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

BRIEF FOR THE UNITED STATES
SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner has standing to claim that 18 U.S.C. 229, which prohibits possession or use of a chemical weapon, 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 opinion (Pet. App. 26-35) and order (Pet. App. 36) of the district court denying petitioner's motion to dismiss the indictment are 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 petition for a writ of certiorari was granted on October 12,

2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of 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. Pet. App. 4-5.

Petitioner appealed her conviction and sentence on numerous grounds, including that Congress exceeded its authority under Article I of the Constitution in criminalizing the possession and use of chemical weapons. The court of appeals held that petitioner lacked standing to raise that claim. Pet. App. 1-24.

1. Concerned about the use of chemical weapons not only in conventional warfare but also by terrorists or others, the Senate approved and the United States ratified an international treaty that prohibited the development, possession, and use of chemical weapons by nations, private companies, and individuals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (Convention or Chemical Weapons Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45; 143 Cong. Rec. 5812 (1997). Member states, including the United States, pledged never to "use chemical weap-

ons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 39. Each member state was required to "adopt the necessary measures to implement its obligations under this Convention." *Id.* at 40. In particular, each member state was required to enact domestic legislation—"including * * * penal legislation"—that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Ibid.*

To fulfill its commitments under this treaty, Congress enacted the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-857 (enacting 22 U.S.C. 6701 *et seq.* and 18 U.S.C. 229 *et seq.*). The criminal provisions of the Act, which mirror the prohibitions in the Convention, make 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); see Pet. App. 39. A "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter" (such as a legitimate industrial, agricultural, medical, or pharmaceutical purpose) and "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A) and (7). A "toxic chemical" is a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A). See Convention Art. II, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. 282 (1993), 1974 U.N.T.S. at 327 (using same definitions). A person who violates the criminal provi-

sions of the Act may be fined, may be "imprisoned for any term of years," and may be subject to civil penalties. 18 U.S.C. 229A.

2. In 2005, petitioner learned that her husband was having an affair with a family friend, Myrlinda Haynes, and that Haynes had become pregnant as a result. Pet. App. 2. Petitioner "vowed revenge" and began harassing Haynes on the phone and through the mail. *Id.* at 2, 65.[1] Petitioner repeatedly phoned Haynes and made threatening statements like "'I [am] going to make your life a living hell,' and 'dead people will visit you.'" *Id.* at 48. Petitioner also sent Haynes harassing letters, including photos which "depicted Ms. Haynes'[s] face cut by some type of straight edge," and made disparaging remarks to Haynes's employer "in an attempt to have her fired." *Id.* at 65; see C.A. App. 299. Haynes reported this conduct to the local police, and in November 2005, petitioner was convicted of harassment in state court. Pet. App. 48, 64.

Petitioner then changed her tactics. From November 2006 through her arrest in June 2007, petitioner attempted to poison Haynes on 24 different occasions using highly toxic chemicals. Pet. App. 2; C.A. App. 278. Petitioner has an advanced degree in microbiology and was working for Rohm and Haas, a multinational chemical manufacturer. Pet. App. 2. Petitioner used her specialized scientific knowledge to "select unusually toxic chemicals" that would be harmful through topical exposure even if Haynes did not ingest them. *Id.* at 23. The first chemical, potassium dichromate, is a corrosive

[1] Although the presentence investigation report (PSR) was filed under seal in the court of appeals, petitioner included a copy of it in the appendix to her petition and filed it publicly in this Court. See Pet. App. 43-91.

chemical that destroys human tissue on contact and causes systemic poisoning and kidney and liver damage when absorbed. *Id.* at 52; C.A. App. 249, 251. The second chemical, 10-chloro-10H-phenoxarsine, is an arsenic-based specialty chemical that damages the central nervous system and brain when absorbed or ingested. Pet. App. 53; C.A. App. 238-239. Both chemicals are lethal in very small doses (less than two teaspoons). Pet. App. 2 n.1; C.A. App. 238-239, 251-253.

Over a period of eight months, petitioner repeatedly placed these dangerous chemicals on various surfaces Haynes regularly touched, such as Haynes's front door, car door handles, and mailbox. Pet. App. 2, 32. Petitioner understood that these chemicals could be toxic or lethal if swallowed or touched. *Id.* at 2, 22-24, 62; C.A. App. 199-201. For that reason, petitioner wore gloves when applying these chemicals. C.A. App. 364-365. Fortunately, the chemicals were visible to the naked eye, and Haynes noticed them and took care to avoid touching them or exposing her infant daughter to them. Pet. App. 2. On one occasion, however, Haynes accidentally touched some of the potassium dichromate and was burned. *Id*. at 54; C.A. App. 286. If Haynes's infant daughter had come into contact with even a few crystals of that chemical, it could have been fatal. C.A. App. 252-253.

Haynes called the local police to report this suspicious activity. Pet. App. 2. The police speculated that the substances Haynes observed might be cocaine and suggested that she clean her car more frequently. *Ibid.*; C.A. App. 284-285. The police then tested the substance found on the car and determined that it was not cocaine. C.A. App. 279-280. Haynes contacted local law enforce-

ment authorities more than a dozen times, but they did not take further action. *Id.* at 279.

After Haynes noticed that the chemicals had been placed in her mailbox, she notified her letter carrier, who referred the matter to the United States Postal Inspection Service. Pet. App. 3; C.A. App. 286-287. Postal inspectors placed surveillance cameras in and around Haynes's home, and they saw petitioner opening Haynes's mailbox and stealing her mail. Pet. App. 3, 49. They also saw petitioner place a rag containing a red powdery substance inside Haynes's car muffler and go back and forth between her car and Haynes's car with chemicals. *Id.* at 3, 49-51. Chemical analysis revealed that the red powder was potassium dichromate and that a white powder found on Haynes's home and car was 10-chloro-10H-phenoxarsine. *Id.* at 51-53. Upon further investigation, inspectors learned that nearly four pounds of potassium dichromate were missing from the Rohm and Haas facility where petitioner worked, and that the 10-chloro-10H-phenoxarsine was directly traceable to that facility. *Id.* at 3, 50-51, 53; C.A. App. 204-206.

Federal authorities obtained an arrest warrant for petitioner and search warrants for her home and car. Pet. App. 3. The police executed the warrants and discovered quantities of both chemicals and pieces of Haynes's mail. *Id.* at 3-4; C.A. App. 33. After she was arrested, petitioner waived her rights and acknowledged that she had stolen the 10-chloro-10H-phenoxarsine from her employer. Pet. App. 3. Petitioner later stated that she had obtained the potassium dichromate over the Internet. *Id.* at 2; see *id.* at 51 & n.2.

3. A grand jury in the Eastern District of Pennsylvania returned an 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 theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 4; J.A. 13-16. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authority in enacting Section 229. C.A. App. 46. She contended that "the charged statute 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." *Ibid.*[2]

The district court denied the motion. Pet. App. 27-28, 36. The court explained that the statute was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." *Id.* at 28.[3]

Petitioner entered a conditional guilty plea to all four counts of the indictment, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 5. The district court sentenced her to six years of imprisonment, to be followed by five years of supervised release, and imposed a fine and a restitution order. *Ibid.*; C.A. App. 382.

4. On appeal, petitioner renewed her argument that Congress lacked the authority under the Constitution to

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[2] Petitioner contended that Section 229 is invalid both on its face and as applied to her. See, *e.g.*, C.A. App. 42, 53. Because the standing analysis in this case is the same as to both claims, there is no need to distinguish between them for current purposes.

