No. _____

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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April 9, 2010

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QUESTION PRESENTED

Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute and her resulting conviction as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

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The district court's unpublished bench ruling, denying petitioner's motions to suppress and dismiss, is reproduced at App. 26–35.

JURISDICTION

The court of appeals rendered its decision on September 17, 2009, and denied a timely petition for rehearing and rehearing en banc on December 10, 2009. App. 25. On March 9, 2010, Justice Alito extended the time for filing a petition for certiorari to and including April 9, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution states:

> 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.

U.S. Const. amend X.

The legislative powers of Congress are enumerated in Article I, section 8 of the United States Constitution, but do not include any general police power. *See* U.S. Const. art. I, § 8.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (commonly referred to as the "Chemical Weapons Convention") are reproduced at App. 37–42.

To fulfill its obligations under the Chemical Weapons Convention, Congress enacted penal legislation codified at Title 18, section 229 of the United States Code.

Title 18, section 229(a) of the United States Code, provides in pertinent part:

> (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; * * * *

Title 18, section 229F(1)(A) of the United States Code, in pertinent part, defines a "chemical weapon" as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."

Title 18, section 229F(8)(A) of the United States Code, in pertinent part, defines "toxic chemical" as

"any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."

STATEMENT OF THE CASE

This case arises out of a domestic dispute that arose from a married woman's discovery that her closest friend was pregnant with her husband's child. In the wake of that traumatic discovery, the wife tried to injure, but not kill, the former friend by spreading toxic chemicals on her car door handles, front doorknob, and mailbox. Instead of referring this domestic dispute to local law enforcement authorities, the United States Attorney decided that a federal prosecution was in order and indicted petitioner on the novel theory that, because the assault involved chemicals, petitioner had violated a federal statute implementing the United States' treaty obligations under an international arms-control agreement that prohibits nation states from producing, stockpiling, or using chemical weapons.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 40-year-old woman who, until she was incarcerated, lived with her husband, Clifford Bond, and their adopted child, in the small borough of Lansdale, Pennsylvania. App. 67. Lansdale is located about 28 miles northwest of Philadelphia and has a population of approximately 17,000. Within the community, Ms. Bond is known by her nickname "Betty." She has a masters degree in business administration and a masters degree of science in microbiology. App. 74–75.

Ms. Bond lived in Lansdale since 2001 and has been married to her husband for more than 14 years. App. 67. Before marrying, Ms. Bond lived most of her life in Barbados, where she was raised by her mother. App. 66. As a young child, Ms. Bond's father had multiple affairs and fathered other children outside of marriage. *Id.* When she was eleven, Ms. Bond's parents divorced, and Ms. Bond has not seen her father for more than 17 years. *Id.*

In 1995, Ms. Bond moved with her mother and sister to the United States, where she became close friends with Myrlinda Haynes, a woman who had also immigrated from Barbados. App. 66. Ms. Bond, as well as her mother and sister, came to consider and treat Ms. Haynes as virtually a member of the family. Ms. Haynes owned a home in the nearby municipality of Norristown. App. 56, 69.

In 2006, Ms. Haynes announced that she was pregnant. Unable to bear a child of her own, Ms. Bond was happy and excited for her closest friend. App. 2. But this initial excitement did not last. Ms. Bond later learned that the child's father was her own husband. *Id.* The news of this double betrayal, which brought back painful memories of her father's infidelities, caused Ms. Bond to fall apart. She started losing her hair and suffered intense periods of depression, anxiety, and occasional panic. App. 72–73.

In the midst of her emotional breakdown, Ms. Bond became fixated on punishing Ms. Haynes and making her "life a living hell." App. 48. Ms. Bond stole a bottle of 10-chloro-10-H phenoxarsine (an arsenic-based chemical) from her employer, the chemical manufacturer Rohm & Haas, and she

purchased a vial of potassium dichromate through Amazon.com from a photography equipment supplier. App. 2. Both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal. App. 2 n.1. Ms. Bond knew that the chemicals were irritants and believed that, if Ms. Haynes touched the chemicals, she would develop an uncomfortable rash. App. 58.

