No. 13-7132

IN THE

Supreme Court of the United States

MARVIN CHARLES GABRION,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF FORMER LAW ENFORCEMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Of Counsel:
ELIZABETH L. FASSE
The Constitution Project
Suite 1000
1200 18th Street, N.W.
Washington, DC 20036

DOUGLAS W. BARUCH
Counsel of Record
AARON T. TUCKER
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, N.W.
Washington, DC 20006
(202) 639-7000
Douglas.Baruch@friedfrank.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae are a group of former law enforcement officials with approximately 100 years of combined experience in the criminal justice system. Their names and relevant experience are identified in the Appendix. As part of their law enforcement duties, *amici* have encountered and grappled with the intersection between state and federal criminal jurisdiction, as well as the different capabilities and effectiveness of state and federal officials with respect to prosecution of general criminal activity. During the span of their careers, *amici* have witnessed and experienced the increased federalization of criminal law and the consequential growth of federal enforcement and prosecution of criminal activity that has traditionally been prosecuted by the States.[1]

Amici's collective experience in the law enforcement arena informs their view that, as a general matter, achievement of the efficient, fair, and effective application of criminal law is enhanced by deferring to the States to enforce general criminal law. *Amici* have an interest in maintaining the proper balance between the State and Federal

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief.

Governments with respect to their exercise of jurisdiction over local criminal activity and in protecting the right of the States to determine how to best address and prosecute local criminal activity that lacks any federal interest. The basic principles of federalism, which are enshrined in the United States Constitution, are intended to protect this balance and allow each State to carry out its own unique prerogatives with respect to local crime and punishment without interference from the Federal Government.

As illustrated by this case, the Federal Government has effectively federalized all aspects of crime and punishment in National Forests. *Amici* view the unilateral decision of the U.S. Department of Justice to extend the Federal Government's general criminal jurisdiction into all National Forests – without any clear Congressional mandate and relying on statutory reinterpretation – as severe overstepping. *Amici* have an interest in stemming the tide of federalization of crime and punishment and the trend toward the increased exercise of general criminal jurisdiction by the Federal Government. Congress never intended for the establishment of National Forests to result in an expansion of the Federal Government's criminal and civil jurisdiction, nor the loss of rights and privileges of the States and their citizens.

Petitioner asks this Court to review the Federal Government's exercise of general criminal jurisdiction over his conduct in a National Forest, but the impact of permitting such jurisdiction against Petitioner extends far beyond his conviction,

as it would lead to the Federal Government's exercise of general criminal jurisdiction over large swaths of the Country. *Amici* believe that the additional analysis and considerations raised below further demonstrate the scale, scope, and impact of the United States' actions in this case, as well as the level of confusion now present in this previously settled area of law. Confusion and uncertainty regarding the scope of the Federal Government's general criminal jurisdiction should not be tolerated. Not only does such uncertainty infringe on the due process rights of criminal defendants, but it also impedes the ability of law enforcement officials to effectively and efficiently perform their duties. Accordingly, *amici* join with Mr. Gabrion in asking this Court to intervene and grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

In 1911, Congress enacted the "Weeks Act" to provide the Federal Government with the authority to obtain and designate land within the boundaries of the States as National Forests. *See* Act of March 1, 1911, ch. 186, 36 Stat. 961 (codified, as amended, in sections of Title 16 of the United States Code). The express intent of the Weeks Act was to preserve the natural resources of the United States, not to create a federal enclave over which the Federal Government would be able to exercise general criminal or civil jurisdiction. The Weeks Act expresses clear Congressional intent that "the jurisdiction, both civil and criminal, over persons within national forests shall not be affected or

changed by reason of their existence." 16 U.S.C. § 480.

