No. 09-1227

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner has standing to claim that 18 U.S.C. 229(a) exceeds Congress's powers under Article I of the Constitution and, for that reason, is inconsistent with the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 581 F.3d 128. The decision of the district court (Pet. App. 26-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2009. A petition for rehearing was denied on December 10, 2009 (Pet. App. 25). On March 9, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 9, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, peti-

tioner was convicted of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1-24.

1. In 1993, the Senate ratified an international treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (the Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45. Member states, including the United States, pledged "never under any circumstances" to "use chemical weapons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 39. The Convention also required each member state to, *inter alia*, enact domestic penal legislation that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Id.* at 40. In accordance with this treaty commitment, Congress passed the Chemical Weapons Convention Implementation Act of 1998 (Implementation Act), Pub. L. No. 105-277, 112 Stat. 2681, (22 U.S.C. 6701 *et seq.*) and corresponding penal legislation, see 18 U.S.C. 229 *et seq.*

The criminal provisions in the Implementation Act mirror the prohibitions in the Convention. The statute makes it unlawful for a 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), and it defines "chemical weapon" as "[a] toxic

chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose," 18 U.S.C. 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals" and "includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. 229F(8)(A).

2. In November 2006, petitioner began attempting to expose Myrlinda Haynes to toxic chemicals after learning that Haynes was having an affair with petitioner's husband and was pregnant as a result. Pet. App. 2, 48-49. To implement her plan, petitioner stole a quantity of 10-chloro10H-phenoxarsine from her employer and ordered a vial of potassium dichromate over the Internet. *Id.* at 2. As a trained microbiologist, petitioner understood that the chemicals were toxic if swallowed or touched and were potentially lethal in relatively small doses. *Id.* at 2, 22-24, 62.

Over several months, petitioner deposited the chemicals 24 times on various surfaces that she knew Haynes would touch, including car door handles and Haynes's mailbox. Pet. App. 2. Haynes usually noticed the powder before touching it and injuring herself, but, on one occasion, she sustained a chemical burn on her thumb. *Ibid.* After Haynes complained about the powder to her letter carrier, postal inspectors set up surveillance at her house and identified petitioner as the perpetrator of the attacks. *Id.* at 3. Following petitioner's arrest, she admitted taking the chemicals from her employer. *Ibid.*

A grand jury in the Eastern District of Pennsylvania returned a four count indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of stealing mail, in violation of 18 U.S.C. 1708. Pet. App. 4. As relevant here, petitioner moved to dismiss the Section 229 counts on the ground that Congress exceeded its Article I authority in enacting the statute. The district court denied the motion. *Id.* at 4, 28.

3. On appeal, petitioner renewed her constitutional challenge to the statute. She contended that 18 U.S.C. 229 prohibits local criminal conduct that is a matter of state regulation, contains no jurisdictional element, and could not be justified by Congress's treaty power. Pet. C.A. Br. 9-12. In petitioner's view, Section 229 was therefore not "based on a valid exercise of constitutional authority" and represented "an unjustifiable expansion of federal law enforcement into state-regulated domain." *Id.* at 10-11; see *id.* at 16-27 (arguing that "[t]he 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," and answering that it cannot). Her opening brief did not cite the Tenth Amendment to the Constitution. In response, the government argued that "[b]ecause the statute * * * was enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause" and that "[a]s a consequence, that statute does not violate the Tenth Amendment." Gov't. C.A. Br. 18.

Following oral argument, the court of appeals asked for supplemental briefing on whether petitioner "ha[s] 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." 08-2677 Docket entry (3d Cir. Aug 14, 2009). In response, the government acknowledged that it had not previously raised a standing objection but relied on this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*), to argue that petitioner lacked standing "to assert an infringement of state sovereignty in violation of the Tenth Amendment." Gov't Supp. C.A. Br. 1-2.