According to the government, between November 2006 and June 2007, Ms. Bond went to Ms. Haynes's home on several occasions and spread chemicals on Ms. Haynes's car door handle and mailbox, and on the doorknob of her apartment's front door. App. 2. None of these attempted assaults were successful or particularly sophisticated. *Id.* In fact, Ms. Haynes avoided harm because she always noticed the easy-to-spot chemicals, except once when she sustained a small chemical burn to her thumb that "required repeated rinsing with water." App. 54. This is the only physical injury that Ms. Haynes suffered. *Id.* Although it is possible that the chemicals could cause death at sufficiently high doses, the undisputed evidence shows that Ms. Bond had no intent to kill Ms. Haynes. App. 57–58, 60–61.

When Ms. Haynes became aware that someone was spreading chemicals on her car door handle and in her mailbox, she complained to the local police and to the postal inspection service. In response, postal inspectors installed surveillance cameras in and around Ms. Haynes's home. App. 3. The cameras eventually captured Ms. Bond opening Ms. Haynes's mailbox, stealing a business envelope, and stuffing potassium dichromate inside the muffler of

Ms. Haynes's car. *Id.* On June 7, 2007, postal inspectors arrested Ms. Bond and executed search warrants on her house and car. They then took Ms. Bond into custody, where she signed a statement admitting that she had taken chemicals from Rohm & Haas. *Id.*

Ms. Bond's arrest was a shock to her friends and family, who believed that the attempted assaults were completely out of character. App. 68–72. An expert later performed a mental health evaluation on Ms. Bond and concluded that she had "committed the crimes [that] resulted in her arrest while suffering from a significantly reduced mental capacity" resulting from an "intense level of anxiety and depression." App. 73. The expert also opined that Ms. Bond was "not likely to recidivate." *Id.*

B. The Federal Indictment

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. While there certainly would be a role for local prosecutors to exercise appropriate prosecutorial discretion, no one would dispute that Ms. Bond's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see* 18 Pa. Cons. Stat. § 2702, and harassment. *See* 18 Pa. Cons. Stat. § 2709. Indeed, Ms. Bond accepted full responsibility for her actions and was willing to plead guilty and face whatever punishment her community was prepared to mete out. Ms. Bond's defense counsel accordingly urged the federal authorities to transfer the case to local law

enforcement for prosecution and punishment under state law. That request was denied.

An Assistant United States Attorney instead prosecuted Ms. Bond under a novel theory that she had violated 18 U.S.C. § 229(a)(1), a federal statute implementing the United States' treaty obligations under the 1993 Chemical Weapons Convention. App. 37–42. That treaty, formally entitled the "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction," is an arms-control agreement intended to address the proliferation of weapons of mass destruction and to prohibit nation states from using chemical weapons. App. 37 (Preamble). The treaty embodies a pledge by its signatory states never to develop or use chemical weapons, to destroy any existing chemical weapon stockpiles, and to avoid militarizing chemicals or using riot control agents as a method of warfare. App. 39 (Article I). As the International Committee of the Red Cross has explained, the treaty reinforces the 1924 Geneva Protocol prohibiting chemical and biological warfare, and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." ICRC Advisory Serv. on Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR8F. The treaty's Article VII requires state signatories to enact domestic legislation prohibiting persons in their territories from engaging in activities that the treaty prohibits participating states from undertaking. App. 40–42.

The United States ratified the Chemical Weapons Convention on April 25, 1997, and implemented associated legislation through Public Law No. 105-277, Executive Order 13128, and the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771. Consistent with its obligations under Article VII of the Convention, Congress also enacted penal legislation, codified at 18 U.S.C. § 229, granting federal courts authority over any statutory violations occurring within the United States. *See* 18 U.S.C. § 229(c). The statute's section 229(a)(1) provides that "it shall be unlawful for any person knowingly ... to ... acquire ... own, possess, or use ... any chemical weapon." *Id.* § 229(a)(1). The statute defines "chemical weapon" to mean any "toxic chemical and its precursors, except where intended" for "any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(1)(A), (7)(A). In turn, the statute broadly defines "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A).