For decades, there was no dispute regarding the meaning of the Weeks Act or the scope of the Federal Government's jurisdiction over criminal activity within the National Forests. Attorneys General and the U.S. Department of Agriculture, which is tasked with management of National Forests, agreed and consistently argued that the plain language of the Weeks Act did not permit the Federal Government to exercise general criminal jurisdiction over National Forests. Instead, the Federal Government limited its jurisdiction to those crimes that were committed against the United States, leaving the individual States to serve the traditional role as the enforcer of general criminal law in National Forests within State borders.

Recently, the United States has upended this longstanding and ingrained balance between state and federal criminal jurisdiction by exercising general criminal jurisdiction over National Forests. This dramatic shift was not occasioned by any new Act of Congress or change in regulations. Congress has not modified the Weeks Act, has not enacted separate legislation to modify the scope of federal criminal jurisdiction in National Forests, and has not otherwise authorized the Federal Government to prosecute general criminal activity occurring in National Forests. And the Department of Agriculture has not promulgated new regulations on the subject. Nonetheless, nearly a century after enactment of the Weeks Act, the Attorney General has assumed responsibility for the enforcement of

what had previously been considered state crimes through a novel reinterpretation of the law.

The United States' jurisdictional grab has injected uncertainty concerning which criminal laws apply in large portions of the Country. The Sixth Circuit's disposition of this case illustrates this confusion. Although two of the three judges on the panel agreed that the Federal Government could exercise jurisdiction over Petitioner, they could not agree on the reason why. And the third judge on the panel adopted in dissent the very analysis that the United States advocated for decades – that the Weeks Act did not grant the Federal Government the authority to exercise general jurisdiction over crimes committed in National Forests. Their vehement disagreement is ample proof of the type of uncertainty that this Court should resolve.

The magnitude of the impact of the United States' new interpretation of the Weeks Act is stark. As Circuit Judge Gilbert S. Merritt, Jr. observed in his dissent below, National Forests "comprise 193 million acres or 8.5% of the total land area of the United States." *United States v. Gabrion*, 517 F.3d 839, 879 (6th Cir. 2008) (Merritt, J., dissenting). All but ten States have land designated as National Forest and, in several States, National Forests comprise more than 20% of the land. The Department of Justice's decision to federalize the enforcement of crime on such a large scale through a statutory reinterpretation that is unsupported by the statutory text is antithetical to this Nation's long tradition of federalism and to the maintenance of the

States' right to maintain control of, and responsibility for, local crime and punishment.

The Federal Government's usurpation of general criminal jurisdiction in this manner gravely affects States' rights and the rights of individuals in the States, as this case shows. The State of Michigan was not only the first jurisdiction in the United States to abolish the death penalty, but it has expressly prohibited the imposition of the death penalty in its State Constitution. Michigan citizens decided in 1846 that crime is best deterred without the use of the death penalty, and they have adhered to that view ever since. Nevertheless, in this case, the Federal Government assumed jurisdiction and is seeking to impose the death penalty on Petitioner, a citizen of Michigan, for a crime he allegedly committed in Michigan. The consequences of the Federal Government's decision to exercise general jurisdiction over crimes in National Forests – in this case, nullifying the prerogatives of Michigan's citizens – are likely to be felt far and wide.

The Federal Government's decision to take over the police power across 8.5% of the Country should be reviewed by this Court. *Amici* urge this Court to grant certiorari and then to turn back this improper attempt to federalize crime in National Forests, thereby restoring to the States their traditional role as the enforcer and prosecutor of local crime and reestablishing the balance between state and federal jurisdiction that the Weeks Act was intended to preserve.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF THE FEDERAL GOVERNMENT'S JURISDICTION OVER GENERAL CRIMES COMMITTED IN NATIONAL FORESTS

The three separate opinions issued by the Sixth Circuit panel in this case demonstrate the confusion caused by the United States' about-face with respect to the question of whether it has statutory authority to exercise general jurisdiction over crimes that occur in National Forests. For decades, there was no confusion at all. The Weeks Act expressly states that the creation of National Forests does not vest in the Federal Government jurisdiction to prosecute general crime in those National Forests, and the United States itself expressly rejected the notion that it could exercise general criminal jurisdiction in National Forests. But the Department of Justice is now pursuing a different path and is reading the Weeks Act as fully compatible with the Federal Government prosecuting individuals for crimes that occur in National Forests, even where those crimes implicate no discernable federal interest.

