

JUL 20 2010

No. 09-1227

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONERS

The government's brief confesses error and acknowledges that the court of appeals was wrong to deny Ms. Bond standing to challenge the federal statute under which she was convicted. This Court should therefore grant Ms. Bond's petition and accept the government's suggestion that the judgment below cannot stand.

The Court should not, however, accept the government's proposed remedy—a summary order that grants, vacates, and remands (“GVR”) for further consideration. The government's GVR proposal ignores that this is not an ordinary confession of error case for at least two reasons: *First*, the error that the government belatedly recognizes goes to the courts' Article III jurisdiction and specifically to petitioner's standing. Because standing is an issue that courts must consider *sua sponte* and notwithstanding the parties' agreement, it is not a matter on which the court of appeals may simply reverse course in light of the government's concession. *Second*, and relatedly, the court of appeals reached its conclusion based on both its reading of this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), and its invocation of the principle reflected in *Rodriguez de Quijas v. Shearson*, 490 U.S. 477 (1989), that it is not for the lower courts to anticipate the overruling of this Court's precedents.

In these circumstances, a GVR is inappropriate and not likely to produce anything other than further delay. While there has been debate about the proper use of the GVR power, we are not aware

of any case remanding for reconsideration in light of a confession of error when the issue the court of appeals must revisit is a standing question and when the lower court has indicated that it considers itself bound by this Court's precedent. Granting a GVR in these circumstances would go far beyond the "most questionabl[e]" category of cases where the Court has previously been willing to GVR in light of a government confession of error. *Stutson v. United States*, 516 U.S. 177, 182 (1996) (Scalia, J., dissenting). The far better course is either to summarily reverse the decision below or to consider the continuing validity of *Tennessee Electric* upon plenary review.

I. The Parties Agree That The Third Circuit's Decision Should Not Be Allowed To Stand.

Both sides agree that the Third Circuit's decision is wrong and should not be allowed to stand. In a dramatic reversal of position, the government now concedes that Ms. Bond has standing to challenge the federal statute under which she was prosecuted as beyond Congress's enumerated powers and inconsistent with the Tenth Amendment. See U.S. Br. 6. As the government's brief explains, the Third Circuit's decision misconstrues *Tennessee Electric* and overlooks other relevant precedent. *Id.* at 6–16. The government thus embraces the premise of Ms. Bond's petition: when an individual is "subject to loss of liberty or property as the result of a federal statute regulating her primary conduct," there is no standing bar insulating the federal statute from judicial review. *Id.* at 12.

The judgment below should therefore be reversed. Because Ms. Bond has standing to challenge the federal statute under which she was convicted, this case should be sent back to the court of appeals with instructions to resolve the serious constitutional claims that Ms. Bond has raised.

II. The Court Should Summarily Reverse The Judgment Below Or, In The Alternative, Grant Plenary Review.

Although the government concedes that the decision below is manifestly incorrect, it urges the Court to afford the Third Circuit an opportunity to reconsider its decision. U.S. Br. 16–17. According to the government, merely because it has conceded error, there “is a reasonable likelihood that the court of appeals on remand will recognize” that Ms. Bond has standing. But, with all respect, that assessment ignores both that the issue is one of Article III standing, as to which the views of the parties do not relieve the court of its independent obligation to ensure that standing exists, and that the Third Circuit stated that it found standing absent based on its reading of precedent from this Court that the court of appeals was not free to ignore. An open-ended remand would do nothing to resolve confusion within the lower courts, and the “reasonable likelihood” is that the Third Circuit would reinstate the decision it believed itself to be duty-bound to reach. A GVR under these circumstances would produce only inequitable delay.

1. Contrary to the government’s assertions, there is no reasonable basis for presuming that the court of appeals will simply change its standing ruling without more substantial direction from this

Court. The Third Circuit fully considered the question of Ms. Bond's standing, after raising the issue *sua sponte* and requesting supplemental briefing. It then found standing absent, determined that its decision was compelled by *Tennessee Electric*, and removed any doubt on that score by invoking *Shearson*. There have been no "intervening developments" in this Court's jurisprudence that "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Nor has the government conceded ultimate error and moved to vacate Ms. Bond's conviction. Instead, the government has merely revised its legal position on the threshold question of standing.

In seeking a remand without reversal, the government effectively urges the Court to "assume that a court of appeals ... adopted a legal position only because the government supported it." *Stutson*, 516 U.S. at 183 (Scalia, J., dissenting). But that assumption makes no sense in the context of this case. Standing is a jurisdictional prerequisite that the court of appeals had an "independent obligation" to resolve. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009). As the Third Circuit recognized in an opinion authored by the same judge who authored the decision below, standing cannot be conceded or conferred by agreement of the parties. See *Golden v. Government of V.I.*, 47 Fed. Appx. 620, 622 (3d Cir. 2002) (Ambro, J.); *Beck v. Alabama*, 447 U.S. 625, 632 n.6 (1980) ("the parties of course cannot confer jurisdiction ... by agreement"). Because standing is jurisdictional, the government's

concession of error is not “reasonably probably entitled to deference” or even “potentially determinative.” *Lawrence*, 516 U.S. at 172.