Section 229 thus sweeps broadly to criminalize any conduct involving a toxic chemical used for any non-peaceful purpose. Unlike other federal statutes that address assaultive conduct, section 229 includes no requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault have an effect on interstate commerce, that the victim be a person or institution with recognized federal status, or that some other legitimate federal interest be involved. *See, e.g.*, 18 U.S.C. §§ 111–115,

1951, 2111, 2113, 2114.3, 2332a. The statute appears to be somewhat unique insofar as it includes no requirement that the government prove a federal interest as an element of the offense.

Ms. Bond's assault against her husband's paramour did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the Assistant United States Attorney decided to prosecute Ms. Bond under 18 U.S.C. § 229. On September 5, 2007, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Ms. Bond with two counts of knowingly acquiring, transferring, receiving, retaining, or possessing a chemical weapon that is "a toxic chemical" not intended "to be used for a peaceful purpose" within the meaning of 18 U.S.C. § 229F(7)(A). *See* App. 4. The grand jury's indictment also charged Ms. Bond with two counts of mail theft in violation of 18 U.S.C. § 1708.

C. The Proceedings Below

In the district court Ms. Bond moved to suppress certain evidence and to dismiss the two chemical weapons counts under 18 U.S.C. § 229(a)(1). Ms. Bond argued that 18 U.S.C. § 229 exceeded the federal government's enumerated powers, violated bedrock federalism principles guaranteed under the Tenth Amendment, and impermissibly criminalized conduct that lacked a nexus to any legitimate federal interest. App. 7. She also argued that the statute should be struck down as unconstitutionally vague, and contended that the affidavits used to support the search

warrants failed to establish probable cause. *See* App. 4, 7.

On November 19, 2007, the district court denied Ms. Bond's motions. App. 36. In a ruling from the bench, the district court accepted the government's argument that 18 U.S.C. § 229 did not violate federalism principles because the statute "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [t]o comply with the provisions of a treaty." App. 28. The district court also ruled that the statute was not impermissibly vague, and held that the search warrants were properly issued. *See* App. 28–30.

On December 5, 2007, Ms. Bond pleaded guilty to all four counts of the indictment, but reserved her right to appeal the district court's ruling on her pretrial motions to dismiss and suppress. *See* App. 46–47. On June 3, 2008, the district court held a sentencing hearing. At that hearing, it enhanced Ms. Bond's offense level under the sentencing guidelines based on a determination that, although she was only a low-level technician at Rohm & Haas, she had used a "special skill" in selecting chemicals that were toxic through topical exposure. *See* App. 5. The district court then sentenced Ms. Bond to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and restitution in an amount of $9,902.79. *See id.* (Had Ms. Bond been convicted under state law for aggravated assault, she likely would have faced a prison sentence of between 3 and 25 months. *See* 18 Pa. Cons. Stat. § 2702(a)(4); 204 Pa. Code § 303.13.)

Ms. Bond filed a timely appeal with the U.S. Court of Appeals for the Third Circuit. *See* App. 1. The court of appeals recognized that Ms. Bond's Tenth Amendment claim raised important issues concerning the scope of Congress's authority under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 2, to effectuate the federal treaty power. *See* App. 9–10. Describing the question as an issue of first impression, the Third Circuit acknowledged that it was unclear how far treaty-implementing legislation may intrude into areas over which the states possess primary authority. *See id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). The court of appeals also recognized that Ms. Bond's Tenth Amendment claim would require the court to "wade into the debate over the scope and persuasiveness of" this Court's 1920 decision in *Missouri v. Holland*, 252 U.S. 416 (1920). App. 10. It noted the "significant scholarly debate" over whether *Holland* was correctly decided and "mounting interest for reconsideration of the rationale for *Holland*'s holding." App. 10 & n. 4.

The Third Circuit ultimately declined, however, to reach the merits of Ms. Bond's constitutional arguments. Instead, it chose to resolve the case on grounds never raised by any of the parties. In particular, the Third Circuit reached the startling conclusion that a criminal defendant convicted under a federal statute lacks standing to challenge that statute as beyond Congress's power to enact or otherwise inconsistent with the Tenth Amendment. *See* App. 14. The lower court thus held that Ms. Bond had no standing to challenge 18 U.S.C. § 229, even though she argued that her indictment and conviction were unlawful because, as applied to her,

the statute impermissibly exceeded Congress's delegated authority.