A. The Weeks Act Bars The Federal Government's Exercise Of General Criminal Jurisdiction In National Forests

In the early 1900s, there was a vibrant debate in this Country concerning the need to further advance conservation policies and measures, which were first

established by President Theodore Roosevelt, intended to protect and conserve the Nation's natural resources. In connection with that debate, the Weeks Act was proposed and, in 1911, enacted by Congress to "enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers." *See* Act of March 1, 1911, ch. 186, 36 Stat. 961. The Congressional debate focused on a number of conservation-related concerns, such as deforestation, overcrowding, the waste and loss of natural resources, forest fires, and the erosion, silting, and irregular flow of the nation's watersheds and navigable waters. *See* 45 CONG. REC. 8743 (1910). The comprehensive forestry policy embodied in the Weeks Act was viewed as "an issue of supreme importance alike to the present and the future." *Id.*

Although its goal was to advance conservation efforts, Congress also was well aware of the potential unintended consequences of granting the Federal Government the right to become a landowner of vast forests within the various States. One particular concern was the impact of the Weeks Act on the division of civil and criminal jurisdiction between the State and Federal Governments. Indeed, Congress debated this precise issue. On June 24, 1910, during Senate debate, Senator William Borah of Idaho inquired: "Is the object of this contract between the States and the National Government that some of the States wish to contract away some of their sovereignty as a State?" 45 CONG. REC. 8895 (1910).

The response from Senator Francis G. Newlands of Nevada was unequivocal: "Oh, no; that is not the purpose. That could not be accomplished." *Id.* Senator Newlands later explained more fulsomely:

> I do not understand that in seeking the consent of Congress to any agreement or compact between the several States it involves any effort either to enlarge the powers or the jurisdiction of the National Government or to turn over to the National Government any of the powers of the State. The bill simply recognizes that these great waterways of the country are not confined within state boundaries, and that the Nation has a certain interest in them for the purpose of promoting and regulating interstate and foreign commerce, and that every other interest in them belongs either to the States themselves by virtue of their sovereignty or belongs to individual owners by reason of ownership.

Id.

Congress later memorialized Senator Newlands' intent in the Weeks Act:

> The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses

> against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

16 U.S.C. § 480. In short, the Weeks Act specifically prohibited the Federal Government from using its passage (and the resulting authority to create National Forests) to expand its jurisdiction. Instead, it reserved to the Federal Government certain rights as a landowner, including the right to exercise jurisdiction over and inflict punishment for "offenses against the United States" that occur therein.[2]

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[2] The manner in which Congress limited the scope of federal criminal jurisdiction in the Weeks Act stands in stark contrast to the manner in which Congress has defined federal jurisdiction in National Parks. The scope of the Federal Government's jurisdiction over each National Park is expressly defined by statute. *See, e.g.*, 16 U.S.C. § 24 ("The Yellowstone National Park . . . shall be under the sole and exclusive jurisdiction of the United States. All the laws applicable to places under the sole and exclusive jurisdiction of the United States, shall have force and effect in said park."). Congress could have also authorized such expansive federal criminal jurisdiction in National Forests, but it did the opposite: Congress explicitly stated in the Weeks Act its intent not to change or expand the Federal Government's general criminal jurisdiction in National Forests. The Department of Justice cannot now expand the Federal Government's criminal jurisdiction by simply expanding its reading of the Weeks Act.