[3] Although the district court also suggested that the statute might be a valid exercise of Congress's Commerce Clause power, C.A. App. 100, it did not reach that issue because it determined that the statute was a valid exercise of the Treaty Power and the Necessary and Proper Clause authority, *id.* at 168.

enact 18 U.S.C. 229. Petitioner defined 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. Petitioner contended that Congress cannot rely on the Treaty Power to enact a statute without "another [independent] basis in the Constitution to do so." *Id.* at 19.

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." Gov't C.A. Br. 18 (citing *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920)). "As a consequence," the government explained, "that statute does not violate the Tenth Amendment by infringing on the states' reserved powers." *Ibid.*; see *id.* at 27.

Following oral argument, the court of appeals requested supplemental briefing on the question 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." J.A. 17-18. In response, the government acknowledged that it had not previously raised a standing objection but argued that under this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939), petitioner lacked standing "to assert an infringement of state sovereignty in violation of the Tenth Amendment." J.A. 19.

5. The court of appeals concluded that petitioner lacked standing to raise her constitutional claim. Pet. App. 11-16. The court framed the question as "whether private parties have standing to challenge a federal act

on the basis of the Tenth Amendment." *Id.* at 12. The court believed that it was bound to answer this question in the negative in light of this Court's statement in *TVA* that private utilities could not challenge the sale of electrical power by a federally chartered company under the Tenth Amendment. *Id.* at 12, 14-15. The court therefore "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 rejected petitioner's argument that she would have no recourse if the court found she lacked standing, stating that if a State "refuse[d] to prosecute a viable Tenth Amendment claim" a defendant could use the "local political processes to effect change in the state's policy of acquiescence." Pet. App. 16 n.8 (internal quotation marks omitted).[4]

6. Petitioner filed a petition for rehearing en banc, contending that the court of appeals erred in holding that she lacked standing to challenge her conviction on the ground that Congress lacked the authority under the Constitution to enact Section 229. Pet. for Reh'g En Banc 3-9. Petitioner stated that her "main argument" was that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution," and that her "Tenth Amendment argument" was

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[4] The court of appeals also rejected petitioner's arguments that Section 229 is unconstitutionally vague; that the warrants used to search her car and home were not supported by probable cause; and that the district court erred in applying a sentence enhancement because she used specialized knowledge to facilitate her crime. Pet. App. 16-24. Petitioner did not renew those arguments in her petition, and they are accordingly not before this Court.

"ancillary" to that claim. *Id.* at 6. The court of appeals denied the rehearing petition. Pet. App. 25.

SUMMARY OF ARGUMENT

Petitioner has standing to challenge her conviction on the ground that Congress exceeded its Article I authority in enacting 18 U.S.C. 229.

A. The court of appeals misapprehended the nature of petitioner's claim. Two different types of claims implicate the Tenth Amendment. The first type consists of claims that the federal government has interfered with a specific aspect of state sovereignty by, for example, commandeering state legislatures or executives. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). The second consists of claims that Congress exceeded its Article I authority in enacting legislation. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010); *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

Petitioner has raised only an enumerated-powers claim, not an interference-with-sovereignty claim. She contends that Congress lacked the authority under the Constitution to enact Section 229, and that by enacting legislation in excess of its enumerated powers, Congress trespassed upon areas reserved to the States by the Tenth Amendment. Petitioner does not argue that the federal government has impermissibly directed or frustrated the activities of state legislatures or executives regarding chemical weapons. Instead, she focuses on Congress's regulation of chemical weapons and whether that regulation is within Congress's authority.

B. Petitioner has standing to raise her enumerated-powers claim. To establish Article III standing, petitioner must show that she has a concrete and particular-

ized injury that is fairly traceable to the challenged government action and that likely would be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Petitioner meets those requirements. She has been prosecuted and sentenced under a federal criminal statute. She contends that Congress lacked the authority to enact that statute and that her conviction is therefore invalid. If a federal court agreed with petitioner, the remedy would be to overturn her conviction. Petitioner therefore has established Article III standing. Further, there is no prudential barrier to petitioner's standing here. Petitioner is raising her own 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. She is not asserting a State's sovereign right to set its own policy and conduct its own affairs.

The court of appeals' suggestion that a State must intervene in federal criminal prosecutions to raise enumerated-powers challenges on behalf of its citizens is directly contrary to this Court's decision in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), which established that a State generally cannot represent its citizens as *parens patriae*. Thus, the ruling of the court of appeals would leave the courts powerless to address claims that Congress exceeded its Article I authority, thereby denying effective recourse to defendants criminally prosecuted under statutes that are beyond Congress's authority to enact.

Other than the decision below, the government is not aware of any decision of this Court or of another court of appeals holding that a criminal defendant lacks standing to challenge the federal statute under which she was prosecuted on the ground that the statute exceeds the

scope of Congress's authority under Article I. At the same time, there are numerous decisions in both the criminal and civil context in which this Court has assumed that such standing exists and decided on the merits a private party's enumerated-powers challenge.

C. The court of appeals erroneously believed that it was bound to deny petitioner standing by this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939). The standing rule established in *TVA* is not applicable here, because it concerned a claim of impermissible interference with a specific aspect of state sovereignty, not an enumerated-powers claim.

Numerous decisions of this Court and the courts of appeals recognize the distinction, for standing purposes, between interference-with-sovereignty claims and enumerated-powers claims. These decisions confirm that, as a general matter, an individual may bring an enumerated-powers challenge to a statute that directly regulates that individual. Because petitioner does not raise an interference-with-sovereignty claim, this Court need not decide whether an individual may raise that distinct type of claim. But in the government's view, the *TVA* Court correctly held that only States or state officials have standing to raise such claims.

ARGUMENT

PETITIONER HAS STANDING TO ARGUE THAT 18 U.S.C. 229 EXCEEDS CONGRESS'S ARTICLE I AUTHORITY

Petitioner, a criminal defendant convicted under 18 U.S.C. 229, has standing to challenge her conviction on the ground that the statute exceeds the scope of Congress's authority under Article I. Petitioner has been prosecuted, convicted, and sentenced under Section 229. If her argument that Congress lacked Article I author-

ity to enact Section 229 were correct, petitioner's criminal conviction could not stand.

The court of appeals misapprehended petitioner's claim, analyzing it not as an enumerated-powers claim but as an interference-with-sovereignty claim that must be raised by a State.[5] But petitioner does not contend that the federal government has improperly directed or frustrated the activities of state officials; instead, she focuses entirely on Congress's authority to regulate individual conduct regarding chemical weapons. Because the challenged federal statute operates directly on petitioner to regulate her behavior, petitioner has standing to challenge it as unconstitutional. That conclusion is fully consistent with this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939), which held that private parties lack standing to raise interference-with-sovereignty claims because such claims properly belong to the States. The court of appeals' judgment therefore should be reversed.

A. Petitioner Has Brought Only An Enumerated-Powers Claim, Not An Interference-With-Sovereignty Claim

Determining whether an individual has standing to raise a claim "requires careful judicial examination" of the claim to determine "whether the particular [litigant] is entitled to an adjudication of the particular claim[] asserted." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Here, the court of appeals characterized petitioner's claim as a "Tenth Amendment challenge to § 229." Pet.

