No. 12-158

IN THE

MORRIS TYLER MOOT COURT OF APPEALS AT YALE

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Brief for Petitioner

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QUESTIONS PRESENTED

1. Whether the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations; and

2. Whether the provisions of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, can be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*.

PARTIES TO THE PROCEEDING

The petitioner in this action is Carol Anne Bond.

The respondent is the United States of America.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 3, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment of the United States Constitution provides:

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

U.S. Const. amend. X.

The Treaty Clause provides:

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

U.S. Const. art. II, sec. 2, cl. 2.

The Necessary and Proper Clause provides:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Executing the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, sec. 8, cl. 18

STATEMENT OF THE CASE

A. Bond's Domestic Dispute

Petitioner, Carol Anne Bond, was understandably excited when one of her closest friends, Myrlinda Haynes, announced that she was pregnant. But soon after hearing the good news, Bond learned that her husband, Clifford Bond, was having an affair with Hayes and was the father of Haynes' child. *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009). Following the betrayal of her husband and her friend, Bond became embroiled in a romantic rivalry and vowed revenge. *Id.* at 131. She purchased a vial of potassium dichromate over the Internet, and stole a bottle of 10-chloro-10-H-phenoxarsine from her employer. These chemicals can cause toxic harm if ingested or exposed to the skin at sufficiently high doses. In some cases, these chemicals can be lethal. *Id.* at 131-32.

On several occasions, Bond attempted to poison Haynes with the chemicals. None of these attempts were successful because Haynes would notice the chemicals and easily avoid harm. *Id.* at 132. On one occasion, Haynes sustained a minor chemical burn on her thumb. *Id.* This was the only injury that Bond caused Haynes. After Haynes complained to the local postal carriers about the chemicals on her mailbox, the United States Postal Inspection Service placed surveillance cameras around Hayne's home. Bond was seen stealing an envelope from Hayne's mailbox and placing potassium dichromate inside Hayne's car muffler. *Id.* On the basis of this information and a chemical test of the potassium dichromate, Bond was arrested and searched. Bond waived her constitutional rights and admitted to stealing chemicals from her employer. *Id.*

B. The Chemical Weapons Convention & Implementing Legislation

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destructions, 32 I.L.M. 800 (1993) (the "Chemical Weapons

Convention") is an international arms-control agreement that outlaws the production, possession, and use of chemical weapons. Signatory states pledge to never use or develop chemical weapons, to destroy any existing chemical weapon stockpiles, and to submit to inspections to verify compliance. *Id.* Article VII requires states to enact domestic legislation to implement their obligations under the convention. States agree to prohibit persons from engaging in activities "prohibited to a State Party." *Id.* at 810. And the obligations under the treaty must be implemented "in accordance with [the] constitutional processes" of each signatory state. *Id.* The United States Senate ratified the treaty on April 24, 1997.

Congress then passed implementing legislation, giving domestic legal effect to the Chemical Weapons Convention. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-855, *codified at* 22 U.S.C. § 6701 (the "Act"). The Act creates procedures for the destruction of chemical weapons, including record-keeping and reporting requirements. The Act also establishes criminal and civil penalties for violations. The Act makes it a crime for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). "Chemical weapon" is defined broadly to mean any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). "Toxic chemical" is defined equally broadly 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).

Key to the Act's scope is the exception for chemical weapons "intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). Before applying this exception, the scope of the Act's prohibitions against chemical weapons would be untenably large: every household cabinet

would be a chemical weapons stockpile. Accordingly, the Act defines "purposes not prohibited" to include "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A). The Act includes no requirement that the possession or use of a chemical weapon occur within the special jurisdiction of the United States or have some impact on interstate commerce. Finally, violations of the Act carry substantial penalties. If the violation results in the death of another person, the Act mandates the death penalty or life imprisonment. *Id.* § 229A(a)(2).

C. Procedural History

1. Bond's Motion to Dismiss

Bond's attempts to harm her romantic rival could have been appropriately handled by local law enforcement and prosecuted under state criminal laws against assault. *See* 18 Pa. Cons. Stat. § 2701. Instead, Bond was prosecuted by the United States Attorney's Office and charged with, *inter alia*, two counts of using of a chemical weapon in violation of 18 U.S.C. § 229(a). J.A. 13-16. Bond moved to dismiss the chemical weapons charges. Bond argued that the Act implementing the Chemical Weapons Convention was unconstitutional as applied to her because § 229 violated principles of federalism implicit in our constitutional structure. Bond also argued that the Act was unconstitutionally vague and violated the Due Process Clause. *Bond*, 581 F.3d at 133. The district court denied Bond's motion, ruling that the Act was constitutional because it was "enacted by Congress and signed by the President under the necessary and proper clause . . . to comply with the provisions of a treaty." *Id.* The court also ruled that the Act was not impermissibly vague. *Id.* Bond pled guilty to all charges and was sentenced to six years' imprisonment, five years of supervised release, a $2,000 fine, and restitution of $9,902.79. *Id.*

Bond filed a timely appeal with the United States Court of Appeals for the Third Circuit. On appeal, Bond continued to argue that the Act violates principles of federalism because it is not based on a valid exercise of constitutional authority. *Id.* at 135. After oral argument, the Third Court requested supplemental briefing on the question of whether Bond had standing to assert that the Act encroaches on state sovereignty in violation of the 10th Amendment. J.A. 17-18. After supplemental briefing, *see* J.A. 19-33, the Third Circuit held that Bond lacked standing to pursue her appeal. *Bond*, 581 F.3d at 137-138. The court noted that Bond's argument about the constitutionality of the Act raised difficult issues of first impression concerning how far legislation implementing a treaty may intrude into areas where the states have primary authority. *Id.* at 135. Despite the weight of these issues, the court held that Bond could not raise a Tenth Amendment challenge to the Act absent the involvement of a state.