4. The court of appeals concluded that petitioner lacked standing to raise her constitutional claim. Pet. App. 11-16. It stated that the "courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." *Id.* at 12. After discussing the cases, the court said it was "persuaded by the reasoning advanced by the majority of [its] sister courts and conclude[d] that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." *Id.* at 14. The court deemed this Court's decision in *TVA* to be controlling on the issue and stated that it was therefore bound to follow it. *Id.* at 14-15 (citing *Rodriguez de Quijas* v. *Shearson*, 490 U.S. 477, 484 (1989)). The court disagreed with petitioner that its conclusion barred "any recourse" for individuals like petitioner "in the face of Tenth Amendment violations accepted by a state." *Id.* at 16 n.8. In the court's view, if a State "refuse[d] 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." *Ibid.* (citation omitted).

DISCUSSION

Petitioner contends (Pet. 19-26) that the court of appeals erred in concluding that she does not have standing to assert a claim that 18 U.S.C. 229 exceeded Congress's enumerated powers and thus violates the Tenth Amendment. The government agrees with that contention. A criminal defendant has standing to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact. The court of appeals' contrary conclusion was based on this Court's statement in *TVA*, *supra*, that the private parties in that civil case "ha[d] no standing to raise any question * * * under the [Tenth] [A]mendment" "absent the states or their officers" as parties to the litigation. 306 U.S. at 144; see Pet. App. 11. That portion of *TVA* addressed a distinct kind of Tenth Amendment claim involving unwarranted intrusions into State sovereignty and not a claim, like that here, that a statute exceeds Congress's enumerated powers. The Court has repeatedly permitted private parties to press such enumerated-power claims, and the court of appeals erred by not doing so here. The Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of the position of the United States asserted in this brief.

1. In *TVA*, a group of private utilities raised various constitutional challenges to the TVA, which was selling low-cost electricity in competition with them. The TVA's wholesale electricity supply contracts required distributors to agree to resell the power at specified retail rates, and the private utilities contended that this amounted to "regulating" not only the TVA's "own rates and ser-

vice," but also "the rates and service of distributors of its power," and, by extension, "the rates of privately owned and state-regulated utilities" that had to compete with the TVA-supplied entities. 306 U.S. at 123; see *id.* at 143-144. The utilities argued that "[t]he distribution and sale of electricity within [a] State is a local public service, subject to full and complete regulation by the State under its police powers" and that the TVA's rate practices would "destroy[]" the regulatory "power[] of the States" in the area in violation of the Tenth Amendment. *Id.* at 122, 123; see *id.* at 136 (utilities claimed that TVA's sale of electricity effectively constituted "federal regulation of the internal affairs of the states" in violation of the Tenth Amendment); see also *id.* at 143 (Utilities argued that "since the [TVA] sells electricity at rates lower than those heretofore maintained by the [private utilities] such sale is an indirect regulation of [their] rates" in violation of the Tenth Amendment.).[1]

The Court rejected this claim on alternative grounds. The Court first explained that there was no Tenth Amendment violation because the TVA's practice of putting retail price terms in its wholesale contracts was not "regulation of the [private competitors'] business" but "nothing more than an incident of competition." *TVA*, 306 U.S. at 143-144; see *id.* at 144 ("The sale of

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[1] As their principal form of relief, the private utilities sought an injunction barring the TVA from "generating electricity out of water power" and from selling such power "in competition with any of the complainants." *TVA*, 306 U.S. at 135. Consistent with their Tenth Amendment claim, however, they also sought an injunction barring the TVA "from regulating their retail rates through any contract, scheme or device; and from substituting federal regulation for state regulation of local rates for electric service, more especially by incorporating in contracts for the sale of electricity terms fixing retail rates." *Ibid.*

government property in competition with others is not a violation of the Tenth Amendment."). The Court also found that the utilities lacked standing to raise this claim. The Court had previously noted that the States in which the TVA operated had expressly authorized municipal and non-profit utilities to obtain power from the TVA. See *id.* at 141-142. The Court thus explained, "[a]s we have seen there is no objection to the [TVA's] operations by the states, and, if this were not so, the [utility companies], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment." *Id.* at 144.