Until recently, the United States repeatedly stated that the Weeks Act is unambiguous in its intent to not alter federal jurisdiction in National Forests (except in a very narrow way). The Department of Agriculture explained that, in accordance with the Weeks Act, the Federal Government had never acquired concurrent or exclusive jurisdiction over the National Forests. *See* 4311 Op. Off. Legal Counsel U.S. Dep't. Agric. 14521 (1942). Instead, the Weeks Act only granted the Federal Government authority to prosecute crimes occurring in National Forests if the crimes were against the United States or involved a violation of federal law related to the protection of federal property. *See* 4658 Op. Off. Legal Counsel U.S. Dep't Agric. 15944 (1943). These were the "offenses against the United States" referred to in the Weeks Act. The Department of Agriculture provided the following example to justify its position that the Federal Government could not exercise general criminal jurisdiction over National Forests:

> Congress might pass a law inconsistent with a State law. The Federal enactment in such a case would probably take precedence. If the State law was one conferring a right or a privilege on the inhabitants of the State, they would lose this right. This, in a very real sense, would involve a loss of jurisdiction by the State.

4311 Op. Off. Legal Counsel U.S. Dep't Agric. 14521 (1942).

This position was not isolated to the Department of Agriculture. The Department of Justice urged this Court to adopt this plain meaning of the Weeks Act in *Adams v. United States*, 319 U.S. 312 (1943). The United States argued that "[t]he jurisdiction over persons within the forest would be both 'affected' and 'changed' within the meaning of this provision if they were subjected both to State laws and to the federal laws applicable to federal lands *instead of to the former alone*." Brief for the United States, *Adams v. United States*, 319 U.S. 312 (1943) (No. 889), 1943 WL 54788, at *24 (emphasis added).[3] In fact, the United States specifically argued that the Weeks Act "shows that Congress has declined to accept [concurrent jurisdiction] as to forest lands." *Id.* at *23. There can be no dispute that, as of 1943, the United States believed it could not exercise general jurisdiction over crimes that occur in National Forests.[4]

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[3] To illustrate its point, as the Department of Agriculture had done just a year earlier, the Department of Justice provided the Court with a concrete explanation of the potential negative impact of an expansion of the Federal Government's criminal jurisdiction: "[P]ersons could be prosecuted in both [federal and State] courts for the same offense, inasmuch as 'the double-jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained.'" *Id.* (citing *Jerome v. United States*, 318 U.S. 101 (1943)).

[4] Petitioner cited many other statements made by the Department of Agriculture that also expressed this view. *See* Pet. at 14-16. The Department continued to express this view as late as 1966, when it again stated that the Federal Government did not obtain general jurisdiction over land

B. The United States' Reinterpretation Of The Weeks Act Has Created Uncertainty And Confusion In The Law Concerning Federal Criminal Jurisdiction In National Forests

Even though there have been no amendments to the Weeks Act since its 1911 passage, the United States has now reversed its position on the scope of its jurisdiction over crimes committed in National Forests.[5] Notwithstanding the plain language of the Weeks Act and the United States' prior advocacy for restraint in the exercise of jurisdiction over criminal activity in National Forests, the Department of Justice began prosecuting individuals for crimes committed in National Forests even though the crimes themselves had no connection to any federal interest. There was no change of law or authorization from Congress, as one might expect to have occurred before such a drastic change in the scope of federal prosecutorial power; rather, the Department of Justice simply reinterpreted the Weeks Act to authorize itself to prosecute all criminal activity occurring in National Forests, contrary to the statute's plain meaning.[6]

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designated as a National Forest. *See* Letter from Orville L. Freeman, Sec'y of Agric., to Gerald B. Feasby (July 1, 1966).

[5] It is not clear when the Department of Justice changed its interpretation of the Weeks Act.