2. This Court's Earlier Decision

This Court granted certiorari and reversed. *Bond v. United States*, 131 S. Ct. 2355 (2011) ("*Bond I*"). Bond had standing to challenge her conviction in light of the Tenth Amendment because the "allocation of powers" between the federal and state government "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are defined." *Id.* at 2364. Given the liberties that are protected by federalism, Bond had a "direct interest in objecting to laws that upset the constitutional balance." *Id.*

3. The Decision on Remand

On remand, the Third Circuit rejected Bond's invitation to interpret the Act to avoid constitutional difficulties and held that the Act was constitutional as a necessary and proper means of implementing the Chemical Weapons Convention. *United States v. Bond*, 681 F.3d

149, 151 (3d Cir. 2012) ("*Bond II*"). First, the Third Circuit found that the Act applied to Bond's conduct. The court was "tempted" to interpret the Act to avoid constitutional doubts that arise from a statute that "turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Id.* at 154 n.7. But the court rejected Bond's reading of the "other peaceful purpose" exception—found in legislation implementing an international arms-control treaty among states concerned about the spread of weapons of mass destruction—to mean "peaceful" in the sense of "non-warlike."

Next, the Third Circuit analyzed the constitutionality of the Act as applied to Bond's conduct. Relying on this Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), the court held that the Act was a valid exercise of congressional power under the Necessary and Proper Clause to implement treaties. Even though the Act's breadth was "striking" and Bond's prosecution seemed to "trivializes the concept of chemical weapons," the court felt compelled to following the instruction of a single sentence from *Holland*: "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432. Following *Holland*, Congress could implement the Chemical Weapons Convention regardless of whether Congress would otherwise have the power to criminalize Bond's conduct or whether the Act invaded state sovereignty. *Bond II*, 681 F.3d at 156. "[P]rinciples of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid." *Id.* at 153. The court found that the Chemical Weapons Convention was a valid treaty. Thus, the Act must have been constitutional.

Judge Rendell and Ambro filed separate concurrences. Judge Rendell emphasized that "no principle of federalism . . . would limit the federal government's authority to prosecute

[Bond] under the Act." *Id.* at 167 (Rendell, J., concurring). In contrast, Judge Ambro was concerned about the implications of the court's holding and urged this Court to "provide a clarifying explanation" of *Holland*. *Id.* at 169 (Ambro, J., concurring). Without this Court's clarification, "a blank check exists for the Federal Government to enact any laws that are rationally related to a valid treaty and that do not transgress affirmative constitutional restrictions." *Id.* at 170. This "acquirable police power . . . can run counter" to the limitations on federal power. *Id.* In this case, the Act tested the other boundaries of treaty-implementing authority with its "shockingly broad definitions" that federalize "purely local, run-of-the-mill criminal conduct." *Id.*

SUMMARY OF THE ARGUMENT

I. The Act is unconstitutional as a necessary and proper means of executing treaty power because it exceeds Congress's power to implement treaties and intrudes on state sovereignty.

A. The Third Circuit incorrectly held that Congress could criminalize Bond's conduct under the Necessary and Proper Clause because the Act exceeded the scope of Congress's enumerated powers.

1. Congress cannot expand its powers when implementing treaties. *Missouri v. Holland* wrongly suggested that implementing legislation can ignore traditional structural limits on legislative power.

i. *Holland*'s suggestion that treaties can increase legislative powers is inconsistent with the structure of the federal government. Legislative powers limited to those enumerated in the Constitution. And these can powers only be altered by constitutional amendment. Otherwise, Congress would be able to ignore constitutional limits, and even decisions of this Court.

ii. *Holland* also ignores textual limits on the necessary and proper power. The President's treaty power ends when the treaty is signed and ratified, and Congress cannot assume these powers when implementing an already completed international agreement.

ii. Both before and after *Holland*, this Court has been consistent that Congress cannot use treaties to expand their power. Furthermore, outside of *Holland*, this Court has never assumed that the validity of a treaty presupposes validity of a statute that implements it.

iv. Because there are few reliance interests at stake, and because *Holland*'s reasoning is inconsistent with the Court's jurisprudence, *stare decisis* should not prevent this Court from overruling *Holland*.

2. Congress could not criminalize Bond's local, noneconomic conduct. This Court has clearly held that this type of activity is outside the regulatory purview of the federal government.

B. The Act also violates the Tenth Amendment by interfering with state sovereignty over law enforcement.

II. If the Court does not strike down the statute, it must find that the government's interpretation is incorrect. This Court has a long history of avoiding a statutory interpretation that raises grave constitutional doubts, like the government's interpretation of the Act in the instant case.

A. Applying the Act to criminalize Bond's conduct at the very least raises constitutional concerns about federalism, state sovereignty, individual liberty, limitation of congressional powers, and more. The Court must choose Bond's interpretation because it is plausible and steers clear of constitutional doubt.

1. Bond's actions were in the "peaceful purposes" exception of the Act. "Peaceful" means "non-warlike" in the context of the convention, an international arms control agreement. Both the text and context of the treaty confirm this reading.

2. The legislative history confirms that Congress and the administration that introduced the Act understood Bond's actions as not being prohibited. Congress did not even consider Bond's actions in a "gray area," it was clear such state law crimes were excepted.

B. This Court has been especially conscious of avoiding constitutional issues when the government's interpretation intrudes on traditionally local criminal conduct.

1. When federal and state criminal laws are in conflict, the government has the burden to prove that Congress actively considered and affirmatively decided to infringe upon state power. This is because the Court assumes that Congress is careful to respect the Constitution. The government cannot meet this burden.

2. The government's interpretation leads to a slippery slope that blurs the line between state and federal crimes and criminalizes marginal cases, such as the one before the Court today. An international arms control agreement, therefore, leads to the sentencing of a domestic romantic act of revenge.

3. Even if the Court still finds the Act's meaning ambiguous, the rule of lenity favors of the defendant in this criminal matter.