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[5] In its supplemental brief to the court of appeals, the United States argued that petitioner lacked standing to bring her enumerated-powers claim. Upon further reflection, the government concluded to the contrary that petitioner has standing to bring her claim. See U.S. Cert. Br. 9-16.

App. 11; see *id.* at 12, 14-15; see also J.A. 17-18 (court's letter asking parties whether petitioner has standing to argue "that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution"). That characterization, however, does not resolve the question whether petitioner has standing, because there are two different types of claims that potentially implicate the Tenth Amendment.

1. The Tenth Amendment provides that "[t]he 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. This Court has recognized two distinct types of claims that implicate Tenth Amendment interests.

The first type consists of claims that the federal government has intruded upon a specific aspect of state sovereignty by, for example, directing the conduct of state legislators or executives. This type of claim was considered in cases such as *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). In *New York*, the Court held that the Tenth Amendment forbids the federal government from "commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 161 (citation omitted). In *Printz*, the Court extended *New York*, prohibiting the commandeering of state executive branch officials. 521 U.S. at 933 ("The Federal Government may not compel the States to enact or administer a federal regulatory program." (quoting *New York*, 505 U.S. at 188)). See also *Reno* v. *Condon*, 528 U.S. 141, 151 (2000) (federal government may not "require the States in their sovereign capacity to regulate their own citi-

zens"). In such cases, although an enumerated power may give Congress authority over a subject, the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly interferes with state sovereignty. *Printz*, 521 U.S. at 924; *New York*, 505 U.S. at 160.

The second type of claim consists of claims that Congress lacks the authority to legislate in a certain area. The key question in those cases is whether the challenged federal statute is a valid exercise of "one of the powers delegated to Congress in Article I of the Constitution." *New York*, 505 U.S. at 155. This Court has considered this type of challenge on numerous occasions, in cases such as *Gonzales* v. *Raich*, 545 U.S. 1 (2005), which concerned the Commerce Clause power; *Sabri* v. *United States*, 541 U.S. 600 (2004), which concerned the Spending Clause power; *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which concerned Congress's authority to enforce the rights guaranteed by the Fourteenth Amendment; and *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), which concerned Congress's authority under the Necessary and Proper Clause. In some (but not all) of these cases, the Court has invoked the Tenth Amendment, explaining that 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." *New York*, 505 U.S. at 156; see also, *e.g.*, *Comstock*, 130 S. Ct. at 1962.

This Court has specifically distinguished between these two types of claims. For example, this Court re-

cently explained that it has "focused" its attention in the Tenth Amendment context on "laws that commandeer the States and state officials in carrying out federal regulatory schemes." *McConnell* v. *FEC*, 540 U.S. 93, 186 (2003) (citing *Printz* and *New York*), overruled in part on other grounds by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010). The Court "contrast[ed]" that type of claim with an enumerated-powers challenge to a federal statute that "regulates the conduct of private parties" and "imposes no requirements whatsoever upon States or state officials." *Ibid.* For that latter type of claim, the Court protects Tenth Amendment interests by "polic[ing] the absolute boundaries of congressional power under Article I." *Id.* at 187 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995)).

2. Petitioner has advanced only one type of "Tenth Amendment" claim—a claim that Congress lacks the authority to criminalize the possession and use of chemical weapons. She does not contend that Congress has improperly commandeered state officials or otherwise interfered with a specific aspect of state sovereignty.

Throughout this case, the gravamen of petitioner's claim has been that Congress lacks the authority to criminalize the possession and use of chemical weapons under 18 U.S.C. 229. In moving to dismiss the indictment, petitioner argued that "there is no basis in the Constitution to support the enactment of 18 U.S.C. § 229 or its application to the particularly localized facts of this case." C.A. App. 42. She stated that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," *id.* at 52 (quoting *Morrison*, 529 U.S. at 606), 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.[6] In support of that contention, petitioner also argued that Section 229 contains no "federal nexus" and that crimes like assault are "routinely handled by law enforcement in state prosecutions." *Id.* at 58-59.

In the district court, the government understood petitioner as raising an enumerated-powers challenge, and it argued in response that Congress validly enacted Section 229 to implement a treaty using its Necessary and Proper Clause authority. Gov't Resp. to Mot. to Dismiss Indictment 7-8, 2:07-CR-528 Docket entry No. 30 (E.D. Pa. Nov. 13, 2008). The district court resolved the claim on that basis, holding that Section 229 was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 28.

On appeal, petitioner renewed her contention that Congress lacked the authority to enact 18 U.S.C. 229. She again noted that Congress must have a source of authority in the Constitution for every law it enacts, Pet. C.A. Br. 9, and she contended that the Treaty Power and the Necessary and Proper Clause were insufficient to confer that authority without "another basis in the

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[6] See also C.A. App. 53 (arguing that "no conceivable basis in the Constitution exists that supports the enactment of 18 U.S.C. § 229"), 64 ("There is no valid basis in the Constitution supporting the enactment of 18 U.S.C. § 229 or its application to the alleged facts of this case."). In her reply brief in support of her motion to dismiss the indictment, petitioner defined the "essential question" before the court as "whether the federal government can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." *Id.* at 82.

Constitution," *id.* at 19. Petitioner also argued that Section 229 "contains no federal nexus," *id.* at 11 (internal quotation marks omitted); see *id.* at 27, and constitutes an "unjustified expansion of federal law enforcement into state-regulated domain," *id.* at 10-11. Petitioner's brief did not cite the Tenth Amendment to the Constitution.

In response, the government explained that Section 229 was enacted to comply with the Chemical Weapons Convention, a valid treaty that furthers important national and international interests, and that Congress has the authority to enact such legislation under the Treaty Power and the Necessary and Proper Clause. Gov't C.A. Br. 21-32 (relying on, *inter alia*, *Missouri* v. *Holland*, 252 U.S. 416 (1920)). Because Congress had the authority under the Constitution to enact Section 229, the government argued, that statute does not "violate the Tenth Amendment by expanding federal law enforcement 'into state-regulated domain.'" *Id.* at 23 (quoting Pet. C.A. Br. 10-11).

After the court of appeals dismissed petitioner's claim for lack of standing, petitioner attempted to further clarify her claim. She stated that her "main argument" is that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution," in enacting Section 229. Pet. for Reh'g En Banc 6. Thus, petitioner has consistently explained her "Tenth Amendment" challenge as a claim that Congress lacked the constitutional authority to enact Section 229.

Petitioner has never suggested that Section 229 is constitutionally infirm because it commandeers state legislative or executive officials or otherwise interferes with a specific aspect of state sovereignty. Nor has petitioner raised any other type of Tenth Amendment claim.

It is true that, in her rehearing petition, petitioner stated that she was "challeng[ing] the constitutionality of the chemical weapons statute on three grounds": (1) that "Congress acted outside of its enumerated powers" in enacting Section 229; (2) that the statute "require[s] no proof of [a] federal nexus"; and (3) that "the enactment violate[s] the Tenth Amendment of the Constitution." Pet. for Reh'g En Banc 2. Petitioner characterized her enumerated-powers challenge as "separate and apart from a Tenth Amendment challenge," *id.* at 4 n.3, but she also said that her Tenth Amendment argument was "not critical" and was "ancillary to [her] main argument that Congress acted outside of its enumerated powers," *id.* at 6. Before this Court, petitioner frames her claim as whether Section 229 "is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment." Pet. i; see *id.* at 14, 22; Pet. Reply 2. But neither in this Court nor the court of appeals has petitioner identified any way in which Section 229 would violate the Tenth Amendment except to be in excess of Congress's delegated authority under Article I.

