crucial to the claim. Indeed, allowing private parties to assert claims on behalf of absent States itself would infringe the sovereignty of the States. See Amicus Br. 21; U.S. Br. 45.

3. Petitioner contends (Br. 17-27) that *TVA* should be limited or overruled. As an initial matter, this Court need not decide whether to limit or overrule *TVA*, because petitioner raises a fundamentally different type of Tenth

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[3] Contrary to petitioner's contention (Br. 20-21), the Court's standing holding in *TVA* is consistent with its earlier decisions. In *Helvering* v. *Davis*, 301 U.S. 619 (1937), the Court considered whether Congress had the authority to enact certain provisions in the Social Security Act, *id.* at 638-645; the Court held (without addressing standing) that those provisions were supported by Congress's Article I, § 8, Spending Clause power, *id.* at 640-645. The shareholder who brought suit in *Helvering* raised only an enumerated-powers Tenth Amendment argument; he did not contend that the Social Security Act impermissibly regulated the States. In *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the Court considered the arguments that a different portion of the Social Security Act impermissibly exceeded Congress's Article I authority and that "the states in submitting to it have yielded to [federal] coercion." *Id.* at 578. The Court considered these claims on the merits, but did not clearly distinguish between the private company's enumerated-powers claim and its claim of state coercion. See *id.* at 578-597; see also U.S. Br. 43 n.17. In neither *Helvering* nor *Steward Machine* did the Court hold that a private party may raise a claim of intrusion on a specific aspect of state sovereignty in violation of the Tenth Amendment.

Amendment claim than the one at issue in *TVA*: petitioner argues that Congress exceeded its authority in regulating her conduct in enacting Section 229, while *TVA* concerned a claim that Congress impermissibly usurped sovereign activities of the States. See U.S. Br. 36-38; see also pp. 11-13, *infra*.

While it is not at issue here, the third-party standing conclusion in *TVA* is not dicta, as petitioner contends (Br. 19). The *TVA* Court expressly rejected the utilities' Tenth Amendment claim on two alternative grounds—that "the sale of government property in competition with others is not a violation of the Tenth Amendment" and that the utilities "have no standing" to raise that claim. 306 U.S. at 144. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

In petitioner's view (Br. 19-20), the Court's statement that the utilities, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment," 306 U.S. at 144, simply "rejects the argument that, at least absent state participation, there would be any special rule allowing the Ninth and Tenth Amendment claims to go forward when the Fifth Amendment claims would not." Pet. Br. 19-20. But *TVA*'s key sentence did not distinguish between Fifth Amendment claims on the one hand, and Ninth and Tenth Amendment claims on the other; it referred specifically to Tenth Amendment claims and said that the utilities "have no standing" to raise them absent the States. 306 U.S. at 144.

4. It is true that this Court's standing jurisprudence has evolved since *TVA*. At the time of *TVA*, a litigant's standing required the invasion of a legally protected interest, a showing that "goes to the merits" and that is no longer required. See *Association of Data Processing Serv.*

*Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-154 (1970) (citing *TVA*, 306 U.S. at 137-138); see also U.S. Br. 38 n.15. But *TVA*'s standing holding independently reflects the prudential limitation on third-party standing. That limitation remains an important part of this Court's standing jurisprudence. See, *e.g.*, *Newdow*, 542 U.S. at 12; *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

Furthermore, since *TVA*, the Court has limited the types of intrusions on state sovereignty that violate the Tenth Amendment. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Today, the alleged Tenth Amendment claim in *TVA* (that the federal government impermissibly displaced state authority to regulate electric power rates) would not state a valid Tenth Amendment claim. But that is a distinct question on the merits from whether private parties have prudential standing to raise claims that Congress's regulation of the States intrudes on a specific aspect of state sovereignty in violation of the Tenth Amendment.

Accordingly, whether petitioner has standing in this case depends on whether she is arguing that Congress exceeded its enumerated powers by regulating her conduct under Section 229, as opposed to arguing that Section 229 regulates States in a manner that impermissibly intrudes on a specific aspect of state sovereignty.