In reaching this counterintuitive conclusion, the Third Circuit observed that the "courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." App. 12. The court of appeals recognized that the Seventh and Eleventh Circuits, relying on *New York v. United States*, 505 U.S. 144 (1992), have held that the "Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals," and so individuals have standing to raise Tenth Amendment objections. App. 13 (quoting *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999)). Nonetheless, the Third Circuit joined other circuits in deeming itself bound by this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). In the Third Circuit's view, the "holding of *Tennessee Electric*" directly applies to the facts of Ms. Bond's case and is therefore "binding irrespective" of the Court's more recent precedents. App. 15. Accordingly, recognizing that only this Court enjoys the prerogative of overruling its own precedents, the Third Circuit held that a private party lacks standing to pursue a Tenth Amendment challenge to a federal statute, "absent the involvement of a state or its officers as a party or parties" to the litigation. App. 14.

The Third Circuit deemed it significant that the state was "notably absent" from Ms. Bond's challenge and that Ms. Bond had not argued that her interests were aligned with those of the state.

See App. 15. The court reasoned that denying Ms. Bond the right to challenge the constitutionality of the federal statute under which she was convicted would not deprive her of a meaningful remedy. Instead, according to the Third Circuit, if a state "refuses to prosecute a viable Tenth Amendment claim, the citizens of the state may have recourse to local political processes to effect change in the state's policy of acquiescence." App. 16 n.8 (quoting *Medeiros v. Vincent*, 431 F.3d 25, 35 (1st Cir. 2005)). The Third Circuit never addressed the bedrock principle that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S. at 182. Nor did it address Ms. Bond's practical argument that state officials lack the resources and interest to protect individual citizens, like Ms. Bond, from improper federal prosecutions.

The court of appeals denied a timely petition for rehearing and rehearing en banc on December 10, 2009. *See* App. 25. This petition follows.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three reasons. *First*, the Third Circuit's decision deepens a long-standing, well-recognized conflict in the courts of appeals concerning whether a private party convicted under a federal criminal statute has standing to challenge the statute as unconstitutional as beyond Congress's enumerated powers and inconsistent with the Tenth Amendment. *Second*, the Third Circuit's decision misconstrues this Court's precedents as creating improper standing barriers to parties who are not raising generalized grievances or arguments that uniquely belong to the state as sovereign, but who are instead suffering concrete, particularized injury from being prosecuted and incarcerated under federal statutes that exceed constitutional bounds. *Third*, the question presented raises an important, recurring issue. The Court's intervention is required to restore a judicial check on the improper federalizing of state and local crimes by providing much-needed guidance on the circumstances in which defendants have standing to challenge their convictions under unconstitutional federal legislation.

I. The Third Circuit's Decision Deepens An Acknowledged Split In Authority Among The Courts of Appeals.

As the Third Circuit expressly recognized below, and as other courts have also recognized, the "courts of appeals are split over whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." App. 12; *see also United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009) (discussing split in authority); *Lomont v. O'Neill*,

285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (noting unsettled and "uncertain" state of the law with "appellate and district court cases on both sides of the issue"). This well-recognized conflict within the lower courts means that, in some circuits, criminal defendants can mount Tenth Amendment challenges to convictions obtained under federal statutes, while in others, similarly situated criminal defendants have no standing to argue that the very statute under which they have been convicted is unconstitutional and beyond Congress's power to enact.

The root of this lower-court confusion is this Court's seventy-one-year-old decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). In that case, the Court rejected a challenge by public utilities to the generation and sale of electric power by the Tennessee Valley Authority, in which the utilities claimed that the Authority's actions could not be upheld "without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143. In a single sentence that has become an enduring source of controversy, this Court intimated that only a state or its officials had standing to raise a Tenth Amendment claim of intrusion into state sovereignty. *Id.* at 144 ("appellants, absent the states or their officers, have no standing"). Whether that sentence was "essential to" the Court's "holding and thus binding," *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006), or merely "confusing dicta" overtaken by subsequent decisions, is the subject of vigorous disagreement among the lower courts. *See* Ara B. Gershengorn, *Private Party Standing to*

Raise Tenth Amendment Commandeering Challenges, 100 Colum. L. Rev. 1065, 1073 (2000).