This Court should reverse the Third Circuit and hold that the Act is either unconstitutional, or raises constitutional doubts that favor a plausible interpretation that excludes Bond's local criminal conduct.

ARGUMENT

I. THE ACT IS NOT A NECESSARY AND PROPER MEANS OF EXECUTING THE TREATY POWER.

The Act is unconstitutional as a necessary and proper means of executing the treaty power. The Third Circuit found that the Act's federalization of state criminal law and Bond's prosecution were a valid exercise of Congress's power to implement the Chemical Weapons Convention. *Bond II*, 681 F.3d at 165. On the contrary, the Act exceeds the scope of Congress's power to implement treaties. And the Act violates state sovereignty by displacing state power over criminal law enforcement.

A. The Act's Criminalization of Local, Noneconomic Conduct Exceeds the Enumerated Powers of Congress.

It is axiomatic that the Constitution created a federal government of enumerated powers. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995). Every law enacted by Congress must be based on one of its enumerated powers. And "the enumeration of powers is a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2576 (2012) (quoting *Gibbons v. Odgen*, 9 Wheat. 1, 195 (1824) (Marshall, C.J.)). While the federal government's powers are "few and defined," the state's powers are "numerous and indefinite." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *The Federalist* No. 45 (Madison)). The Tenth Amendment is further confirmation that the federal system is one of enumerated and limited powers. *New York v. United States*, 505 U.S. 144, 156 (1992). This Court has repeatedly cited the diverse benefits that flow from "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Ashcroft*, 501 U.S. at 457-60. But the core feature of our constitutional structure, as this Court recognized

the last time it considered Bond's case, is that "[f]ederalism secures the freedom of the individual." *Bond I*, 131 S. Ct. at 2364.

Despite these well-established limits, the Third Circuit held that Congress had the power to criminalize Bond's conduct under the Necessary and Proper Clause. Congress could implement the treaty "even if it might otherwise lack the ability to legislate in the domain in question." *Bond II*, 681 F.3d at 157. But this conclusion cannot be harmonized with our constitutional structure. The Chemical Weapons Convention and the Necessary Proper Clause do not work together to expand legislative powers. Admittedly, *Missouri v. Holland* suggested that treaties could expand legislative power and that there could be "no dispute" about legislation implementing a non-self-executing treaty. *Holland*, 252 U.S. at 431. But *Holland* is inconsistent with the structure, history, and text of the Constitution, and should be overruled. Congress, therefore, must rely on another enumerated power to implement a non-self-executing treaty. And in this case, the Act is unconstitutional because Congress has no enumerated power to criminalize purely local, noneconomic conduct. *See United States v. Morrison*, 529 U.S. 598, 617 (2000).

1. *Holland* Was Wrong to Suggest That Treaties Can Expand the Legislative Powers of Congress.

In *Missouri v. Holland*, the Court erred when it suggested that the Necessary and Proper Clause would authorize implementing legislation that would exceed congressional power in the absence of a treaty. *Holland*, 252 U.S. at 431 ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."); *see also United States v. Lara*, 541 U.S. 193, 201 (2004). *Holland* presented a facial challenge to a statute implementing a treaty between the United States and Great Britain prohibiting the killing, capturing, or selling of migratory birds. Missouri

argued that the implementing legislation, which prohibited the killing, capturing, or selling of migratory birds, was an "unconstitutional interference with the rights reserved to the States by the Tenth Amendment." *Holland*, 252 U.S. at 431. The Court correctly noted that "it is not enough to refer to the Tenth Amendment," because the federal government was delegated the power to make treaties. *Id.* at 432. But the Court went on to state, without any supporting authorities or reasoning, that there can be "no doubt" about the validity of implementing legislation as a necessary and proper means of implementing the Treaty Power. *Id*. To be sure, Missouri did not argue that there might be separate limits on Congress's power to implement a valid treaty. Instead, the parties focused on the validity of the treaty and the Court "assumed without further discussion that, because the treaty was valid, so was the implementing statute." *Bond II*, 681 F.3d at 156-57. Not surprisingly, this single sentence has been the subject of academic criticism. *See, e.g.*, Nicholas Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

Holland was wrongly decided and must be overruled. To begin, this Court has long held that the treaty power is subject to constitutional limits. The power to make treaties "does not extend 'so far as to authorize what the Constitution forbids.'" *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (quoting *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)). And the constitutional limits on the treaty power extend to legislation implementing a non-self-executing treaty. "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion)). Thus, the expansion of federal power that led to Bond's prosecution cannot escape constitutional scrutiny. And the structure of federal power, the text of the Constitution, and this Court's case

law on the treaty power show that *Holland* was wrong to suggest that treaties can expand the legislative powers of Congress.

i. *Holland*'s "Acquirable Police Power" is Inconsistent With the Structure of Enumerated and Limited Federal Powers.

Holland and its application in this case are inconsistent with the very notion of enumerated and limited powers. Following *Holland*, Congress can legislate on any subject rationally related to a treaty even if, in the absence of the treaty, the legislation would be outside the powers enumerated in Article I, Section 8. *Holland*, 252 U.S. at 432 (noting that there are subjects "that an act of Congress could not deal with but that a treaty followed by such an act could."); *see also United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."). The treaty would "endow" Congress with new powers "independent of the powers enumerated in Article I." 1 Laurence H. Tribe, *American Constitutional Law*, § 4-4, 645-46 (3d ed. 2000). And this fount of new powers would be dynamic, ebbing and flowing as the United States enters into and exits international agreements. Moreover, the Third Circuit noted that many academics now urge that there is no limitation no the subject matter that a treaty may address. *See Restatement (Third) of Foreign Relations Law of the United States* § 302-303 (1987); *but see Riggs*, 133 U.S. at 296 ("That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear."). The ability of treaties to expand the legislative powers, therefore, may be limitless. To be sure, the *scope* of congressional power can shift over time. For example, a regulated activity that was once local might come to have a substantial effect on interstate commerce. But this Court has never held that the *objects* of congressional power might change over time.