Moreover, the government’s new position that *Tennessee Electric* is not controlling would not be a new argument for the Third Circuit; it is the same position that Ms. Bond unsuccessfully advocated below. The Third Circuit rejected that position, not because it deferred to the government, but because it deferred *to this Court* and viewed itself as bound by *Tennessee Electric*. App. 15 (citing *Shearson*, 490 U.S. at 484). Similarly, although the government argues that *Pierce County v. Guillen*, 537 U.S. 129 (2003), confirms that Ms. Bond has standing, see U.S. Br. 12–13, the Third Circuit already considered and rejected that argument. In the Third Circuit’s view, *Pierce* “does no more than indicate an interest of at least four Justices in *Tennessee Electric*’s binding status.” App. 15.

Because there have been no intervening developments in the Court’s jurisprudence, the government suggests that the Third Circuit might be inclined to reverse course in light of its recent decision in *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010). In that case, the court of appeals assumed (without discussion) that a criminal defendant enjoyed standing to challenge a federal statute as exceeding Congress’s commerce clause authority, but also held that the defendant lacked standing to bring a Tenth Amendment challenge to a requirement that state law enforcement accept registrations from federally mandated sex offender programs. See App. 17.

As the government acknowledges, the distinctions it seeks to draw in *Shenandoah* are at best implicit. See U.S. Br. 17. *Shenandoah* does not mention either *Tennessee Electric* or the Third Circuit's decision below. Moreover, although it is true that *Shenandoah* rejected the defendant's standing to bring a Tenth Amendment challenge to the statute's alleged infringement on state sovereignty, when it came to the defendant's commerce clause claim, the Court did not characterize that challenge as a Tenth Amendment claim or even note any question of standing. Instead, *Shenandoah*'s discussion of the commerce clause challenge involved the type of "drive-by" exercise of jurisdiction that the Court has indicated lacks any precedential force. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) ("drive-by jurisdictional rulings' ... should be accorded 'no precedential effect'" (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998))). Accordingly, there is no basis for assuming that the Third Circuit would give weight to *Shenandoah*'s unexplained exercise of jurisdiction, let alone view that decision as grounds for reconsidering its interpretation of *Tennessee Electric*. In fact, the full court of appeals denied Ms. Bond's request for rehearing en banc a mere two months before the *Shenandoah* panel issued its decision. App. 25.

A GVR in this case would thus put the Third Circuit in an untenable position. To reach the correct legal result, the court of appeals would either have to assume that the Court's GVR is a de facto summary reversal, *but see Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001), or else view the government's change in position as sufficient for the court to admit

that it was flatly wrong in concluding that *Tennessee Electric* (and *Shearson* principles) required it to deny standing. Putting the Third Circuit in that position is inconsistent with the respect owed to the lower courts of appeals. *Lawrence*, 516 U.S. at 610. When the issue is standing and the court of appeals has already indicated that it is bound by this Court's precedent, a GVR is a non-sequitur.

2. A GVR also will not resolve the confusion among the lower courts. As both the government and Ms. Bond argued below, and as the Third Circuit concluded, the “court 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 government suggests that this split can be resolved by drawing a distinction between Tenth Amendment claims that challenge a statute as exceeding Congress’s enumerated powers, and those that challenge “unwarranted intrusions into state sovereignty.” U.S. Br. 6. But that distinction eluded the government below and is not explicit in any of the lower court cases cited by the government.

Courts have not distinguished between “state-sovereignty-oriented Tenth Amendment” claims and claims “based on the scope of Congress’s Article I authority.” *Id.* at 14. They have instead focused on whether *Tennessee Electric*’s single-sentence suggestion that private parties lack standing to press Tenth Amendment challenges is binding or merely “confusing dicta” overtaken by subsequent decisions. Pet. 15 (citing cases).

Like the court below, other courts of appeals have held that *Tennessee Electric* is binding and,

applying *Shearson*, have concluded that only this Court has the prerogative to clarify that precedent. See *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 236 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005). These courts have held without qualification that, under *Tennessee Electric*, “private parties lack standing to raise a Tenth Amendment claim.” *Hacker*, 565 F.3d at 526. They have thus adopted the same position that the government championed below (as it has in other cases), urging the Third Circuit to “follow *Tennessee Electric* in holding that there is no private party standing to assert a violation of the Tenth Amendment.” Gov’t C.A. Supp. Br. 4–5; see also Appellee’s Br., *Joe’s v. Norton*, No. 03-16520, 2003 WL 22767945, at *41–43 (9th Cir. Oct. 14, 2003); Appellant’s Br., *United States v. Pitner*, No. 01-30055, 2001 WL 34094788, at *31–32 (9th Cir. Aug. 21, 2001); Appellee’s Br., *Gillespie v. City of Indianapolis*, No. 98-2691, 1998 WL 34077576, at * 19 (7th Cir. Oct. 29, 1998).