The course of this litigation has made clear that petitioner's only Tenth Amendment claim is that Congress exceeded its authority in enacting Section 229 and, for that reason, legislated in an area traditionally reserved to the States. Petitioner has invoked the Tenth Amendment only in that context, not as a direct limitation on Congress's authority, but as a "confirm[ation] that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157. See, *e.g.*, Pet. C.A. Br. 18 ("[u]tilizing 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"). It is well settled that, if Congress has exercised a power delegated to it in the Constitution, it is not intruding upon powers reserved to the States. See, *e.g.*, *Comstock*, 130 S. Ct. at 1962; *New York*, 505 U.S. at 156. Thus, a conclusion that Section 229 is a valid exercise of the Treaty Power and the necessary and proper authority answers petitioner's Tenth Amendment objection.[7]

3. In holding that petitioner lacked standing, the court of appeals misunderstood the nature of petitioner's claim. The court correctly observed that petitioner "asserts that § 229 violates constitutional principles of federalism because it is not 'based on a valid exercise of constitutional authority.'" Pet. App. 7 (quoting Pet. C.A. Br. 10). But the court then characterized petitioner's claim more generally as "a Tenth Amendment challenge to § 229," and relying on that characterization, turned to precedents that concerned the distinct type of Tenth Amendment claim involving commandeering of state officials or other interference with a specific aspect of state sovereignty. *Id*. at 11-14. Based on those precedents, the court concluded that petitioner lacked standing to challenge her conviction on Article I grounds. *Id*. at 15.

That was error. As explained below, whether there is standing to raise a Tenth Amendment claim depends on whether Congress's action is challenged as exceeding

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[7] Petitioner's suggestion that Section 229 is constitutionally infirm because it lacks a jurisdictional element likewise does not raise any independent Tenth Amendment argument. There is no general requirement that federal criminal statutes have jurisdictional elements. Rather, the presence or absence of such an element is one factor to consider in determining whether Congress is validly exercising its Article I authority. See, *e.g.*, *Sabri*, 541 U.S. at 605, 609.

Congress's authority under Article I or impermissibly interfering with a specific aspect of state sovereignty by, for example, commandeering state officials. That is not to say that different standing principles apply to these distinct types of claims. To the contrary—the standing question in both contexts is resolved using the same Article III and prudential principles that apply in all cases. But the results differ, because the different types of claims involve different legal rights and implicate different considerations.

B. A Criminal Defendant Has Standing To Argue That The Statute Under Which She Is Being Prosecuted Was Beyond Congress's Article I Authority To Enact

Petitioner has been prosecuted, convicted, and sentenced under a federal statute that criminalizes the possession and use of chemical weapons. She contends that Congress lacked the authority under the Constitution to enact that statute and that her conviction therefore must be reversed. Petitioner has standing to raise that claim.

1. Under Article III of the Constitution, the federal judicial power is limited to actual "Cases" and "Controversies," U.S. Const. Art. III, § 2, meaning that the federal courts are confined to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968). The requirement of Article III standing "enforces the Constitution's case-or-controversy requirement," *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004), by ensuring that persons seeking to invoke the federal courts' jurisdiction have a sufficiently personal stake in the dispute to ensure "concrete adverseness," *Baker* v. *Carr*, 369 U.S.

186, 204 (1962). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

In order to establish Article III standing, a party must show that she has suffered an "injury in fact" that is concrete and particularized, and not hypothetical or speculative; that the injury is fairly traceable to the challenged action and not the result of the "independent action of some third party not before the court"; and that it is "likely" that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); see, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007). These three requirements constitute the "irreducible constitutional minimum" required to demonstrate standing. *Lujan*, 504 U.S. at 560.

As this Court has explained, "[w]hen the suit is one challenging the legality of government action or inaction," the showing required to establish standing "depends considerably" on whether the person seeking to establish standing is the "object of the action * * * at issue." *Lujan*, 504 U.S. at 561. If she is, then there is "ordinarily little question" that the government's action caused her injury and that a judgment invalidating that action would redress that injury. *Id.* at 561-562. But when the party's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult to establish." *Id.* at 562 (internal quotation marks omitted). In that context, whether the elements of standing are met may depend not on the actions of the party bringing the challenge but on "the response of the

regulated * * * third party" who is not before the court. *Ibid.*

Petitioner meets each requirement for Article III standing. Petitioner contends that her conviction is unconstitutional because Congress lacked the Article I authority to enact Section 229. See, *e.g.*, C.A. App. 42, 52; Pet. C.A. Br. 9-11; see pp. 16-20, *supra*. Petitioner's criminal conviction under 18 U.S.C. 229 constitutes an injury in fact. That alleged injury is actual and concrete: petitioner has been convicted and sentenced to a six-year term of imprisonment, to be followed by a five-year term of supervised release, and has been ordered to pay a fine and restitution. Pet. App. 5; C.A. App. 380-386 (judgment). Further, petitioner's alleged injury is directly traceable to the government's actions, because Congress's enactment of Section 229 provided the basis for her conviction in federal court. If petitioner's argument that Congress exceeded its Article I authority in enacting Section 229 were correct, her conviction would be reversed and her injury would be redressed. See, *e.g.*, *Lopez*, 514 U.S. at 552.

Petitioner therefore has demonstrated an actual, concrete injury fairly traceable to government action that would be redressed if her enumerated-powers challenge succeeded. Indeed, this Court has remarked that "[a]n incarcerated convict's * * * challenge to the validity of his conviction always satisfies 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).

2. Even when a litigant satisfies the Article III standing requirements, prudential considerations may counsel against the exercise of federal jurisdiction. See,

e.g., *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). For example, an individual "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*, 422 U.S. at 499. In addition to "the general prohibition on a litigant's raising another person's legal rights," prudential standing also encompasses "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" and the "requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). These principles, although "closely related" to Article III's case-or-controversy requirement, are "essentially matters of judicial self-governance," designed to protect the federal courts from deciding abstract questions that may be more suited to resolution by the political branches or to judicial resolution in a different case. *Warth*, 422 U.S. at 500; see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

There is no prudential barrier to adjudication of petitioner's enumerated-powers challenge to Section 229 in this case. Section 229 directly regulates private parties, making 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" a chemical weapon. 18 U.S.C. 229(a)(1).[8] Petitioner has been prosecuted under Section

[8] The statute prohibits "any person" from using or possessing chemical weapons, 18 U.S.C. 229, and it defines "person" to include any "State or any political subdivision," 18 U.S.C. 229F(5). But petitioner has never suggested that Section 229 violates the Tenth Amendment by including States and their subdivisions in its substantive provisions. In

229, and she is raising her own legal right to be free from prosecution under Section 229, not any rights of a third party. Petitioner has alleged a concrete and individualized injury—her conviction and sentence—and does not seek to raise a "generalized grievance[]" that is shared by other members of the public and is "most appropriately addressed in the representative branches." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Warth*, 422 U.S. at 499-500).[9]

In sum, petitioner is the appropriate litigant to pursue the claim that Section 229 exceeds Congress's Article I authority. "Where a party champions his 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 when the constitutional requisites are met." *Duke Power Co.*, 438 U.S. at 80-81.