On one side of the divide, two circuits—the Seventh Circuit and the Eleventh Circuit—have permitted private parties to challenge federal statutes as unconstitutional under the constitutional principles embodied in the Tenth Amendment. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703–04 (7th Cir. 1999); *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.6 (11th Cir. 1982); *see also Metrolina Family Prac. Group v. Sullivan*, No. 90-2320, 1991 WL 38691, at *1 (4th Cir. Mar. 25, 1991) (per curiam) (permitting plaintiffs to "assert that the medicare provisions infringe upon state sovereignty under the Tenth Amendment"). These courts have recognized that, when asserting a Tenth Amendment claim, a private party is not necessarily asserting an undifferentiated generalized grievance or seeking to enforce the rights of the state qua state, but rather asserting her own rights to be free from the constraints of unconstitutional federal legislation. *Gillespie*, 185 F.3d at 703 (the Tenth Amendment "nominally protect[s] state sovereignty" but "ultimately secures the rights of individuals"). Relying on *New York v. United States*, 505 U.S. 144 (1992), and emphasizing developments in this Court's standing jurisprudence, these courts have recognized the bedrock principle that the "Constitution divides authority between federal and state governments for the protection of individuals." *Id.* at 181. More directly, in these circuits, criminal defendants do not face the almost unimaginable retort that they do not suffer a sufficiently individualized injury in fact when they are

sentenced to prison for a crime under a statute that Congress arguable lacks authority to enact. The idea that the state that could have prosecuted the individual under its police power—but not the incarcerated individual—has standing borders on the absurd, but it is the law in a majority of circuits.

The approach taken by the Seventh and Eleventh Circuits stands in direct conflict with the Third Circuit's decision below and with decisions from five other courts of appeals holding that private parties do not have standing to challenge federal statutes under the Tenth Amendment. *See United States v. Hacker*, 565 F.3d 522, 525–27 (8th Cir. 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971–72 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234–35 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 33–36 (1st Cir. 2005); *United States v. Parker*, 362 F.3d 1279, 1284–85 (10th Cir. 2004). Few, if any, of these courts have embraced this counterintuitive conclusion with enthusiasm. But they view themselves as constrained by the Court's decision in *Tennessee Electric.*

Like the Third Circuit below, these other courts of appeals have recognized that standing rules have evolved since *Tennessee Electric.* *See* App. 16; *see also Brooklyn*, 462 F.3d at 236 (recognizing that "construing *New York* to diminish the weight" of *Tennessee Electric*'s "reasoning is one possible reading of the case"). Nonetheless, they have largely declined to analyze the constitutional principles undergirding the Court's standing doctrine. Instead, they have concluded that no analysis is required because they are bound by *Tennessee Electric.*

Noting that the Court has not overturned *Tennessee Electric* and that there is "no directly contradictory authority," *Hacker*, 565 F.3d at 526, these courts have declared that they are bound by precedent to deny standing to private parties challenging federal statutes under the Tenth Amendment. *See* App. 14. In reaching this conclusion, they have relied on this Court's oft-repeated admonition that when a precedent has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving" to this Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This reliance on *Shearson* underscores that this acknowledged and deep split among the courts of appeals can only be resolved by the Court's intervention.

Confirming that this division in authority is both significant and real, seven years ago this Court granted *certiorari* in *Pierce County v. Guillen*, 537 U.S. 129 (2003), to address the precise issue raised in this case—namely, "whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." After the parties briefed that question on its merits, the Court ultimately declined to resolve the issue because it was not addressed in the court of appeals' decision and did not have to be reached in light of the other question presented. *Pierce County*, 537 U.S. at 148 n.10. Since *Pierce County*, the split in authority among the lower courts has only deepened. *See, e.g.*, *Brooklyn*, 462 F.3d at 236. The reasons compelling this Court's review are thus even stronger now than

they were in 2003. Moreover, the stakes here—an individual's ability to challenge the deprivation of her liberty as compared to the privileged status of transportation safety records in state court—are significantly greater.