[6] The Government's argument below that the clause "except so far as the punishment of offenses against the United States therein is concerned" gives it authority to exercise jurisdiction here is misguided. Although the Government contends that "offenses against the United States" means the same thing as "offenses against *the laws of* the United States," this Court has

The Sixth Circuit's decision illustrates the unsettled state of the law, providing three separate and distinct ways to analyze this issue and ultimately giving no clear guidance to lower courts on how to address this situation in the future. In the lead opinion, Circuit Judge Alice M. Batchelder explained that whether the Federal Government may exercise concurrent jurisdiction over National Forests depends on the wording of the state statute ceding the land and the extent of jurisdiction granted by the State. *See United States v. Gabrion*, 517 F.3d 839, 848 (6th Cir. 2008) (lead opinion). Judge Batchelder emphasized the interplay between the relevant state statute and the "presumption" that the Federal Government accepted jurisdiction over land it acquired before February 1, 1940, unless it expressly stated otherwise.

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rejected reading words that Congress did not include into a statute. *See, e.g.*, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" (citation omitted)); *United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant. Giving the words used their 'ordinary meaning.'" (citation omitted)). When Congress meant to use the broader phrase "against the laws of the United States," it did so unequivocally. *Compare* Act of August 6, 1861, ch. 56, 12 Stat. 317 (making it a crime "against the United States" to recruit soldiers to engage in armed hostilities against the United States) *with* Act of March 2, 1867, ch. 146, 14 Stat. 424 (permitting deductions from sentence terms for prisoners convicted of offenses "against the laws of the United States").

However, Judge Batchelder did not reconcile this "presumption" with the provision of the Weeks Act in which Congress *did* reject general federal jurisdiction over National Forests: "The jurisdiction, both civil and criminal, over persons within national forests *shall not* be affected or changed by reason of their existence," regardless of whether the National Forests were acquired before 1940 or after. *See* 16 U.S.C. § 480 (emphasis added). Instead, Judge Batchelder dismissed this provision of the Weeks Act as "nothing remarkable," stating that the provision stands only for the proposition that the Federal Government cannot exercise *exclusive* jurisdiction over National Forests. *Gabrion*, 517 F.3d at 852. But the express terms of the statute do not support that reading.

In a concurring opinion, Circuit Judge Karen Nelson Moore disagreed with Judge Batchelder's analysis. Whereas the lead opinion explained that the extent of the Federal Government's jurisdiction over National Forests depends on the applicable state statute, Judge Moore concluded the exact opposite – that it is federal law that determines the level of the Federal Government's jurisdiction. *See id.* at 859 (Moore, J., concurring in the judgment). Judge Moore found that the Weeks Act is controlling and that, even though it did not expressly intend to "change" the jurisdiction in National Forests based on its creation, the Act provides that the Federal Government has permitted the States to "retain concurrent jurisdiction" over National Forests with the federal government. *Id.* But even setting aside the obvious fact that giving the Federal Government concurrent jurisdiction over National Forests is a

"change," Judge Moore's interpretation of the Weeks Act did not account for the fact that the United States previously argued just the opposite to this Court in *Adams*. *See* Brief for the United States, *Adams v. United States*, 319 U.S. 312 (1943) (No. 889), 1943 WL 54788, at *23 ("We think, however, that [the Weeks Act] shows that Congress has declined to accept [concurrent jurisdiction] as to forest lands.").[7]

Judge Merritt's dissenting opinion provides the only rationale that is consistent with the plain language and express intent of the Weeks Act. Judge Merritt adopted the very analysis the United States once expressly advocated but has since abandoned, explaining that the language of the Weeks Act reflects congressional intent to not create general federal criminal jurisdiction in National Forests. *See Gabrion*, 517 F.3d at 877 (Merritt, J., dissenting). While acknowledging the constitutional

[7] The decisions from other Courts of Appeal that have considered this issue only add to the patchwork of answers to what should be a basic question. In *United States v. Raffield*, 82 F.3d 611 (4th Cir. 1996), *cert. denied*, 519 U.S. 933 (1996), the Court of Appeals for the Fourth Circuit reviewed a defendant's challenge to a federal conviction for drunk driving in a National Forest and found that the Federal Government could exercise concurrent jurisdiction based on a different statutory basis. In *United States v. Fields*, 516 F.3d 923 (10th Cir. 2008), *cert. denied*, 556 U.S. 1167 (2009), the Court of Appeals for the Tenth Circuit reviewed a defendant's challenge to a federal conviction for a murder committed in a National Forest, holding that state law granted the Federal Government such authority. The Tenth Circuit's analysis relied on the district court's erroneous reasoning in the instant case. *See id.* at 929.