3. The fact that petitioner has invoked the Tenth Amendment in her enumerated-powers challenge does not mean that her challenge must be advanced or joined by a State. Petitioner is not contending that Section 229 improperly regulates a State. By its terms, Section 229

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any event, petitioner would not have standing to raise a claim that Section 229 would be unconstitutional as applied to a State, because she would not suffer any injury from application of the statute to the State, and the State would be better positioned to challenge the statute's regulation of the State's activities.

[9] This case is unlike *Flores-Villar* v. *United States*, No. 09-5801 (argued Nov. 10, 2010), where the defendant lacks standing on prudential grounds because he wishes to raise his father's right to be free from impermissible gender discrimination, rather than his own rights. See U.S. Br. at 10-14, *Flores-Villar*, *supra*.

proscribes use or possession of chemical weapons; it does not "direct[] the State to enact a certain policy" or "to organize its governmental functions in a certain way." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Petitioner has invoked the Tenth Amendment not as a protection against commandeering of state officials or other interference with a specific sovereign interest of a State, but rather as a confirmation of the limits on Congress's authority under Article I to regulate private parties. See, *e.g.*, *New York*, 505 U.S. at 157.

In fact, a State would not have standing to intervene in a federal criminal prosecution of one of its citizens to challenge Section 229 as outside the bounds of Congress's Article I authority. As this Court explained in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), a State generally does not have standing to challenge federal legislation on behalf of one of its citizens. In *Mellon*, the Court refused to adjudicate a State's claim that a federal statute "constitute[d] an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States." *Id.* at 482. The Court explained that a State may not represent its citizens as *parens patriae* because those citizens "are also citizens of the United States," and "it is no part of [the State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Id.* at 485-486. The Court emphasized that "[i]n that field it is the United States, and not the State, which represents [citizens] as *parens patriae*." *Id.* at 486.

This Court has recently reiterated that *Mellon* "prohibits" a state from suing the federal government "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17

(2007); see also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). And the Court has repeatedly applied that principle to preclude States from raising claims belonging to individuals. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (State not permitted to raise due process and bill of attainder challenges to Voting Rights Act, because these provisions protect "individual persons and private groups," not States, and a State does not "have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government"); *Florida* v. *Mellon*, 273 U.S. 12, 16-17 (1927) (State may not challenge federal inheritance tax levied on individuals as inconsistent with Article I taxation authority, because the State has not "suffered a wrong furnishing ground for judicial redress").

Nor could a State raise in an individual criminal prosecution any independent interest of its own in challenging Section 229 as exceeding Congress's authority. A State has standing to challenge federal action that threatens its own distinct interests only when the federal action "inva[des] a legally protected interest" of the State, causing a concrete and particularized injury. *Lujan*, 504 U.S. at 560. A State suffers a cognizable Tenth Amendment injury when the federal government compels it to "enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. But Section 229 does not require States to take any such action.

When faced with a claim that a federal law exceeds Congress's authority, the Court has consistently required persons concretely affected by the law to sue, rather than allowing a State to sue on an "abstract ques-

tion of legislative power," *i.e.*, whether the legislation "fall[s] within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States." *Texas* v. *ICC*, 258 U.S. 158, 162-163 (1922). That is because an alleged harm to the State's abstract interest in its own sovereignty is not itself a concrete injury. See, *e.g.*, *Mellon*, 262 U.S. at 484-485 (Court lacked jurisdiction to consider "abstract questions of political power" regarding the effect of federal statute on state sovereignty); *New Jersey* v. *Sargent*, 269 U.S. 328, 337 (1926) (allegation that federal law requiring licenses for use of navigable waters "go[es] beyond the power of Congress and impinge[s] on that of the State * * * do[es] not suffice as a basis for invoking an exercise of judicial power").[10] Accordingly, only a criminal defendant like petitioner, and not a State, has standing to bring an enumerated-powers challenge to Section 229 in an individual criminal prosecution.

Because a State may not sue on behalf of its citizens, the court of appeals' view would leave the courts powerless to address claims that Congress exceeded its Article I authority and therefore leave a defendant who was prosecuted under a statute that was beyond Congress's authority to enact with little recourse. Contrary to the court of appeals' suggestion (Pet. App. 16 n.8), the indi-

[10] That is not to say that States may never bring an enumerated-powers challenge to a federal law. Whether a State has standing to bring such a claim depends on whether the law concretely affects the State. In the Spending Clause context, for example, federal statutes often place conditions on the States that choose to receive federal funds, and the States have standing to challenge those conditions as exceeding Congress's authority. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 205, 207-208 (1987).

vidual cannot seek recourse through the state political process because the State cannot intervene in federal court on her behalf, and any potential recourse through the federal political process is unlikely to provide any effective remedy for the individual's injury. For that reason as well, criminal defendants are properly afforded the opportunity to raise enumerated-powers challenges to the federal statutes under which they are convicted.

4. Federal defendants regularly contend that Congress has exceeded its enumerated powers in enacting the statutes under which they are convicted, and this Court routinely has decided those claims on the merits, without any suggestion that the defendants lacked standing to bring such challenges. See, *e.g.*, *Sabri*, 541 U.S. at 607-608 (rejecting a criminal defendant's argument that the federal bribery statute exceeded Congress's Spending Clause authority); *Lopez*, 514 U.S. at 567-568 (reversing a criminal conviction for possession of a firearm in a school zone because the statute exceeded Congress's Commerce Clause authority); *Perez* v. *United States*, 402 U.S. 146, 156-157 (1971) (rejecting a criminal defendant's Commerce Clause challenge to the federal loan-sharking statute); *Champion* v. *Ames*, 188 U.S. 321, 353-354 (1903) (rejecting a criminal defendant's Commerce Clause challenge to a statute prohibiting interstate trafficking in lottery tickets). The courts of appeals likewise have regularly decided criminal defendants' enumerated-powers challenges to their statutes of conviction, without raising any standing concerns.[11]

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[11] See, *e.g.*, *United States* v. *Larsen*, 615 F.3d 780, 784-786 (7th Cir. 2010) (Commerce Clause challenge to the Interstate Domestic Violence

These decisions, of course, do not reflect square or binding holdings on the standing question. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996). But the fact that this Court and the courts of appeals have repeatedly exercised jurisdiction in cases like this for at least a century evidences the courts' recognition that individual criminal defendants may bring such claims. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.") (citations omitted).