### C. Petitioner Has Standing Because She Is Not Asserting A Third-Party Claim

1. Petitioner's contention throughout this litigation has been that Congress exceeded its authority in regulating her conduct under Section 229; she has not argued that Section 229 impermissibly regulates the activities of States. In the district court, petitioner noted that "[e]very law enacted by

Congress must be based on one or more of its powers enumerated in the Constitution," C.A. App. 52 (quoting *United States* v. *Morrison*, 529 U.S. 598, 606 (2000)), and she argued that Section 229 "does not represent a valid exercise of federal authority under the Commerce Clause, the Treaty Power, or other potential authority in the United States Constitution," *id.* at 46. While she asserted that Section 229 intruded into a "state-regulated domain," *id.* at 59, that followed from her view that the statute was invalid unless "it is based on a valid exercise of constitutional authority and * * * requires proof of a federal interest," *id.* at 58. She never mentioned the Tenth Amendment.

In the court of appeals, petitioner again argued that "[t]he Constitution creates a Federal Government of enumerated powers" and that Section 229 is not "based on a valid exercise of constitutional authority." Pet. C.A. Br. 9-10; see *id.* at 17 ("The essential question before this Court is whether the federal government can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers."). Petitioner's appellate brief did not cite the Tenth Amendment at all.

On petition for rehearing en banc, petitioner stated that her "main argument" is that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution" and that her "Tenth Amendment argument" was "ancillary" to that claim. Pet. for Reh'g En Banc 6. Petitioner gave only one reason why Section 229 violates the Tenth Amendment: "the States did not delegate to Congress the power to enact this statute." *Id.* at 5-6.

Petitioner's opening brief in this Court confirms that her Tenth Amendment argument is an enumerated-powers challenge. Petitioner characterizes her claim as a "Tenth Amendment claim[] challenging a federal statute as in ex-

cess of Congress's enumerated powers." Pet. Br. 16 (title; capitalization omitted). She defines the ultimate dispute in this case as a disagreement about "the scope of Congress's authority under the Necessary and Proper Clause * * * to effectuate the federal treaty power" and the continuing vitality of *Missouri* v. *Holland*, *supra*, which concerned the limits on Congress's authority to implement treaties. Pet. Br. 12-13, 38-39. Petitioner consistently focuses on the Article I authority of Congress to enact Section 229, see, *e.g.*, *id.* at 12-13, 27, 32, 37-40, and she has raised no other Tenth Amendment challenge to Section 229.

2. According to the court-appointed amicus, petitioner is arguing 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." Amicus Br. 31. In amicus's view, "standing to challenge exercises of the Treaty Power is more limited than in the Article I, § 8 context" because, under *Missouri* v. *Holland*, *supra*, "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." Amicus Br. 42, 47. Thus, amicus concludes, petitioner's claim must concern only the external limits the Tenth Amendment imposes on legislation Congress concededly has the authority to enact, rather than the question whether Congress had the authority to enact Section 229 in the first place. *Id.* at 46-47. Amicus is mistaken. Petitioner's challenge throughout this litigation has focused on Congress's authority to enact Section 229 to regulate her, not on any impermissible regulation of the States, see pp. 11-13, *supra*, and Section 229's implementation of a treaty does not change that.

a. As an initial matter, petitioner's challenge to Section 229 could be resolved without addressing amicus's arguments about the uniqueness of the Treaty Power, because

the statute is a valid exercise of Congress's Commerce Clause power, combined with its Necessary and Proper Clause power. Although Congress enacted Section 229 in order to implement its treaty obligations under the Chemical Weapons Convention, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).[4]

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[4] Although the government stated to the district court that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties," Gov't Resp. to Mot. to Dismiss Indictment 7, 2:07-CR-528 Docket entry No. 30 (E.D. Pa. Nov. 13, 2008), that statement of what power Congress actually invoked at the time does not mean that other bases of authority beyond those actually invoked are unavailable to defend the statute. A court may, regardless of the government's concession, uphold the statute as a valid exercise of the Commerce Clause power as part of its obligation "to afford congressional enactments the benefit of all reasonable arguments in favor of constitutionality." *United States* v. *Engler*, 806 F.2d 425, 433 (3d Cir. 1986) (court determined that it was "not bound by the government's concession"); see *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) ("A statute is presumed constitutional * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (brackets in original)). In fact, the district court in this case suggested (without deciding) that the Commerce Clause might justify 18 U.S.C. 229. C.A. App. 100.