authority of Congress to enact legislation permitting the Federal Government to prosecute crimes that occur in National Forests, Judge Merritt properly observed that the Weeks Act reflects Congress's determined view not to exercise that authority. Judge Merritt concluded that it is improper for the Executive Branch (or the courts, for that matter), to expand the Federal Government's criminal jurisdiction through the reinterpretation of a statute that is inconsistent with the statute's text, particularly when that statute previously was interpreted the opposite way the United States is now proposing. *See id.* at 878.

Due Process requires certainty and predictability in the context of criminal procedure. *See Schmuck v. United States*, 489 U.S. 705, 721 (1989); *see also Kolender v. Lawson*, 461 U.S. 352, 357-59 (1983). Moreover, law enforcement officials are hamstrung by not having clearly defined roles and responsibilities in exercising their duties. It is unclear how courts (let alone individuals) should determine whether the State or Federal Government has jurisdiction over local, non-federal crimes that are committed in National Forests. This confusion has been caused by the Department of Justice's decision to reinterpret a statute in a manner that finds no support in the statute's text and that runs directly contrary to the United States' past conclusions and arguments concerning this very provision. In fact, the previously settled nature of this area of the law alone should have stayed the Federal Government's hand in reversing course on its interpretation of the Weeks Act. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citing the

fact that the ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), is "embedded in routine police practice" and "part of our national culture" as justifications for upholding the *Miranda* rule). This Court should grant certiorari and bring back the clarity that existed in this area for nearly a century.

THE EXPANSION OF EXISTING LAW TO ALLOW THE FEDERAL GOVERNMENT TO EXERCISE GENERAL CRIMINAL JURISDICTION IN NATIONAL FORESTS WILL IMPACT LAW ENFORCEMENT AND STATES' RIGHTS

The United States' ability to exercise general jurisdiction over crimes committed in National Forests is no small matter. The question presented to the Court in this case is one that will directly impact a large percentage of the land across the Country and, therefore, will apply in other foreseeable scenarios as well. The federalization of criminal law in National Forests not only upsets the delicate balance between State and Federal Governments established by the Constitution, but it also adversely impacts the ability of States to effectively enforce criminal laws in accordance with local priorities and preferences.

National Forests are not some remote wilderness in which no one resides or where local law enforcement serves no role. As Judge Merritt observed in his dissent below, National Forests are interspersed with cities, villages, residences, farms, and private lands. *See Gabrion*, 517 F.3d at 880 (Merritt, J., dissenting). Indeed, the National Forest in which Petitioner's actions occurred includes

private farms, lakes, and home sites. *See id.* at 879. This combination of federal-owned and private land is precisely why, until recently, state and local law enforcement have exercised exclusive jurisdiction over general criminal conduct in National Forests.

There are 155 National Forests in the United States, comprising approximately 193 million acres, or an area about the size of Texas. *See* About Us, U.S. Forest Serv., http://www.fs.fed.us/aboutus (last visited Nov. 11, 2013). In total, National Forests cover 8.5% of the United States and exist in all but ten States. Although the acreage varies by State, the National Forest land in just the most impacted States illustrates the scope of the Federal Government's potential jurisdictional expansion:

State	Size (acres)	National Forest (acres)	National Forest Coverage
Idaho	53,484,160	20,417,382	38.17%
Oregon	62,962,560	15,579,944	24.74%
Colorado	66,620,160	13,900,888	20.87%
Washington	45,630,720	9,291,335	20.36%
California	104,764,800	20,798,539	19.85%
Montana	94,105,600	17,115,843	18.19%
Arizona	72,953,600	11,264,611	15.44%
Utah	54,334,080	8,153,642	15.01%
Wyoming	62,600,320	8,693,923	13.89%
New Hampshire	5,983,360	736,028	12.30%

Land Areas of the National Forest System, U.S. Dep't of Agric. Forest Serv. (Sept. 30, 2012), *available at* http://www.fs.fed.us/land/staff/lar. If the

Department of Justice's interpretation stands, the Federal Government may now exercise general criminal jurisdiction over nearly 40% of the State of Idaho and more than 15% of the land in seven other States.