The courts' adjudication of the merits of these claims reflects the view that "[a]n incarcerated convict's * * * challenge to the validity of his conviction always satisfies

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Act), petition for cert. pending, No. 10-7278 (filed Oct. 25, 2010); *United States* v. *Wright*, 607 F.3d 708, 715-716 (11th Cir. 2010) (Commerce Clause challenge to 18 U.S.C. 922(g)); *United States* v. *Bowers*, 594 F.3d 522, 527-530 (6th Cir. 2010) (Commerce Clause challenge to 18 U.S.C. 2251(a) & 2252(a)(4)(B)), cert. denied, No. 10-5737 (Oct. 4, 2010); *United States* v. *McCloud*, 590 F.3d 560, 568 (8th Cir. 2009) (Commerce Clause challenge to 18 U.S.C. 2251(a)), cert. denied, No. 09-1177 (Oct. 4, 2010); *United States* v. *Rene E.*, 583 F.3d 8, 16-19 (1st Cir. 2009) (Commerce Clause challenge to 18 U.S.C. 922(x)(2)(A)), cert. denied, 130 S. Ct. 1109 (2010); *United States* v. *Hawkins*, 513 F.3d 59, 61 (2d Cir.) (Commerce Clause challenge to 18 U.S.C. 2423(b)), cert. denied, 128 S. Ct. 2488 (2008); *United States* v. *Latu*, 479 F.3d 1153, 1156 (9th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(g)), cert. denied, 552 U.S. 868 (2007); *United States* v. *Patton*, 451 F.3d 615, 620 (10th Cir. 2006) (Commerce Clause challenge to 18 U.S.C. 931(a)), cert. denied, 549 U.S. 1213 (2007); *United States* v. *Whited*, 311 F.3d 259, 264-272 (3d Cir. 2002) (Commerce Clause challenge to 18 U.S.C. 669); *United States* v. *Lue*, 134 F.3d 79, 85 (2d Cir. 1998) (Treaty Power and Necessary and Proper Clause challenge to 18 U.S.C. 1203).

the case-or-controversy requirement," *Spencer*, 523 U.S. at 7, and that, as a prudential matter, a criminal defendant is generally in the best position to mount an enumerated-powers challenge to her conviction. Although this Court has not directly faced a standing objection to a federal defendant's enumerated-powers claim, it has held that a state criminal defendant has standing to challenge a statute requiring segregated seating on interstate buses as exceeding the State's authority because it imposed an undue burden on interstate commerce, in violation of the Commerce Clause. See *Morgan* v. *Virginia*, 328 U.S. 373, 376-377 (1946). The Court explained that the defendant was the "proper person to challenge the validity of this statute as a burden on commerce" because the statute directly regulated where she could sit on the bus, and the "protection against burdens on commerce" therefore "[wa]s for her benefit." *Ibid*. The same logic applies here: Section 229 regulates the possession and use of toxic chemicals by private parties like petitioner, and she is therefore the proper person to challenge the statute as exceeding Congress's Article I authority.

That petitioner has standing here is supported by the numerous civil cases in which this Court also has decided on the merits individuals' claims that statutes regulating their conduct exceeded Congress's Article I authority. See, *e.g.*, *Comstock*, 130 S. Ct. at 1964-1965 (rejecting claim brought by individuals subject to federal civil commitment proceedings that statute authorizing such proceedings exceeded Congress's Article I authority); *Raich*, 545 U.S. at 15-22 (rejecting marijuana growers' and users' Commerce Clause challenge to federal laws criminalizing manufacture, distribution, and possession of marijuana); *Pierce County* v. *Guillen*, 537

U.S. 129, 147-148 (2003) (rejecting private party's Commerce Clause challenge to a federal statute precluding discovery or introduction at trial of documents compiled in connection with federal highway safety programs); *Morrison*, 529 U.S. at 607-627 (agreeing with a civil defendant who argued that a portion of the Violence Against Women Act exceeded Congress's Commerce Clause authority and remedial power under Section 5 of the Fourteenth Amendment).

These decisions, although again not square or binding holdings on the standing question, reflect an apparent recognition that an individual subject to imminent loss of liberty or property as the result of a federal statute that regulates her primary conduct has standing to argue the statute exceeded Congress's Article I authority. And an individual retains standing to bring such a claim even when, as part of the claim, the individual argues 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). In that instance, the Tenth Amendment simply confirms that Congress's authority is limited to that delegated to it in Article I of the Constitution, and any Tenth Amendment concerns are answered by concluding that the challenged federal action is a valid exercise of Congress's Article I authority. See *ibid*.

The government is not aware of any decision by this Court or a court of appeals, other than the decision below, that has held that a criminal defendant lacks standing to challenge her conviction on the ground that Congress exceeded its Article I authority in enacting the statute under which she was convicted. As explained above, such a decision would run counter to basic stand-

ing principles and erect an unprecedented obstacle to criminal defendants seeking to challenge their convictions on constitutional grounds. This Court therefore should hold that a criminal defendant has standing to argue that Congress exceeded its Article I authority in enacting the statute under which she was convicted.

C. The Court Of Appeals Erred In Relying On *TVA* And Other Decisions Involving Claims That Congress Commandeered State Officers Or Otherwise Interfered With A Specific Aspect Of State Sovereignty

The court of appeals concluded that petitioner lacked standing based on this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, *supra*. *TVA* is not applicable here, because the standing analysis in that case concerned an interference-with-sovereignty claim akin to a commandeering claim. The Court in *TVA* correctly held that only a State has standing to bring such a claim. But because petitioner does not raise such a claim, petitioner has standing under the familiar Article III and prudential principles described above.

1. In *TVA*, a group of private utilities sued the Tennessee Valley Authority, a corporation created by Congress that was selling low-cost electricity in competition with the private utilities. 306 U.S. at 127, 135; see 16 U.S.C. 831. Among other things, the utilities challenged the TVA's sale of electricity at wholesale to municipalities and cooperatives, which would then distribute the electricity further. *TVA*, 306 U.S. at 129, 136. The TVA's contracts with these distributors required them to agree to resell the power at specified retail rates. *Id*. at 129. The utilities contended that, by establishing certain resale rates in contracts with its distributors, the TVA was "indirect[ly] regulat[ing]" the rates

and service of distributors of power, and that regulation was an impermissible "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143; see *id.* at 136 (utilities claimed that the TVA's sale of electricity effectively constituted "federal regulation of the internal affairs of the states" in violation of the Tenth Amendment), 140-142 (utilities claimed that the TVA's sale of electricity interfered with system of state regulation of utilities). The utilities therefore 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." *Id.* at 135.

The Court rejected the utilities' Tenth Amendment challenge on two alternative grounds. First, the Court rejected the claim on the merits, explaining 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 appellants' business" but was "nothing more than an incident of competition." *TVA*, 306 U.S. at 144; see *ibid.* ("The sale of government property in competition with others is not a violation of the Tenth Amendment."). Second, the Court remarked that the private utilities lacked standing to raise the Tenth Amendment objection in any event. 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 explained that "there is no objection to the [TVA's] operations by the states," and even "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.[12]

The utilities had also challenged the TVA's operations on a variety of other grounds. As relevant here, they also argued that the statute creating 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 was "a plain attempt" by Congress "to exercise a power not granted to the United States." *TVA*, 306 U.S. at 135-136; see *id.* at 120 (utilities' argument that "[b]oth the statutory scheme and the administrative plan are plainly attempts, in the guise of exercising the implied power to improve streams for navigation, to exercise power not granted but forbidden to the Federal Government"). The Court addressed that enumerated-powers claim separately from the utilities' "Tenth Amendment" challenge, and it rejected the claim on the distinct ground that the utilities could not sue based on "damage consequent on competition, otherwise lawful." *Id.* at 140.[13]

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[12] Although the dissenting Justice referred to the utilities as "public utilities," 306 U.S. at 148 (Butler, J., dissenting), the record makes clear that they were privately owned companies. See, *e.g.*, Appellants' Br. at 61-64, *TVA*, *supra* (No. 27) (describing nature of the utilities' business); Gov't Br. at 5, *TVA*, *supra* (No. 27) (describing the utilities as "fourteen privately owned corporations engaged in some phase of the business of generating, transmitting, and selling electricity").