II. The Third Circuit's Decision Misconstrues This Court's Precedents.

In addition to deepening an existing conflict among the courts of appeals, the decision below misconstrues this Court's *Tennessee Electric* decision. Regardless whether *Tennessee Electric*'s discussion of standing is relevant when a party brings an undifferentiated, generalized grievance about federal intrusions into the prerogatives of state government, or when a case implicates a unique attribute of state sovereignty (such as the location of the state capital), the decision does not apply to deny standing to private parties who have suffered concrete, particularized injury because they are being prosecuted under an unconstitutional federal statute.

This Court has long expressed concern about attempts by private parties to convert the judiciary "into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). The Court has therefore distinguished between litigants who allege concrete, personalized injury from those who assert merely an "undifferentiated, generalized grievance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Flast v. Cohen*, 392 U.S. 83, 88 (1968); *see also Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007) (denying private parties

standing to raise Tenth Amendment claim because they alleged only an "undifferentiated, generalized grievance"). A plaintiff who raises "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 601 (2007) (plurality opinion) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992)). Similarly, even if a party satisfies Article III's requirements, there may be prudential reasons to deny standing if the party is resting his claim to relief on the legal rights and interests of third parties. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–13 (2004).

But this Court has also recognized that, when a plaintiff has a particularized stake in the litigation and is asserting her own legal rights, there is no standing bar insulating federal statutes from judicial review. *See Lance*, 549 U.S. at 442. Nor does it make any difference whether a state has consented or failed to object to overreaching federal intrusions into areas of traditional state concern. While one can imagine issues that uniquely concern the State's sovereign interests, the interest in not being deprived of liberty by a federal statute that exceeds Congress's enumerated powers is surely not among them. The Constitution "does not protect the sovereignty of the States for the benefit of the States or state governments as abstract legal entities"—to the contrary, "the Constitution divides authority

between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181–82 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

The United States Solicitor General recognized this fundamental point in his merits brief in *Pierce County v. Guillen*, 537 U.S. 129 (2003). *See* Brief for the United States, *Pierce County* (No. 01-1229), 2002 WL 1560236. In doing so, the Solicitor General articulated a position in tension with the position taken by the government in the proceedings below.

The Solicitor General argued in *Pierce County* that *Tennessee Electric* did *not* deprive the private party of standing to plead a Tenth Amendment violation. In the Solicitor General's view, the private party had standing because the party was not raising a generalized grievance about a federal statute's inference with state sovereign prerogatives. Instead, the gravamen of the private party's complaint was that the statute exceeded "the permissible reach of Congress's Article I powers" because it was unrelated to "any legitimate federal interest." Brief for the United States, *Pierce County* (No. 01-1229), 2002 WL 1560236, at *25. The Solicitor General observed that this Court has "adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the State where the regulatory activity took place raised no objection to the statute." *Id.* (citing *United States v. Lopez*, 514 U.S. 549 (1995); *Perez v. United States*, 402 U.S. 146 (1971)). And he specifically noted that, because the federal statute operated

"directly on individual litigants" (in that case, by depriving them of a state-created right to obtain certain information), "adversely affected individual litigants" had standing to "raise a constitutional challenge." *Id.* at 27.

The principles recognized by the Solicitor General in *Pierce County* apply with even greater force here. Ms. Bond is not raising an undifferentiated, generalized grievance concerning the conduct of government or complaining broadly that a federal statute interferes with state prerogatives. Her concern is not some abstract idea that the state should take greater umbrage at a federal intrusion. Instead, she is raising the most concrete, particularized objection imaginable: she should not be locked in federal prison for six years for allegedly violating a chemical-weapons statute that, as applied to her conduct, greatly exceeds Congress's enumerated powers and is unrelated to any legitimate federal interest. Because there can be no dispute that the federal statute has directly caused Ms. Bond particularized harm—it is hard to imagine a more particularized injury in fact—she is an "adversely affected" litigant with standing to challenge the statute as unconstitutional under the Tenth Amendment.