The private utilities had separately argued that the statute establishing the TVA was not a proper "exercise of the federal power to improve navigation and control floods in the navigable waters of the nation" and that it was a "plain attempt, in the guise of exerting granted powers, to exercise a power not granted to the United States, namely, the generation and sale of electric energy." *TVA*, 306 U.S. at 135-136; see *id.* at 120. The Court rejected that enumerated-power claim on a distinct standing ground, namely that the utilities could not sue based on "damage consequent on competition, otherwise lawful." *Id.* at 140.[2]

[2] The district court decision affirmed by the Supreme Court in *TVA* similarly distinguished between the two constitutional claims advanced by the utilities. It noted that the utilities "contend that the TVA statutes constitute an unlawful interference with the police power of the states because they regulate the rates of utilities which themselves are subject to state regulation." *Tennessee Elec. Power Co.* v. *Tennessee Valley Auth.*, 21 F. Supp. 947, 959-960 (E.D. Tenn. 1938), aff'd, 306 U.S. 118 (1939); see *id.* at 960 ("The statute does not fix, nor purport to fix, the complainants' rates. But the contention is that the lower rates of the TVA will inevitably force complainants to lower their rates."). The district court noted that the states in which the TVA operated had

2. As the court of appeals noted, *TVA* holds that "a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." Pet. App. 14. The court of appeals accurately summarized the rule of *TVA* but erroneously thought it barred petitioner's argument in this case. Petitioner is not advancing a "state sovereignty" claim like the one that *TVA* held was unavailable to private parties. For example, petitioner does not contend that 18 U.S.C. 229 unconstitutionally dictates how Pennsylvania must exercise its regulatory authority over toxic chemicals. Instead, petitioner argues that the statute was enacted in excess of Congress's Article I powers. As noted above, this Court in *TVA* did not reject the utilities' analogous Article I claims on third-party standing grounds. It found the absence of State parties significant only with respect to the utilities' entirely distinct claim that the TVA was interfering with the States' regulatory authority over electricity rates.

The source of the confusion over the meaning of *TVA* is the "Tenth Amendment" label now applied to both types of claims. When the Court in *TVA* found that the private parties lacked standing to assert their Tenth

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authorized utilities to purchase power from the TVA and that "no state has intervened as a party in this proceeding to protest that its laws are violated by the TVA." *Ibid.* "Questions 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." *Ibid.* In a separate portion of its opinion, the district court rejected on the merits the utilities' distinct contention that the TVA statute was beyond Congress's enumerated powers, and the court did not interpose any standing barrier to that claim. See *id.* at 958-959.

Amendment claim, it was referring to their claim that the TVA was effectively dictating how the States would be able to exercise their sovereign power to set intrastate utility rates. 306 U.S. at 143-144. The claim bore a resemblance to those addressed more recently in cases such as *New York* v. *United States*, 505 U.S. 144, 161 (1992) (Tenth Amendment bars Congress from "commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (citation omitted), and *Printz* v. *United States*, 521 U.S. 898, 933 (1997) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.") (quoting *New York*, 505 U.S. at 188). In such cases, an enumerated power may give Congress authority over a subject, but the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly intrudes on State sovereignty. *Id.* at 924.

In a separate category of cases, the Tenth Amendment has been cited when the Court has considered whether a statute is "authorized by one of the powers delegated to Congress in Article I of the Constitution." *New York*, 505 U.S. at 155. In such cases, the Tenth Amendment is the "mirror image[]" of an enumerated power: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* at 156.

Petitioner in this case advances this second type of "Tenth Amendment" claim. She contends that 18 U.S.C. 229 was not authorized by the treaty power or any other power conferred on Congress in the Constitution and for

that reason intrudes upon the domain of the States. *E.g.*, Pet. C.A. Br. 18 ("Utilizing the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach would violate the Constitution's limitations on federal government domain."); see *McConnell* v. *FEC*, 540 U.S. 93, 186, 187 (2003) (contrasting Tenth Amendment claims involving "laws that commandeer the States and state officials in carrying out federal regulatory schemes" with claims that statutes "regulat[ing] the conduct of private parties" breached the "absolute boundaries of congressional power under Article I"), overruled in part on other grounds, *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010).