[13] The district court decision affirmed by the Supreme Court in *TVA* similarly distinguished between these two different constitutional claims. The court first addressed the utilities' claim that the TVA statute was beyond Congress's enumerated powers. *Tennessee Elec. Power Co.* v. *TVA*, 21 F. Supp. 947, 958-959 (E.D. Tenn. 1938), aff'd, 306 U.S. 118 (1939). The court decided this claim on the merits, without suggesting that the utilities faced any standing barrier in raising it. The court concluded that Congress enacted the TVA statute "for

2. The court of appeals in this case held that petitioner lacked standing to argue that Section 229 exceeded Congress's constitutional authority because the court viewed itself as bound by this Court's statement in *TVA* that private utility companies "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. In the court of appeals' view, *TVA* stands for the general proposition 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. Because petitioner "d[id] not even attempt to argue that her interests are aligned with those of a state," the court concluded that she "lack[ed]

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purposes within its constitutional powers," and that the TVA statute was "an appropriate means to accomplish these legitimate ends." *Id*. at 959.

In a separate portion of the opinion, the district court addressed the utilities' claim 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." *TVA*, 21 F. Supp. at 959-960. The court noted that the States in which the TVA operated had 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." *Id*. at 960. The court determined that the private utilities were "not authorized to object on behalf of the states" and concluded 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." *Ibid*. In so holding, the court observed that it would be a "strange doctrine that acts authorized by a sovereign state constitute interference with its sovereign rights because of the fact that they are also authorized by the Federal Government." *Ibid*.

standing to pursue her Tenth Amendment challenge to § 229." *Id.* at 15.

TVA does not bar petitioner from asserting her enumerated-powers challenge here. The portion of *TVA* addressing a private party's standing to raise a Tenth Amendment claim addressed a different type of claim, involving unwarranted interference with a specific aspect of state sovereignty. The private utilities argued that TVA was "regulat[ing] * * * the internal affairs of the states" by effectively dictating how the States would be able to exercise their sovereign power to set intrastate utility rates. 306 U.S. at 135-136. That claim bore a resemblance to those addressed more recently in cases such as *New York* and *Printz*.[14] When the Court in *TVA* found that the private parties lacked standing to assert their Tenth Amendment claim, it was referring only to that claim. See *id.* at 143-144. The Court concluded that when the claim is an interference with a specific aspect of state sovereignty, only the State or state officials have standing to raise the claim. *Id.* at 143.

Petitioner is not advancing a claim based on interference with a specific aspect of state sovereignty such as the claim the Court found that private parties lacked standing to bring in *TVA*. She does not contend that 18 U.S.C. 229 unconstitutionally dictates how Pennsylva-

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[14] *TVA* did not involve a commandeering challenge, but instead involved a claim that the federal government interfered with state regulation in the sphere of authority reserved by the Constitution to the States. This Court has subsequently limited the scope of such claims under the Tenth Amendment. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But the claims at issue in *TVA* parallel commandeering claims because they involved an alleged interference with a specific aspect of state sovereignty, rather than the reach of particular enumerated powers under Article I.

nia must exercise its regulatory authority over toxic chemicals. Nor could she, because Section 229 places no restrictions on whether or how a State criminalizes use of toxic chemicals as weapons. Instead, petitioner argues that the statute was enacted in excess of Congress's Article I powers. See pp. 16-20, *supra*.

The *TVA* Court found that the utilities lacked standing because they attempted to raise a claim predicated on the States' interests. Here, petitioner's claim asserts her own right to be free from prosecution under a criminal statute that she alleges Congress lacked the authority under Article I to enact. Allowing petitioner to raise such a claim is fully consistent with *TVA*, because the *TVA* Court found the absence of state parties significant only with respect to the utilities' claim that the TVA was interfering with the States' regulatory authority over electricity rates. 306 U.S. at 144. The *TVA* Court separately considered the utilities' enumerated-powers challenge and rejected that challenge on other grounds. *Id*. at 140. Because petitioner's claim is fundamentally different from the interference-with-sovereignty claim at issue in *TVA*, and does not raise the third-party standing concerns animating the Court's decision in *TVA*, *TVA* does not bar the adjudication of petitioner's claim here.[15]

[15] The *TVA* Court's conclusion that the utilities lacked standing to raise their enumerated-powers challenge does not mean that petitioner lacks standing here. The Court's rejection of the utilities' challenge was based on its prior decisions holding that a party may not sue for "damage consequent on competition, otherwise lawful," 306 U.S. at 140; it was not based on any third-party standing barrier. In any event, this Court has recognized that standing doctrine has evolved since *TVA*. As the Court has explained, *TVA* required a litigant to demonstrate the invasion of a "'legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute

3. In holding that petitioner lacked standing to raise her Tenth Amendment claim, the court of appeals stated that it was joining a "majority of [its] sister courts." Pet. App. 14. But the issue those courts considered was whether a private party has standing to claim that federal law directs or interferes with the activities of the State or state officials in a manner that intrudes on state sovereignty, not whether a private party has standing to challenge a statute directly regulating her conduct as exceeding Congress's enumerated powers. In the decisions relied upon by the court below, the courts held that claims that Congress commandeered state officials or otherwise interfered with a specific aspect of state sovereignty should be advanced by the States themselves, rather than by private parties.[16] In none of those deci-

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which confers a privilege,'" an inquiry which "goes to the merits," whereas the Court's modern standing doctrine focuses on whether the litigant has alleged a concrete and particularized injury that would be redressed by a favorable decision, without regard to the likely success of that claim. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-154 (1970) (quoting *TVA*, 306 U.S. at 137-138).

[16] See, *e.g.*, *United States* v. *Hacker*, 565 F.3d 522, 524, 525-527 (8th Cir.) (finding that a criminal defendant lacked standing to raise the claim that sex offender registration law "violated the Tenth Amendment by compelling states to accept registrations from a federally mandated sex-offender program"), cert. denied, 130 S. Ct. 302 (2009); *Oregon* v. *Legal Servs. Corp.*, 552 F.3d 965, 972-973 (9th Cir. 2009) (remarking that "[o]nly States have standing to pursue claims alleging violations of the Tenth Amendment by the federal government," but then concluding that the State lacked standing because the injury claimed was to the State's citizens and the State "has no independent claim of injury"); *Brooklyn Legal Servs. Corp.* v. *Legal Servs. Corp.*, 462 F.3d 219, 234-235 (2d Cir. 2006) (finding no standing for a private party to assert a Tenth Amendment claim that federal restrictions "intruded unacceptably on state sovereignty" by "interfer[ing] with the states' ability to fund legal assistance programs * * * and perform important

sions did a court of appeals rely on *TVA* to deny a criminal defendant standing to raise an enumerated-powers challenge to his conviction.

Relying on this Court's characterization of Congress's enumerated powers and the Tenth Amendment as "mirror images" of one another, petitioner suggests (Pet. Reply 9) that there is no relevant difference between enumerated-powers claims and interference-with-sovereignty claims for standing purposes. She is mistaken. The Court's "mirror image" language does not equate the two types of claims. Instead, it simply restates the "truism" that any powers not delegated to the federal government are retained by the States. *New York*, 505 U.S. at 156 (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). This Court has explained that even when Congress acts within its enumerated powers, the Tenth Amendment precludes it from exercising its authority in certain ways, *i.e.*, by commandeering state

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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 an interstate fishery management plan "constitute[d] an unlawful 'commandeering' of Rhode Island's legislative prerogatives under the Tenth Amendment"); *United States* v. *Parker*, 362 F.3d 1279, 1284-1285 (10th Cir.) (no standing for a private party to claim that use of the Assimilative Crimes Act to prosecute state-defined gun offenses in federal court "violates the Tenth Amendment because it interferes with the state's Second Amendment powers"), cert. denied, 543 U.S. 874 (2004).