III. The Third Circuit's Decision Raises Important Constitutional Issues That Can Be Resolved Only By This Court.

Apart from resolving a well-entrenched circuit split and correcting the Third Circuit's doctrinal departures, the Court's review is needed more broadly to clarify the circumstances in which criminal defendants have standing to challenge

federal criminal statutes. As the Third Circuit recognized, Ms. Bond has raised serious questions concerning the constitutionality of 18 U.S.C. § 229(a). *See* App. 9–10. But those questions will never be resolved, and the statute will continue to be applied unconstitutionally, if Ms. Bond and other defendants lack standing to challenge their convictions on constitutional grounds.

There is persistent concern, voiced in a variety of contexts, that the federal government is federalizing local and traditional state crimes. *See, e.g.*, Matthew H. Blumenstein, Note, *RICO Overreach: How The Federal Government's Escalating Offensive Against Gangs Has Run Afoul Of The Constitution*, 62 Vand. L. Rev. 211, 217 (2009); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). The growth of federal power in the area of criminal law creates unnecessary strains on the federal justice system while sapping the ability of states to "exercise discretion in a way that is responsive to local concerns." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995). Federal criminal statutes can also create "dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 646 (1997).

For these reasons and others, members of this Court "have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so." *United States v. Morrison*, 529 U.S. 598, 636 n.10 (2000) (Souter, J., dissenting). And the Court has policed impermissible federal encroachments on state authority over "traditionally local criminal conduct." *Jones v. United States*, 529 U.S. 848, 858 (2000) (barring federal prosecution of arson because "arson is a paradigmatic common-law state crime"); *Lopez*, 514 U.S. at 561 n.3 (invalidating statute federalizing the crime of possessing firearms near schools in part because area is one of traditional state concern).

This vigilance is especially important where, as here, the expansion of federal criminal law is one in which state officials may well acquiesce and cannot be relied upon to protect the interests of their citizens. *See New York*, 505 U.S. at 182 (noting "powerful incentives" that might lead state officials "to view departures from the federal structure to be in their personal interests"). The Third Circuit asserted that Ms. Bond still has a meaningful remedy because "the citizens of th[e] state may have recourse to local political processes to effect change" in the state's failure to object to her conviction. App. 16 n.8. But that assertion simply cannot be reconciled with the real-world circumstances of this case, or almost any other case involving a federal criminal prosecution.

No one can reasonably expect states or their citizens to rise up to challenge the constitutionality of Ms. Bond's unlawful conviction. Unlike federal statutes that impinge on a state's prerogatives, a state has few incentives to object to federal laws that serve to relieve a state from its responsibilities. *See Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is ... the business of the States") (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). In particular, as state budgets are constrained, state governments may well prefer to allow the federal government to take responsibility for prosecuting and punishing local crimes and to take over the state's obligations to administer "private justice between the citizens of the same state." The Federalist No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Because states have an incentive to acquiesce in the federalization of state and local crimes, denying criminal defendants standing to challenge the constitutionality of the federal statutes under which they are prosecuted threatens to upend the constitutional balance and leave unchecked expansions in federal criminal law.

The Third Circuit's decision below vividly illustrates this threat. Ms. Bond's failed assault on her husband's paramour is precisely the type of domestic dispute that should have been handled by local authorities with an appreciation for the local community's views on the condign punishment for the crimes that Ms. Bond committed. Decisions in this case should not have been made by a federal prosecutor under a far-fetched theory that Ms. Bond's assault violated a federal statute implementing the United States' obligations to

prevent the proliferation of chemical and biological weapons. Moreover, in denying Ms. Bond standing to challenge this obvious overreach, the Third Circuit avoided addressing what it acknowledged was an "issue[] of first impression" and the subject of "significant scholarly debate" over "how far" federal treaty-implementing legislation "may reach into an area over which states possess primary authority." App. 9–10 & n.4. That outcome not only misconstrues this Court's precedents, but it effectively ensures that substantial departures from our constitutional scheme will never be efficiently remedied.

The Third Circuit's decision should not be allowed to stand. Instead, the Court should grant review, so it may reverse and remand for the lower court to conduct a full and proper consideration of Ms. Bond's weighty constitutional arguments.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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