The Federal Government's takeover of criminal enforcement responsibilities with respect to 8.5% of the Country has broad implications for the States and their ability to effectively enforce their own criminal laws. If the Sixth Circuit's decision in this case is adopted nationwide, an estimated 3,600 federal crimes that are currently codified in the United States Code will now be applicable and enforceable in National Forests across the Country.[8] These criminal laws will be enforceable without regard to whether they are consistent with state laws that already govern law enforcement norms within those same National Forests. And the Federal Government's decision to prosecute crimes that occur in National Forests will not be reined in by considerations of state law enforcement officials or state preferences.

The police power traditionally has been reserved to the States. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of [State] sovereignty is the power to create and enforce a criminal code."); *Keller v. United States*, 213 U.S. 138, 144 (1909) ("Speaking generally, [the police power] is reserved to the states . . . ."). For good reason.

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[8] *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000).

Amici's collective experience is that state and local law enforcement officials and courts can handle and enforce local crime more efficiently and effectively than their federal counterparts. A number of factors contribute to this, but one of the most important is that local law enforcement officials have a singular focus on local crime and the local impact of their enforcement actions. Local law enforcement officials have long utilized community policing techniques that require law enforcement officials to build relationships with the local community and demonstrate their singular focus on local safety and policy concerns. In contrast, federal prosecutors are expected to consider the wider policy and political impact of their actions on the United States as a whole and, as a general matter, federal law enforcement officials often do not have the ability or incentive to form the same close relationships with the community.[9]

The Federal Government's exercise of general criminal jurisdiction over National Parks threatens these relationships between local law enforcement officials and their communities. The prospect of federal prosecution of criminal activity in National Forests undermines the ability of local law enforcement officials to build trust with the

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[9] Community policing is not just an urban technique; rather, it is rooted in rural policing and is used across the Country, with more than two-thirds of local police departments and 62% of sheriffs' offices using some form of community policing. *See* U.S. Dep't of Justice: Office of Justice Programs, National Institute of Justice, J. Ashcroft, D. Daniels & S. Hart, *Community Policing Beyond the Big Cities* at 1 (2004).

community by ensuring that community interests and prerogatives prevail in law enforcement decisions. The uncertainty in this area thus creates a divide between local law enforcement and the communities they serve, making policing crime more difficult.

Moreover, state laws are more appropriately tailored to the needs and preferences of the citizens of each State. This is true, if for no other reason, simply as a result of the fact that state citizens shape state laws, but have very little power on their own to shape federal law given that each State is just one of fifty. In fact, state law enforcement officials, in contrast to their federal counterparts, can properly tailor the enforcement of state laws to the local jurisdiction's distinct needs, are far better positioned to respond to local choices and preferences, and are more accountable to state and local constituencies. When the Federal Government steps in to prosecute a local crime with no federal interest, it interferes with the State's exercise of its police power and impedes or contradicts carefully considered state and local policy decisions regarding the exercise of those police powers.