The Court has often decided enumerated-powers claims analogous to petitioner's on the merits, without any suggestion that the absence of a state litigant undermined standing. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949, 1964-1965 (2010) (rejecting on the merits claim by individuals, against whom federal government had instituted civil commitment proceedings, that civil commitment statute was enacted in excess of Congress's Article I authority); *United States* v. *Morrison*, 529 U.S. 598 (2000) (agreeing with civil defendant's claim that portion of Violence Against Women Act, 42 U.S.C. 13981, under which he had been subject to suit exceeded Congress's Commerce Clause authority); *United States* v. *Lopez*, 514 U.S. 549 (1995) (reversing criminal conviction for possession of a firearm in a school zone because statute exceeded Congress's Commerce Clause authority); *Perez* v. *United States*, 402 U.S. 146 (1971) (rejecting criminal defendant's claim that federal loan-sharking statute exceeded Congress's Commerce Clause power). That neither the Court nor

the litigants in those cases thought to question standing reflects an apparent recognition that an individual subject to loss of liberty or property as the result of a federal statute regulating her primary conduct has standing to argue the statute exceeded Congress's Article I authority. And this remains true even when a litigant asserts that the federal statute "violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control." *Comstock*, 130 S. Ct. at 1962 (internal quotation marks omitted); see *ibid.* (recognizing that Tenth Amendment claim in this context is answered by determining whether the action is authorized by Congress's enumerated powers and that "[i]n the end . . . it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment") (quoting *New York*, 505 U.S. at 159).

The distinction between the two types of claims is further illustrated by *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). The Court granted a petition for a writ of certiorari in that case to address two questions:

> 1. Whether 23 U.S.C. §409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

> 2. Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.

Pet. at i, *Pierce County*, *supra* (No. 01-1229); see 535 U.S. 1033 (2002) (granting the petition for a writ of certiorari).

The Court decided the first question on the merits, finding that the statute was a "proper exercise" of Congress's power under the Commerce Clause. *Pierce County*, 537 U.S. at 146-148. The enumerated power claim in that case was advanced by a private party, see *id.* at 136, but the Court did not suggest there was any standing problem that would bar its consideration.

The Court noted that the private party had separately contended that the statute "violates the principles of dual sovereignty embodied in the Tenth Amendment because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action." *Pierce County*, 537 U.S. at 148 n.10. The Court noted that the Washington Supreme Court "did not address this precise argument, reasoning instead that the [statute] was beyond Congress' enumerated powers." *Ibid.* The Court declined to consider the question in the first instance and thus found it unnecessary to "address the second question on which we granted certiorari: whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question." *Ibid.* The Court in *Pierce County* thus

recognized that this particular standing question was relevant only to the state-sovereignty-oriented Tenth Amendment claim and not one based on the scope of Congress's Article I authority.[3]

3. The court of appeals said it was joining a "majority of [its] sister courts" in finding a lack of standing in this case, Pet. App. 14, but it failed to recognize that the decisions on which it relied all found standing lacking when private individuals attempted to assert Tenth Amendment claims of the commandeering and state-sovereignty variety. Such claims, the courts held, should be advanced by the States themselves. See *United States* v. *Hacker*, 565 F.3d 522, 524, 525-527 (8th Cir.) (considering on the merits criminal defendant's Commerce Clause challenge to Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901, *et seq.*, but finding he lacked standing on separate claim that the statute "violated the Tenth Amendment by compelling states to accept registrations from a federally mandated sex-offender program"), cert. denied, 130

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[3] In *Pierce County*, as here, the United States contended that the standing rule of *TVA* barred only claims that a federal statute "violates the Tenth Amendment, in the sense of invading a sphere of sovereignty reserved to the States or impermissibly interfering with the governmental structure of the States." U.S. Br. at 24, *Pierce County*, *supra* (No. 01-1229). The United States noted that while the Washington Supreme Court had "referred in passing in its decision to the Tenth Amendment and to [the federal statute's] effect on state sovereignty, its decision focused on whether [the statute] exceeds the permissible reach of Congress's Article I powers." *Id.* at 24-25 (internal citations omitted). "Once it is understood that Guillen's challenge to [the federal statute] involves alleged limitations on Congress's delegated powers rather than an alleged incursion on state sovereignty, it becomes clear that the Court may adjudicate Guillen's constitutional claim, even if neither the State nor the County joins in his challenge." *Id.* at 25.