Congress's enumerated powers can only be altered through a constitutional amendment, as specified in Article V. But as a consequence of *Holland*, a treaty can evade these requirements and rewrite constitutional limits. *Cf. Reid*, 354 U.S. at 17 ("[P]ermitting the United States to exercise power under an international agreement without observing constitutions prohibitions . . . would permit amendment of that document in a manner not sanctioned by Article V."). A treaty could endow, or withdraw, a legislative power without constitutional amendment. Shifting treaty commitments—just like "[s]hifting legislative majorities"—"cannot change the Constitution." *Boerne v. Flores*, 521 U.S. 507, 529 (1997).

Moreover, converting treaties into a license for a federal police power would allow Congress to overturn the decisions of this Court. Congress could, for example, reenact the portions of the Violence Against Women Act that this Court struck down in *United States v. Morrison*, 529 U.S. 598, 627 (2000), as exceeding the powers under the Commerce Clause and Fourteenth Amendment. Only this time Congress would cite the International Covenant on Civil and Political Rights as the source of its authority to make constitutional what was once *ultra vires*. Indeed, some scholars have suggested this end-run around *Morrison*. *See* Ronsenkranz, *supra*, at 1871-73. But it is "emphatically the province and duty of the judicial department"—not an international treaty—"to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

ii. *Holland* is Inconsistent With the Textual Limits on the Power to Implement Treaties.

Holland was equally in tension with the text of the Necessary and Proper Clause and the Treaty Clause. Legislation implementing a negotiated and ratified treaty is not a necessary and proper means of executing the Executive's general power to make treaties. Nowhere in these

clauses is Congress vested with the power to give domestic legal effect to a completed international agreement.

Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers listed in Article I, Section 8 and "all other Powers" enumerated in the Constitution. U.S. Const. art. I, § 8. And the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties" U.S. Const. art. II, § 2. Putting the clauses together, Congress has the power to make laws that are "incidental" to the President's power to make treaties and "conducive to its beneficial exercise." *McCulloch v. Maryland*, 4 Wheat. 316, 418 (1819). The text is clear: the object of Congress's power under the Necessary and Proper Clause must be the negotiation of international agreements. Congress could, for example, clearly appropriate money for the negotiation of treaties or for research into the costs and benefits of a proposed treaty. *See* Rosenkranz, *supra*, at 1882-83.

But legislation implementing a ratified treaty does not vindicate or advance the power of the President to make treaties. The President's exercise of the treaty power is completed when the treaty is signed and ratified. A non-self-executing treaty is "ratified with the understanding that it is not to have domestic effect of its own force." *Medellin v. Texas*, 552 U.S. 491, 527 (2008). The treaty can become domestic law "only in the same way as any other law—through passage of legislation by both Houses of Congress." *Id.* at 526. After the treaty is signed and ratified, "the responsibility for transforming [the] international obligation . . . into domestic law" passes to the Congress and its legislative discretion. *Id.* at 525-26. Indeed, the Congress is under no obligation to implement any treaty. *Id.* at 526. This complete division between the President's power to make an international agreement and the Congress's power to implement a treaty via domestic legislation is "governed by the fundamental constitutional principle that 'the power to

make the necessary laws is in Congress; the power to execute in the President.'" *Id.* (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006)).

In other words, the Necessary and Proper Clause does not authorize implementing legislation because Congress cannot pass legislation to carry into execution a power that has already been discharged. The necessary and proper power "does not license the exercise of any 'great substantive and independent power[s].'" *Sebelius*, 131 S. Ct. at 2591 (quoting *McCulloch*, 4 Wheat. at 411). And the power does not extend beyond the completed exercise of a constitutional power. The Court has presumed this temporal limit on the scope of the necessary and proper power. *See, e.g.*, *Sebelius*, 131 S. Ct. at 2591 ("The Clause is 'merely a declaration, for the removal of all uncertainty, that the means of *carrying into execution* those [powers] otherwise granted are included in the grant.") (quoting VI *Writings of James Madison* 383 (G. Hunt ed. 1906)) (emphasis added); *Comstock*, 130 S. Ct. at 1956 ("[W]e look to see whether the statute constitutes a means that is related to *the implementation of* a constitutionally enumerated power.") (emphasis added). Congress cannot implement what has already been implemented. The Clause is an invitation to *ex ante* legislative assistance, not *ex post* legislative bootstrapping.

iii. The Court Recognized This Limit on the Treaty Power Before and After *Holland*.

Finally, *Holland* is inconsistent with this Court's interpretation of the treaty power, which made clear that Congress cannot "enlarge" the scope of federal power through treaty. *Mayor of New Orleans v. United States*, 35 U.S. 662, 736 (1836). Before *Holland*, it was known that the implementation of a treaty must be exercised consistently "with the nature of our government and the relation between the States and the United States." *Holden v. Joy*, 84 U.S. 211, 243 (1873). The limits on federal power could not "be nullified by the Executive or by the Executive and the Senate combined." *Reid*, 354 U.S. at 17.

New Orleans instructs that the limits of Article I, Section 8 apply with equal force when Congress is implementing a treaty. In *New Orleans*, the federal government claimed that it owned certain parcels of vacant land in New Orleans that were ceded by Spain in a treaty. *New Orleans*, 35 U.S. at 711. But the Court recognized that a federal government of "limited powers" could not regulate the land without relying on an enumerated power. *Id.* at 736. "A treaty," the Court noted, "could not give this power to the federal government." *Id*. After considering and rejecting the commerce power and the power to establish military forts as possible bases for exercising federal jurisdiction, the Court held that the land belonged to New Orleans because the federal government had no power to regulate the lots. "Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." *Id*. *Holland* never cited or engaged with *New Orleans*. And lower courts have made same point about the limits of the treaty power. *See Power Authority v. FPC*, 247 F.2d 538, 543 (D.C. Cir. 1957), *vacated as moot sub nom. American Public Power Association v. Power Authority of State of New York*, 355 U.S. 64 (1957) ("No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.").