Because nothing precludes treaty-implementing legislation from drawing on multiple sources of authority, *e.g.*, *United States* v. *Shi*, 525 F.3d 709, 721 (9th Cir.), cert. denied, 129 S. Ct. 324 (2008), and because the Commerce Clause argument presents a pure issue of law if the case is remanded, the court of appeals should consider it as an alternative basis for upholding Section 229 in this case. See *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) ("A prevailing party may * * * assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the

Section 229 makes it unlawful for any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). As this Court explained in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 26. To illustrate this point, the Court cited a series of criminal statutes that are materially indistinguishable from Section 229. *Id.* at 26 n.36. Those statutes include 18 U.S.C. 175(a), the statute that implements the Biological Weapons Convention by making it unlawful to "knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831, the statute that implements the Convention on the Physical Protection of Nuclear Material by imposing similar prohibitions with respect to nuclear material; and 18 U.S.C. 842(n)(1), the statute implementing the Plastic Explosives Convention by making it unlawful "to ship, transport, transfer, receive, or possess any plastic explosive that does not contain a detection agent."[5]

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trial court."). Precluding its consideration because of the government's failure to raise it below would be especially unwarranted if the court of appeals therefore had to "wade into" what it regarded as difficult constitutional issues under *Missouri* v. *Holland*. Pet. App. 10 & n.4. And equally unwarranted would be the constitutional invalidation of a statute in petitioner's case alone based on an incomplete analysis, even if a valid basis would sustain the statute for everyone else.

[5] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. No. 11,080, 1456

*Raich*'s citation of these statutes makes clear that Congress may regulate the intrastate possession, manufacture, and distribution of these weapons as part of its regulation of the interstate market, just as Congress validly placed similar restrictions on homegrown marijuana. See 545 U.S. at 16-22. The same is true for the chemical weapons regulated by Section 229. Section 229, like the statute in *Raich*, is part of a "comprehensive framework" for prohibiting "the production, distribution, and possession" of chemical weapons. *Id.* at 24; see, *e.g.*, Pet. App. 38 (Convention preamble explains that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of" the objective of eliminating weapons of mass destruction). Congress could rationally have concluded that the intrastate possession, manufacture, and distribution of these weapons substantially affects interstate commerce and must be restricted to control the interstate market. *Raich*, 545 U.S. at 16-19; *id.* at 33-34, 39-41 (Scalia, J., concurring); see also Pet. App. 37 (Convention's recognition that it was regulating economic activity); 18 U.S.C. 229F(7) (statutory carve-out for trade in chemicals with legitimate uses).[6] Accordingly, petitioner's challenge to Section 229

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U.N.T.S. 101; Convention on the Marking of Plastic Explosives for the Purpose of Detection, ICAO Doc. 9571, 30 I.L.M. 721 (Mar. 1, 1991).

[6] This case illustrates the link between intrastate possession and interstate commerce: petitioner ordered one of the chemicals used to commit her crime over the internet, Pet. App. 51 & n.2; C.A. App. 114-115, and she obtained the other chemical from her employer, a multinational chemical manufacturer, C.A. App. 193, after that chemical had been acquired and moved from a chemical company in another state, *id.* at 139, 204. See J.A. 13-15 (indictment).

can be rejected without exploring amicus's theories about the uniqueness of treaty-based claims.

b. Even if Section 229 were justified solely as an exercise of Congress's Necessary and Proper Clause authority to implement treaties, petitioner would have standing to raise the claim. Amicus contends (Br. 45-46) that petitioner's "claim cannot be an Article I, § 8 challenge" because *Missouri* v. *Holland*, *supra*, establishes that Congress's authority to implement treaties is not limited by its enumerated powers. Amicus's reading of *Missouri* v. *Holland* is correct, but his conclusion does not follow.

Amicus seeks to define petitioner's claim by positing one way in which it would fail on the merits. *Missouri* v. *Holland* did reject an Article I challenge to a treaty, explaining that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute under Article 1, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432; see *United States* v. *Lara*, 541 U.S. 193, 201 (2004). But petitioner does not dispute (Br. 39-40) *Holland*'s holding that Congress has broad authority to implement valid treaties; instead, she argues that *Holland* should be "reassess[ed]" and "overrul[led]." In her view, Congress cannot "use international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." C.A. App. 82.

The foreclosure of petitioner's argument under current law does not preclude her from challenging that law. See, *e.g.*, *Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."); see also *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); *Camp*, 397 U.S. at 153. Nor does it transform her claim from a challenge to congressional power under Article I into a challenge—as amicus puts it (Br. 10-12)—to the "Treaty Power" itself under Article II.