Courts that have reached the opposite conclusion, holding that *Tennessee Electric* is not binding, likewise have not relied on the government’s proposed distinction between enumerated and sovereignty-oriented claims. In *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), for example, the Seventh Circuit addressed what the government might characterize as an enumerated powers claim, holding that a former police officer enjoyed standing to challenge a federal statute prohibiting persons convicted of domestic violence offenses from possessing firearms (the police officer lost his job because, under the

statute, he was unable to carry a firearm). Although the government contested standing and relied on *Tennessee Electric*, the Seventh Circuit concluded that *Tennessee Electric* was not controlling and that “standing barriers have been substantially lowered” as a result of more recent precedent. *Id.* at 700.

Similarly, this Court’s decisions cast substantial doubt on whether the Third Circuit on remand would be willing to cabin *Tennessee Electric* in the manner proposed by the government. In *New York v. United States*, the Court held that, because the Tenth Amendment’s text is “essentially a tautology,” whether “Congress has invaded the province reserved to the States by the Tenth Amendment is ... a question that must be answered by inquiring whether Congress has exceeded the limits of authority bestowed upon it by Article I of the Constitution.” *Gillespie*, 185 F.3d at 704 (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)). As the Court explained, the two inquiries are “mirror images” and, therefore, contrary to the government’s suggestion, there is no such thing as a separate category of undefined “state sovereignty” claims under the Tenth Amendment that do not also require addressing whether the federal statute is “authorized by one of the powers delegated to Congress in Article I of the Constitution.” U.S. Br. 10 (quoting *New York*, 505 U.S. at 155); *see also United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) (expressing concern over confusion relating to the Tenth Amendment). Nor, of course, is it obvious why a citizen would lack standing to assert any aspect of the liberty-protecting structural guarantees embodied in the Tenth Amendment. *Cf. Free Enter. Fund v. Public*

Co. Accounting Oversight Bd., No. 08-861, 2010 WL 2555191, at *10 n.2 (June 28, 2010).

Against this backdrop, reversal of the Third Circuit's decision is necessary to return uniformity to the law. The proper approach is not to salvage *Tennessee Electric* by drawing a line between Tenth Amendment challenges complaining about intrusions into state sovereignty and Tenth Amendment challenges complaining that Congress has exceeded its enumerated powers. Instead, the Court should take this opportunity to inter the troublesome language in *Tennessee Electric* and make clear that Tenth Amendment claims are not subject to special standing rules. The Tenth Amendment, "although nominally protecting state sovereignty, ultimately secures the rights of individuals." *Gillespie*, 185 F.3d at 703 (citing *New York*, 505 U.S. at 181). Private citizens have standing to raise Tenth Amendment claims when the federal government exceeds its proper sphere of authority because the federalism principles enshrined in our Constitution were "adopted by the Framers to ensure protection of our fundamental liberties." *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York*, 505 U.S. at 182.

Accordingly, when confronted with a Tenth Amendment challenge, the lower courts should be instructed to apply the ordinary, well-established tests for standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Parties may lack standing to raise Tenth Amendments claims if they allege only an "undifferentiated, generalized grievance," *Lance v. Coffman*, 549 U.S. 437, 442 (2007), or if their claims rest on the legal rights and

interests of third parties. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–13 (2004). But a party who has suffered concrete, particularized injury does not lose standing merely because the government might characterize the Tenth Amendment claim as a challenge to an imposition on state sovereignty.

3. The notion that a citizen has standing to protest that the statute under which the government has deprived her of liberty is in excess of Congress's power or otherwise in violation of the Tenth Amendment seems sufficiently straightforward to warrant summary reversal. If the Court believes that interring *Tennessee Electric* requires plenary consideration, then it should grant the petition and appoint an *amicus* to defend the Third Circuit's mistaken judgment. But the Court should not issue a GVR that will provoke only head-scratching by a court of appeals already on record as viewing itself bound by this Court's precedent. As the Court has recognized, where "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 516 U.S. at 168.

Having confessed error as to standing, the government should have taken this opportunity to confess error on the merits and moved to vacate Ms. Bond's unlawful conviction. This local domestic dispute, resulting in a small chemical burn to the thumb of Ms. Bond's husband's paramour, should never have been prosecuted under a federal statute designed to prevent the proliferation of chemical weapons. But absent that concession, the only

appropriate course is to reverse the Third Circuit's misguided standing decision, with instructions for the court of appeals to render a prompt decision on Ms. Bond's constitutional challenge. Ms. Bond has already been held in federal prison for approximately 37 months for a failed assault that, had she been prosecuted and convicted under state law, would have resulted in a prison sentence of at most between 3 and 25 months. Pet. 10. Requiring Ms. Bond to return to the court below for another round of briefing on whether the Third Circuit should change its mind on the threshold standing question carries the significant risk that she will have fully served her unlawful prison sentence before the merits of her constitutional claims are ever resolved.

CONCLUSION

The Court should grant the petition for writ of certiorari and either summarily reverse or grant plenary review.

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