Moreover, the Court has not endorsed *Holland*'s claim there can be "no dispute" about legislation implementing a valid treaty. *Holland*, 252 U.S. at 432. Instead, the Court has consistently separated its analysis of implementing legislation from its analysis of the treaty. And the validity of one has never assured the validity of the other. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court held unconstitutional provisions of the Uniform Code of Military Justice that implemented an executive agreement with Great Britain. The provisions gave military courts jurisdiction over the spouses of members of the armed forces, in violation of the Fifth and Sixth

Amendments. *Reid*, 354 U.S. at 18-19 (plurality opinion). But the Court only considered the constitutionality of the implementing legislation, and did not question the validity of the treaty. And in *Medellin v. Texas*, 552 U.S. 491 (2008), the Court rejected the President's attempts to implement various international obligations related to the Vienna Convention while assuming the validity of all of the treaties in question. *Holland*, therefore, was wrong to rely on the validity of the treaty to prove the validity of the implementing legislation. Also, these cases confirm that there is nothing anomalous about the coexistence of a valid treaty and invalid implementing legislation. In this case, the validity of the Chemical Weapons Convention will be untouched by this Court's decision to hold the Act unconstitutional.

iv. *Holland* Should Not Be Upheld on *Stare Decisis* Grounds.

Stare decisis is not a barrier to overturning *Holland* and restoring limitations on the power to implement treaties. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). Here, *Holland*'s single reference to the power to implement treaties under the Necessary and Proper Clause lacked reasoning or authority. Moreover, this reference was inconsistent with the structure, history, and text of the Constitution. "[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Concededly, *Holland* is an old opinion. But the government cannot identify a sufficient reliance interest in implementing treaties that are normally outside the legislative power of Congress. The fact that it has taken nearly one hundred years for a treaty to test "[t]he most important sentence in the most

important case about the constitutional law of foreign affairs" indicates how rarely any treaty will exceed the enumerated powers of Congress. Rosenkranz, *supra*, at 1868. And the government has seldom relied on this argument to defend implementing legislation. *See, e.g.*, Brief for the Respondents, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 3379598 (relying solely on the scope of the Copyright Clause—not the Necessary and Proper Clause—to justify legislation implementing the Agreement on Trade Related Aspects of Intellectual Property Rights). Moreover, this indicates how few implementing statutes the Court would endanger if it finds the Act unconstitutional. In fact, most treaties explicitly accommodate our constitutional structure of federalism. *See generally* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 449-492 (2003).

2. Bond's Local, Noneconomic Conduct Fell Outside the Traditional Enumerated Powers of Congress

Once *Holland*'s error is corrected, it becomes clear that Congress did not have the power to criminalize Bond's conduct. When Congress implemented the Chemical Weapons Convention, the treaty could not provide the power to criminalize Bond's conduct. And the Necessary and Proper Clause cannot authorize the implementing legislation. Instead, Congress must rely on one of its other enumerated powers to authorize this prosecution. But this Court has previously held that Congress lacks the power to criminalize local, noneconomic conduct. *Morrison*, 529 U.S. at 617. Bond's criminal actions never crossed state lines and cannot be said to have had a substantial effect on interstate commerce. The Act contains no jurisdictional element that "might limit its reach" to cases that effect interstate commerce, *Lopez*, 541 U.S. at 562. And Congress made insufficient findings that the Act was related to interstate commerce. *Id.* Finally, the government has previously waived any argument that the Commerce Clause might salvage this prosecution. *Bond II*, 681 F.3d at 151-52 n.1.

B. The Act's Intrusion on State Powers Over Law Enforcement Violates the 10th Amendment.

Even if this Court refused to overturn *Holland* and restore a sensible structural limitation on the treaty power, the Act is unconstitutional because it violates the Tenth Amendment's guarantee of state sovereignty. The Constitution established a system of dual sovereignty and the states retain a "residual and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting *The Federalist* No. 39 (J. Madison)). When a law for carrying into the execution the Treaty Power "violates the principle of state sovereignty," it is not a law proper for carrying into the execution the Treaty Power. *Id.* at 923-24. Such a law is an "'ac[t] of usurpation' which 'deserves to be treated as such.'" *Id.* at 924 (quoting *The Federalist* No. 33 (A. Hamilton)). Bond's prosecution represents a massive federal intervention into state criminal law, an area where the "[s]tates possess primary authority." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). The Act federalized a state law assault case, one that could have easily been prosecuted by the state of Pennsylvania. Bond's conduct violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, or aggravated assault, *see id.* § 2702. Moreover, there are no limits on the ability of the federal government to displace state law enforcement. The Third Circuit could not deny that "[t]he Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Bond II*, 681 F.3d at n. 7. Every kitchen cupboard, therefore, would be a potential federal prosecution. *Cf.* Transcript of Oral Argument at 29, *Bond v. United States*, 131 S. Ct. 2355 (2011) (noting Justice Alito's statement that "pouring a bottle of vinegar in [a] friend's goldfish bowl" could lead to a federal prosecution under the Act).

* * *

This Court should reverse the decision below and hold the Act unconstitutional as a necessary and proper means of implementing the treaty power. Chief Justice Marshall once remarked that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 1 Cranch at 176. Despite this command, *Holland* suggested that treaties have an unlimited ability to expand legislative power. *Holland* was wrongly decided and must be reversed. Without *Holland*'s limitless view of federal power, it is clear that the Act exceeds the enumerated powers of Congress. Independently, the Act's intrusion into state sovereignty and complete displacement of state criminal law violates the Tenth Amendment. For both reasons, the Act is unconstitutional.