Petitioner has never argued that the Chemical Weapons Convention is itself invalid under the Tenth Amendment; she has argued only that Congress does not have the authority to enact Section 229 to implement the Convention.

c. Because amicus concludes that petitioner cannot challenge Congress's Article I authority to enact Section 229, he reasons that petitioner must be raising a Tenth Amendment claim that belongs to the States. Amicus Br. 34-36, 46-47. Amicus does not define this Tenth Amendment claim, or explain why it may *only* be raised by States, or explain which States would be expected to raise it. Instead, he cites statements petitioner made in the courts below about how (in her view) Section 229 intrudes on state prerogatives. *Id.* at 34-36 & n.7. All of these statements, however, were made in support of petitioner's argument that Congress exceeded its Article I authority in enacting Section 229, and as she herself explained, her only "Tenth Amendment argument" was that "the States did not delegate to Congress the power to enact [Section 229]," an argument that is wholly "ancillary" to her enumerated-powers claim. Pet. for Reh'g En Banc 5-6; see, *e.g.*, *Comstock*, 130 S. Ct. at 1962 (Congress's Article I powers "by definition" are "not powers that the Constitution 'reserved to the States'"). Accordingly, petitioner has not raised the type of Tenth Amendment claim that belongs only to the States.

3. Because petitioner challenges Congress's authority to regulate her own conduct under Article I, the prudential limitation on third-party standing relied upon in *TVA* does not bar her claim. Petitioner's claim is the type of enumerated-powers challenge routinely raised by private litigants and considered by the courts, see U.S. Br. 30-31, not the type of state-sovereignty-based challenge that belongs only to a State or state officials, see *id.* at 43 n.17. A State would not have standing to challenge Section 229 on

petitioner's behalf, see, *e.g.*, *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), see also U.S. Br. 27-28, and it should not be expected to do so where, as here, the prosecution does not injure the State by, for example, requiring it to "enact or enforce a federal regulatory program," *Printz*, 521 U.S. at 935.

### D. Justiciability Considerations Do Not Provide A Basis For Affirming The Decision Below

1. Amicus contends (Br. 42, 48-56) that petitioner's claim presents a nonjusticiable political question because it implicates the scope of the Treaty Power. That argument was not addressed below, and the Court can resolve the standing issue presented here without resolving the distinct political question issue amicus raises. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (the "standing and political question doctrines" each "pose[] a distinct and separate limitation," and the Court may address a standing objection before addressing the political question objection). That course is particularly appropriate here because, as discussed above, Section 229 can be sustained without any need to inquire into the Treaty Power. See pp. 13-17, *supra*.

2. Were the Court to consider amicus's justiciability argument, it should reject it in the present context. Amicus's justiciability argument is premised on the view that petitioner "challenges * * * the exercise of foreign relations powers by the political branches." Amicus Br. 48. But petitioner has not argued that the Convention itself is invalid; instead, her only argument is that Congress exceeded its authority in enacting Section 229. That type of claim does not require the courts to review the conduct of the political Branches in entering into or terminating treaties; it only requires courts to explore the enumerated powers of

Congress, an area with which the courts are quite familiar. Indeed, this Court adjudicated just such a claim on the merits in *Missouri* v. *Holland*. That decision, and the numerous other decisions addressing Congress's implementation of treaties[7] and Congress's Article I authority in other contexts, see U.S. Br. 29-32 (citing cases), refute amicus's contention that petitioner's particular claim raises a nonjusticiable political question.[8]

It may well be that some challenges to the treaty-making process raise political questions. But the Court need not grapple with those potentially difficult issues here, where petitioner has not challenged the validity of the Chemical Weapons Convention, but only Congress's implementation of it through Section 229.

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[7] See, *e.g.*, *United States* v. *Belfast*, 611 F.3d 783, 804-805 (11th Cir. 2010), petition for cert. pending, No. 10-8120 (filed Dec. 22, 2010); *Shi*, 525 F.3d at 720-721; *United States* v. *Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001), cert. denied, 535 U.S. 977, 535 U.S. 1028, and 537 U.S. 926 (2002); *United States* v. *Lue*, 134 F.3d 79, 82-84 (2d Cir. 1998); *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973).

[8] Amicus also suggests (Br. 53-56) that if petitioner's claim is nonjusticiable with respect to her, it is justiciable if advanced by a State. But the political question doctrine concerns whether courts should decide a certain question, not who should be allowed to bring a claim. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 210-213 (1962).

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For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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FEBRUARY 2011