S. Ct. 302 (2009); *Oregon* v. *Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009) (only States have standing to pursue "Tenth Amendment [c]oercion [c]laim"); *Brooklyn Legal Servs. Corp.* v. *Legal Servs. Corp.*, 462 F.3d 219, 234-235 (2d Cir. 2006) (*Brooklyn Legal Servs.*) (no standing for private party to assert Tenth Amendment claim that federal restrictions "intrude[] unacceptably on state sovereignty" by "interfer[ing] with the states' ability to fund legal assistance programs * * * and perform important functions on behalf of state judicial systems"), cert. denied, 552 U.S. 810 (2007); *Medeiros* v. *Vincent*, 431 F.3d 25, 28-29, 33-36 (1st Cir. 2005) (private party lacked standing to claim that interstate fishery management plan "constitute[d] an unlawful 'commandeering' of Rhode Island's legislative prerogatives under the Tenth Amendment"), cert. denied, 548 U.S. 904 (2006); *United States* v. *Parker*, 362 F.3d 1279, 1284-1285 (10th Cir.) (no standing for private party to claim that use of Assimilative Crimes Act, 18 U.S.C. 13, to prosecute state-defined gun offense in federal court "violates the Tenth Amendment because it interferes with the state's Second Amendment powers"), cert. denied, 543 U.S. 874 (2004).

When, by contrast, private parties contend that a statute to which they are subject was beyond Congress's enumerated powers to enact, each of those courts of appeals considers the claim on the merits without dismissing for lack of standing. See, *e.g.*, *United States* v. *Volungus*, 595 F.3d 1, 9 (1st Cir. 2010) (Congress acted within its authority in enacting 18 U.S.C. 4248: "When the federal government exercises any of the powers granted to it by the Constitution, it is not a valid objection that the exercise may bring with it some incidents of the police power."); *United States* v. *Tom*, 565 F.3d

497, 502-506, 508 (8th Cir. 2009) (same; statute "does not upset the delicate federal state balance mandated by the Constitution."); *United States* v. *Lue*, 134 F.3d 79, 85 (2d Cir. 1998) (rejecting defendant's Tenth Amendment challenge to statute that implemented international treaty against hostage taking: "Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material.") (citation omitted); *United States* v. *Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996) ("In light of our holding that congressional enactment of the [Child Support Recovery Act] does not violate the Commerce Clause, Mr. Hampshire's Tenth Amendment argument fails."), cert. denied, 519 U.S. 1084 (1997); *United States* v. *Mussari*, 95 F.3d 787, 791 (9th Cir. 1996) (rejecting Tenth Amendment challenge because "Congress act[ed] under one of its enumerated powers"), cert. denied, 520 U.S. 1203 (1997).

4. Notwithstanding the court of appeals' error, plenary review is not appropriate in this case. The court of appeals should be afforded an opportunity to reconsider the question in light of the position now taken by the government. In particular, since the court of appeals thought its standing ruling was compelled by *TVA*, Pet. App. 15, it should have an opportunity to revisit the question with a clear view of the nature of the Tenth Amendment claim actually at issue in that case.

Moreover, in a case decided after the one at issue here, the court of appeals demonstrated a correct understanding of the two types of Tenth Amendment claims and the related standing rules for each. In *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir. 2010), petition for cert. pending, No. 09-1205 (filed May 7, 2010), the court of appeals rejected on the merits a

criminal defendant's contention that SORNA "exceeded [Congress's] commerce clause authority," *id.* at 160, without any suggestion that the defendant lacked standing to make that claim. The court viewed differently the defendant's contention that "SORNA is unconstitutional because it compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment." *Id.* at 161. The court held that the defendant lacked standing to assert that distinct, state-sovereignty-oriented Tenth Amendment claim. *Id.* at 161-162 (citing *Hacker*, 565 F.3d at 525-526; *Brooklyn Legal Servs.*, 462 F.3d at 234-236; *Medeiros*, 431 F.3d at 33-36).

There is a reasonable likelihood that the court of appeals on remand will recognize that petitioner here, like the defendant in *Shenandoah*, has standing to contend that the statute under which she was prosecuted exceeds Congress's enumerated powers.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the position of the United States asserted in this brief.

Respectfully submitted.

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