II. ALTERNATIVELY, THE ACT DOES NOT PROHIBIT BOND'S CONDUCT.

Alternatively, Bond's conduct was not prohibited by the Act. As already indicated, the government's interpretation of 18 U.S.C. § 229—that an international treaty on chemical weapons covers Bond's domestic poisoning case—unleashes a host of grave constitutional concerns. Such a reading upsets the balance of federalism, dangerously oversteps congressional boundaries under the Necessary and Proper Clause, and violates the Tenth Amendment. If the Court does not *strike down* § 229, it must interpret it *not to apply* to Bond in order to maintain its constitutionality. Fortunately, the text and context of § 229 offers a plausible explanation that avoids the constitutional issues posed by the government's interpretation.

A. The Act Should be Read to Avoid Constitutional Questions Arising From the Government's Interpretation.

The constitutional doubts arising from the government's interpretation of § 229 can be avoided by Bond's plausible interpretation of the Act. According to this Court's longstanding canon of constitutional avoidance: "[W]here a statute is susceptible of two constructions, by one of which constitutional doubts arise and by the other of which such questions are avoided, our

duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999) (emphasis added) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co*., 213 U.S. 366, 408 (1909)). Constitutional avoidance "has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *see also Murray v. The Charming Betsy,* 2 Cranch 64 (1804). In the modern context, constitutional avoidance has been endorsed by the entire Court. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 223 (2009). When the government applies the Act to Bond, it undoubtedly raises constitutional doubts. As a unanimous Court wrote in *Bond I*, federalism is an "end in itself" and protects the "integrity, dignity, and residual sovereignty of the States." *Bond I*, 131 S. Ct. at 2364. As this Court asserted in *Bond I*, "[f]ederalism secures the freedom of the individual," *Id.* at 2358. Applying the Act to Bond strips individuals and states of these rights.

1. Bond's Actions Were Within the "Peaceful Purposes" Exception.

A plausible interpretation of the Act avoids these constitutional doubts. The Act prohibits any use of certain chemicals unless specifically excluded. Bond's conduct should be read within the "purposes not prohibited" section of the Act if we are to maintain the Act's constitutionality. Not only is petitioner's explanation of the relevant text of § 229 plausible in instant case, it also the most commonsensical in light of the structure, text, and context of § 229 and Congress's understanding in passing it.

To avoid constitutional concerns inherent in the government's interpretation of the Act, the Court need only accept a "plausible" interpretation. Bond's reading meets and surpasses this threshold. The government's misinterprets the Act, and indeed the treaty from which it maps its language, to extend to areas of traditional state police power. The Act implements the Chemical

Weapons Convention, an arms control agreement whose aim was to prevent sovereign nations from producing, proliferating, and using chemical weapons as acts of war. Chemical Weapons Convention, *supra* at 800. The Act declares it unlawful "for any person knowingly . . . to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). The Act further specifies that production and use of chemical weapons are prohibited except under four purposes not prohibited by the Act which includes the following: "Peaceful purposes.--Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(A). The important phrase "peaceful purpose" as a modifier sheds light on the type of activity that is not included in the act, and the type of chemicals that are not "chemical weapons" in this context.

A common sense reading of the text and context of the peaceful purposes exception shows clearly that it does not cover the assault of a romantic rival as in instant case, nor was it intended to by Congress. While counterintuitive to the definition adopted by the Third Circuit, Bond's acts were "peaceful" according to the definition that makes most sense in the Act. The Third Circuit relied on the definition of "peaceful" as follows: "untroubled by conflict, agitation, or commotion," "of or relating to a state or time of peace," or "devoid of violence or force." *Bond II*, 681 F.3d at 154 (quoting *Merriam Webster's Collegiate Dictionary* (10th ed. 2002)). However, the correct definition to be applied here is "of or relating to a state or time of peace." In this sense "peaceful" can be understood as a contradistinction to "warlike." Peaceful, therefore, means: "the absence of hostilities, as war." *Webster's II New Riverside Dictionary* (rev. ed. 1996).

"Peaceful purposes" should be understood in the context of the Act as "non-warlike." Indeed, this is the only interpretation of "peaceful" that is consistent with the rest of the Act and the treaty it implements. The Chemical Weapons Convention sets the context of the treaty early in its preamble:

> *Determined* to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction . . .
>
> *Recalling* that the . . . United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

Chemical Weapons Convention, *supra*, at 800. The Chemical Weapons Convention was an arms control agreement that sought to eliminate a type of weapon of mass destruction—chemical weapons—in the footsteps of its predecessor, the Biological Weapons Convention. *Id.* (other provisions in the preamble of treaty referencing previous arms control agreement and prohibition of weapons of mass destruction); *see also Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Organization for the Prohibition of Chemical Weapons, http://www.opcw.org/chemical-weapons-convention/ (website of the implementing body of the Chemical Weapons Convention) (last visited Apr. 14, 2013). Importantly, the convention repeatedly uses the terms of war to define what is prohibited. Moreover, it uses the examples of nation-states and terms related to nation-states like "disarmament" and "international control." In the context of the convention, it is clear that "peaceful" was used insofar as it was understood to exclude "non-warlike" activity, since state-

sponsored acts of war and terror was the only type meant to be prohibited in the first place. Although as the Third Circuit noted the common understanding of "peaceful" might be "untroubled by conflict," this was not a common treaty. It was an important international arms control agreement, and its language should be read accordingly. Bond's act of assault using chemicals in a domestic dispute is a far cry from the state-sponsored acts of chemical warfare and terrorism that the treaty contemplated.