Some courts nevertheless have found standing for individuals to raise claims alleging that Congress impermissibly commandeered state officials or otherwise interfered with a specific aspect of state sovereignty. See, *e.g.*, *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 703-704 (7th Cir. 1999) (individual has standing to contend that 18 U.S.C. 922(g)(9) impermissibly compels state officers to implement a federal program), cert. denied, 528 U.S. 1116 (2000).

legislative and executive officials. See *Condon*, 528 U.S. at 149.

Indeed, this Court and the courts of appeals have distinguished between the two types of Tenth Amendment claims for standing purposes. In *Pierce County*, *supra*, this Court granted certiorari to address two questions: (1) whether 23 U.S.C. 409, which protects certain documents compiled or collected in connection with federal highway safety programs from being discovered or admitted in federal or state trials, is a valid exercise of Congress's Article I authority; and (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 Commerce Clause power, without suggesting that the private party bringing the claim lacked standing. *Pierce County*, 537 U.S. at 146-148. On the second question presented, the private party had contended that the statute violated the Tenth Amendment by "prohibit[ing] 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." *Id.* at 148 n.10. But the court below had failed to address that argument, because it "reason[ed] instead that the [statute] was beyond Congress' enumerated powers." *Ibid.* This Court therefore declined to address the standing question in the first instance. In so holding, the Court necessarily recognized that the standing question was

relevant only to the interference-with-sovereignty claim and not the private party's claim regarding the scope of Congress's Article I authority.

Similarly, in *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), a criminal defendant challenged the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.* (SORNA), as both exceeding Congress's Article I authority and commandeering state officials in violation of the Tenth Amendment. *Id.* at 156, 161-162. Analyzing the two claims separately, the court of appeals first rejected on the merits the 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 then held that the defendant lacked standing to raise his second claim, *i.e.*, that SORNA "compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment." *Id.* at 161. See also, *e.g.*, *United States* v. *Hacker*, 565 F.3d 522, 524-527 (8th Cir.) (adjudicating a Commerce Clause challenge to SORNA on the merits but holding that the individual lacked standing to argue that SORNA "violated the Tenth Amendment by compelling states to accept [sex offender] registrations"), cert. denied, 130 S. Ct. 302 (2009). These decisions reflect the common-sense recognition that whether a private party has standing to bring a claim implicating Tenth Amendment rights depends on whether the claim seeks to vindicate the rights of that party or of the State.

4. Because petitioner does not raise a Tenth Amendment challenge premised on a claim that Congress commandeered state officials or otherwise interfered with a

specific aspect of state sovereignty, this Court need not address whether only States may bring such challenges. The *TVA* Court already has answered that question, however, and the rule it announced is correct: Private parties generally lack standing to raise claims that a federal statute violates the Tenth Amendment by commandeering a State or its officials or otherwise interfering with a specific aspect of state sovereignty. This rule is consistent with the decisions of this Court since *TVA*, in which such claims have been raised exclusively by States or state officials.[17]

First, if a private party asserts an injury from an alleged federal commandeering of state officials or other interference with a specific aspect of state sovereignty, the redressability of such an injury may well depend on the State's actions. Although the federal government "cannot compel the States to enact or enforce a federal regulatory program," *Printz*, 521 U.S. at 935, States are free to implement federal law voluntarily, see *id*. at 936 (O'Connor, J., concurring) ("Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may volun-

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[17] See, *e.g.*, *Condon*, 528 U.S. at 147 (suit brought by State and its Attorney General); *Printz*, 521 U.S. at 904 (suit brought by county law enforcement officers); *New York*, 505 U.S. at 153 (suit brought by the State and two counties); *Gregory* v. *Ashcroft*, 501 U.S. 452, 456 (1991) (suit brought by state judges).

Prior to *TVA*, the Court in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), addressed on the merits a private company's claims that portions of the Social Security Act exceeded Congress's Article I authority and that "the states in submitting to it have yielded to coercion" by the federal government. *Id.* at 578. The Court did not address the question of standing, and its discussion of the merits did not clearly distinguish between the private company's enumerated-powers claim and its claim of state coercion. See *id.* at 578-597.

tarily continue to participate in the federal program."); see also *New York*, 505 U.S. at 166-167.

Second, even if a private party could establish a particularized and redressable injury as a result of alleged federal commandeering of state officials or interference with a specific aspect of state sovereignty, prudential standing considerations would bar consideration of the claim because the claim is premised on the rights of a third party—the State. The *TVA* rule reflects the general principle that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties." *Warth*, 422 U.S. at 499. It also allows the courts to avoid adjudicating "rights which those not before the Court may not wish to assert" and to ensure "that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co.*, 438 U.S. at 80; see, *e.g.*, *Hacker*, 565 F.3d at 524, 527.

Relying on this Court's statement in *New York* that the Tenth Amendment "ultimately secures the rights of individuals" (505 U.S. at 181), petitioner suggests (Pet. Reply 9-10) that "[p]rivate citizens have standing to raise Tenth Amendment claims when the federal government exceeds its proper sphere of authority." She is mistaken. *New York* did not address private-party standing, and the quoted language addressed whether state officials' prior consent to a Tenth Amendment violation precludes state officials from later claiming such a violation. 505 U.S. at 181-183. The Court determined that a State could bring a Tenth Amendment challenge notwithstanding its prior consent because the Constitution "divides authority between federal and state governments for the protection of individuals," not for the benefit of States. *Id.* at 181-182. But it does not follow

that private citizens may sue to assert a State's rights; citizens generally must rely on their elected officials to determine which claims to pursue for the benefit of the citizenry. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-833 (1985). Indeed, allowing private parties to bring Tenth Amendment interference-with-sovereignty challenges would infringe the sovereignty of the affected States by permitting individual citizens, rather than state officials, to set state policy and to invoke the power of federal courts in ways that may be adverse to a State's interests. Accordingly, only a State has standing to raise such challenges under the Tenth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. Section 8 of Article I of the United States Constitution provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> To borrow Money on the credit of the United States;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
>
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
>
> To establish Post Offices and post Roads;
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
>
> To constitute Tribunals inferior to the supreme Court;
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in

the Government of the United States, or in any Department or Officer thereof.

2. Section 2 of Article II of the United States Constitution provides, in pertinent part:

The President * * * shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur * * *

3. The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. 18 U.S.C. 229 provides:

Prohibited activities

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

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

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

(b) EXEMPTED AGENCIES AND PERSONS.—

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

(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

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

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

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

(1) takes place in the United States;

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

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

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

whether the property is within or outside the United States.

5. 18 U.S.C. 229A provides:

Penalties

(a) CRIMINAL PENALTIES.—

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

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

(b) CIVIL PENALTIES.—

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

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

(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under sub-

section (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property that was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

6. 18 U.S.C. 229F provides:

Definitions

In this chapter:

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

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

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

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

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(6) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term "purposes not prohibited by this chapter" means the following:

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

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

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

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

(8) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production,

and regardless of whether they are produced in facilities, in munitions or elsewhere.

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

(9) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of Title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 70502(b) of title 46, United States Code.