This case presents a perfect example of how the Federal Government's exercise of general criminal jurisdiction in National Forests inevitably will have the result of undermining state policy decisions and state rights. In a uniquely American exercise,[10] the

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[10] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its

citizens of the State of Michigan decided in 1846 that crime is best deterred without the use of the death penalty, and they have upheld that view ever since.[11] The Michigan State Constitution provides that "[n]o law shall be enacted providing for the penalty of death." Mich. Const. art. IV, § 46. Yet, the United States' prosecution of Petitioner, a Michigan citizen, under federal law resulted in the imposition of the death penalty here. Simply because Petitioner's conduct took place within a football field's length of a National Forest border in Michigan, the Federal Government was able to nullify Michigan's long-held preference for not imposing the death penalty.[12]

The Federal Government's encroachment on States' general police power in National Forests not only disturbs the delicate balance between state and federal law enforcement officials, it also undermines the very core of this Nation's federal system. "The Constitution does not protect the sovereignty of States for the benefit of the States or State

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citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[11] Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755 (1996).

[12] Michigan is not the only state where this issue could arise. Ten other States with National Forests located within their borders have also elected to abolish the use of the death penalty: Alaska, Illinois, Maine, Minnesota, New Mexico, New York, North Dakota, Vermont, West Virginia, and Wisconsin. The Federal Government's actions in this case effectively nullify this choice for large areas of each of these States.

governments as abstract political entities." *New York v. United States*, 505 U.S. 144, 181 (1992). "Rather, Federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (citation omitted)). Our Nation's federal system "enables States to enact positive law in response to the initiative of those who seek a voice in shaping the destiny of their own times, and it protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 131 S. Ct. 2355, 2358-59 (2011) (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

This Court has emphasized that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). Instead, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," particularly in such "traditionally sensitive areas" as criminal jurisdiction. *Id.* Congress did not state its intent to disturb the balance between the State and Federal Governments with respect to criminal jurisdiction in National Forests; instead, it expressly stated that such a result was *not* intended by passing the Weeks Act.

The decision below – and the troubling encroachment of federal power that it endorses – should be corrected.

CONCLUSION

For the foregoing reasons, *amici curiae* join Petitioner in requesting that this Court grant a writ of certiorari.

Respectfully submitted,

DOUGLAS W. BARUCH
Counsel of Record
AARON T. TUCKER
Fried, Frank, Harris,
Shriver & Jacobson LLP
801 17th Street, N.W.
Washington, DC 20006
(202) 639-7000
Douglas.Baruch@friedfrank.com

Of Counsel:
ELIZABETH L. FASSE
The Constitution Project
Suite 1000
1200 18th Street, N.W.
Washington, DC 20036

NOVEMBER 29, 2013

Counsel for Amici Curiae

APPENDIX – LIST OF *AMICI CURIAE*

Norman S. Fletcher

- Judge, Supreme Court of Georgia, 1990-2005 (Chief Justice 2001-2005)
- Special Assistant Attorney General, Georgia, 1979-1989
- Walker County Attorney, Georgia, 1973-1988
- City Attorney, City of LaFayette, Georgia, 1965-1989

William J. Hughes

- U.S. Ambassador to Panama, 1995-1998
- Member, U.S. House of Representatives, New Jersey, 1975-1995
- First Assistant Prosecutor, Cape May County, New Jersey, 1961-1970
- Assistant Prosecutor, Cape May County, New Jersey, 1960
- Township Solicitor, Upper Township, New Jersey, 1959-1961

Bruce R. Jacob

- Dean Emeritus, Stetson University School of Law
- Assistant and Special Assistant Attorney General, Florida, 1960-1962

James M. Petro

- Attorney General, Ohio, 2002-2007
- Council Member/Director of Law, City of Rocky River, Ohio, 1977-1981
- Assistant Director of Law, City of Cleveland, Ohio, 1974-1975
- Assistant Prosecuting Attorney, Franklin County, Ohio, 1973-1974

Harry L. Shorstein

- State Attorney, Fourth Judicial Circuit, Florida, 1991-2008
- General Counsel, City of Jacksonville, Florida, 1974-1976
- Division Head and Chief Assistant State Attorney, Florida, 1970-1974

John K. Van de Kamp

- Attorney General, California, 1983-1991
- District Attorney, Los Angeles County, California, 1975-1983