The exception's inclusion of "industrial, agricultural, research, medical, or pharmaceutical activity or other activity," 18 U.S.C. § 229F(7)(A), further indicates that Bond's assault was not one of the uses of chemical weapons criminalized by the Act. The Third Circuit believed that "other activity" should be related in nature to industry, agriculture, or something similar in nature. In reality, those areas—industry, agriculture, research, medical, and pharmacy—were specified because they were considered "gray areas" and needed to be clarified. In its concern over (nation) state-sponsored development of chemical weapons for use in war, the treaty recognized that industry, agriculture, research, and other activities could be used as a subterfuge, and as a way to evade inspections. *See* Chemical Weapons Convention, *supra*, at 800 (noting in the preamble of the treaty that "the use of herbicides as a method of warfare"). As a result, the convention creates a regimen of inspections and limits on industry and some other areas included in the "purposes not prohibited." Congress was also concerned that industries would be improperly and adversely impacted by the statute. Domestic activities are not explicitly included within the scope of the exceptions because they are not a gray area, understood as "peaceful" in the sense that they are "non-warlike." Using a chemical for the purposes of harassing a romantic rival is so beyond the scope of what was prohibited—it does not *need* to be specified.

2. The Legislative History Confirms the Reading of Bond's Actions as "Non-warlike."

The legislative history of the Act[1] confirms that Bond's interpretation is plausible—that the Act was not intended to prohibit Bond's use of chemicals. Constitutional avoidance after all is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Congress's understanding of the purpose of the Chemical Weapons Convention and their reasons for implementing it through legislation, as well as their concerns before its successful passage, clearly refute the government's interpretation of the Act.

Congress understood the Chemical Weapons Convention to be an arms-control treaty along the lines of its predecessor, the Biological Weapons Convention. *See, e.g.*, 144 Cong. Rec. S5369-03, (daily ed. May 22, 1998) (statement of Sen. Domenici), 1998 WL 259662 (referring to the convention as an "international arms control agreement"); 143 Cong. Rec. S1583-01 (daily ed. Feb. 25, 1997) (statement of Sen. Biden), 1997 WL 77779 ("the convention . . . would outlaw poison gas weapons . . . the proliferation of weapons of mass destruction). The legislative history is uniform in this regard. The Clinton administration, which introduced the Act to Congress, was concerned with nation-states creating chemical and biological weapons, and the Congress reflected those concerns in its debates. *Id.* Senator Joe Biden, a major supporter of the treaty and its implementation, stated before its ratification: "The Chemical Weapons Convention will make it illegal under international and domestic laws for a *country* to use, develop, produce, transfer, or stockpile chemical weapons." *Id.* (emphasis added).

[1] The Chemical Weapons Convention Act of 1998 was passed in the Omnibus Consolidated and Emergency Supplemental Appropriations Act. Most of the legislative history that exists is from the 1997 version of the bill, before the omnibus legislation. The citations indicate in which year the legislative history is from.

Congress sought to implement the convention consistently with the language and purpose of the convention. Nowhere in the legislative history is there any indication that the Act penalized assault of a romantic rival, or any crime not related to state-sponsored acts of war or terror. Representative Lee Hamilton, who introduced the administration's bill to Congress (as the Chemical Weapons Convention Act of 1997) with Representative John Conyers, stated the reason for the Act as follows:

> The Chemical Weapons Convention contains a number of provisions that require implementing legislation to give them effect within the United States. These include: International inspections of U.S. facilities; declarations by U.S. chemical and related industry; and establishment of a national authority to serve as the liaison between the United States and the international organization established by the Chemical Weapons Convention and States Parties to the Convention.

143 Cong. Rec. E925-03 (daily ed. May 14, 1997) (statement of Rep. Conyers), 1997 WL 250268. President Bill Clinton, whose administration introduced the bill to Congress, expressed a consistent understanding of the treaty even after the statute was enacted. *See* 145 Cong. Rec. H11939-02 (daily ed. Nov. 10, 1999) (written statement of Pres. Clinton), 1999 WL 1020615 (equating chemical weapons with "weapons of mass destruction").

Congress's misgivings also show that the Act excludes Bond's crime. Congress was concerned that this legislation that applied to nation-state-sponsored acts of war or terror that would infringe on industries, not even contemplating that it would reach an act of revenge by a romantic rival. The only contemplated constitutional concerns were that the Act would harm Fourth and Fifth Amendment rights of industries and their employees in the face of military and industry inspections. *See, e.g.*, 143 Cong. Rec. S5070-02 (daily ed. May 23, 1997) (statement of

Sen. Hatch), 1997 WL 273724. Moreover, Congress recognized that the definition of "chemical weapons" was broad, even pointing out that "a ballpoint pen contains a chemical that could be extracted and used to make poison mustard gas." 144 Cong. Rec. S5369-03 (daily ed. May 22, 1998) (statement of Sen. Domenici), 1998 WL 259662. As a result, Congress's implementing legislation increases one of the chemical concentration limits from 30% to 80% so fewer U.S facilities would be subject to inspections. *Id.* However, the concern was with industry and not domestic, individual use of chemicals such as Bond's.

The government may argue that the language of the Act was intentionally broad and that there was a reason Bond's actions were not included in the list of exceptions. It is true the language may have been intended broad enough to encompass a much wider range of chemical weapons than that contemplated by Congress, in anticipation of technologies and types of weapons that were known and unknown, made or being invented. Even so, that does not change the fact that it was *not* designed to cover assaults, poisoning cases, and the like. Moreover, even if this were a competing, plausibly interpretation, the Court must choose the one that avoids grave constitutional doubts.

B. The Act Should be Interpreted to Protect State Police Power.

Not only does a commonsense reading of the statute avoid constitutional landmines, it also affirms decades of this Court's history of protecting state police power. This Court has been especially cognizant of avoiding constitutional issues when the government's interpretation intrudes on "traditionally local criminal conduct." *United States v. Bass,* 404 U.S. 336, 350 (1971); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 207 (2009); *Jones v. United States*, 529 U.S. 848, 857-58 (2000). In *Jones*, for example, the Court construed a federal statute not to include arson of a private home since "arson is a paradigmatic common-law

state crime." *Jones*, 529 U.S. at 858. Similarly, Bond's use of chemicals against a husband's lover is a domestic poisoning case that falls under the purview of the state, and has for centuries. The government's interpretation of the statute to convict Bond upsets the balance of state and federal power, and is both extreme and unwarranted. It leads to the conviction of individuals who were clearly not intended to be covered by either the treaty or the Act. Bond is a case-in-point—a woman seeking revenge against her husband's lover, not a country developing chemicals of mass destruction.

1. The Government Cannot Meet Its Burden of Proof That Congress Actively Sought to Infringe on State Police Power in the Act.

The government cannot make the required showing that Congress actively decided to disturb the balance of state and federal power. An interpretation that protects state police power respects both the Constitution and Congress. *See Clark*, 543 U.S. at 382 ("This canon [constitutional avoidance] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."). To that end, this Court has set a high standard for interpreting statutes to infringe on this sovereign power: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349 (1971); *see also Fowler v. United States*, 131 S. Ct. 2045, 2052 (2011) (construing word "possible" to avoid making a federally statute interfere with crimes, investigations, and witness tampering of a state nature); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000) (interpreting statute to not include making false statements on license applications, since this fell under state criminal law). Here, there is a high burden on the government to prove that Congress actively contemplated these federalism questions and decided that the Act is meant to encompass areas of state police power.

The government cannot make this finding on the basis of legislative history. In this case, "the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government." *Bass*, 404 U.S. at 350. There is no evidence that Congress faced the questions before the Court today, or answered them in the way the government would like. In all of the legislative history on the Act, there is no mention of assault cases like Bond's. Congress was concerned by states and weapons of mass destruction and as a corollary states pushing industry as a façade for weapons of mass destruction. The only constitutional concerns Congress raised were related to industry and their civilian workers' Fifth Amendment rights. *See, e.g.*, 143 Cong. Rec. S5070-02 (daily ed. May 23, 1997) (statement of Sen. Hatch), 1997 WL 273724. Absent this explicit contemplation and decision by Congress that the statute encompasses Bond's domestic crime, this Court should interpret the statute to protect state police power.

2. The Government's Interpretation Leads to a Slippery Slope of Federalized State Crimes.

This Court has also recognized that there is a dangerous slippery slope created by not respecting the line between state and federal crimes. In *Fowler*, the Court feared that the application of a federal witness tampering statute to what was traditionally a state crime "would federalize crimes that have no connection to any federal investigation. A person caught by a state police officer with marijuana who murders the state police officer to cover it up could be prosecuted in federal court. That would approach the outer limits of Congress's enumerated powers." *Fowler*, 131 S. Ct. at 2056. And in *Cleveland*, the Court considered the implications of a federal statute encompassing a state matter, issuance of licenses, and found that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution *a wide range of conduct traditionally regulated by state and local authorities*."

Cleveland, 531 U.S. at 24-25 (emphasis added). Similarly applying § 229 to Bond would lead to the federalization of crimes of a purely local nature, for a "marginal case." *Jones*, 529 U.S. at 859-60, (Stevens, J., concurring) (quoting *United States v. Altobella,* 442 F.2d 310, 316 (7th Cir. 1971)). The Third Circuit even admitted that "[t]he Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Bond II*, 681 F.3d at n. 7. According to this Court's jurisprudence, in addition to avoiding important federalism concerns, it should avoid the slippery slope created by infringing on state police power by rejecting the government's interpretation of the statute.

Furthermore, this Court has refused to accept prosecutorial discretion to prevent this slippery slope to salvage a statute. "Prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012) (citing *Abuelhawa v. United States,* 556 U.S. 816, 823 n. 3 (2009)). As Bond's conviction and lengthy period in federal prison highlight, the Court cannot trust prosecutorial discretion to overcome constitutional problems in a statute. Even the Third Circuit admitted that Bond's prosecution "seems a questionable exercise of prosecutorial discretion" that "trivializes the concept of chemical weapons." *Bond II*, 681 F.3d at 165. This Court must either invalidate a statute as unconstitutional or interpret it to avoid the constitutional problem.

3. The Rule of Lenity Favors Bond.

If after analysis of the text and legislative history of a statute, the Court still finds its meaning ambiguous, the rule of lenity requires that this Court read the statute in favor of Bond. *See Moskal v. United States*, 498 U.S. 103 (1990). "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Jones*, 529 U.S. at 858 (quoting *Rewis v. United States,* 401 U.S. 808, 812 (1971)). And "when choice has to be made between two

readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 858 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222 (1952)). Bond was sentenced under a harsher federal statute—as we have argued improperly—to six years in prison, five years of supervised release, a $2,000 fine, and restitution of $9,902.79—for causing a minor thumb injury to her husband's lover. *Bond*, 581 F.3d at 133. Since there is, at the very least, ambiguity between the Third Circuit's interpretation of the statute and Bond's, and since Congress has not spoken in clear and definite language in support of the government's interpretation, the rule of lenity favors Bond.

* * *

In answer to the second question presented before this Court, the provisions of § 229 can be interpreted to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*. At the very least, petitioner's interpretation that her domestic assault be included in the "peaceful" as "non-warlike" exception is plausible, given the plausible dictionary definition of "peaceful" in the context of the treaty and statute. The legislative history of the Act confirms this statutory construction, reflecting the understanding of Congress and the Clinton administration that introduced the bill. Furthermore, the government fails to meet its burden of proving that Congress explicitly intended to intrude on state criminal law. This Court places such a high burden of proof on the government in deference to state police powers, recognizing that not doing so would lead to a slippery slope into cases like the one before the Court today. And finally, notwithstanding these several reasons of choosing Petitioner's interpretation of § 229, the rule of lenity guides the Court in favor of the defendant in this criminal matter.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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