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No. 12-158

In The Morris Tyler Moot Court of Appeals at Yale

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Chemical Weapons Convention Implementation Act of 1997 (the "Act"), Pub. L. No. 105-277, 112 Stat. 2681-856, provides that "it shall be 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). It further defines "chemical weapon" as any "toxic chemical" that may cause "death, temporary incapacitation or permanent harm" except where that substance is intended for, and of a type and quantity consistent with a "peaceful purpose." *Id.* § 229F(1)(A), (7)(A), (8)(A).

The questions presented are:

1. Whether Congress may implement a concededly valid treaty pursuant to the Necessary and Proper Clause; and
2. Whether the provisions of the Act may be permissibly narrowed to exclude petitioner's conduct under the doctrine of constitutional avoidance.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

I. THE CONSTITUTION VESTS CONGRESS WITH THE POWER TO IMPLEMENT A VALID TREATY 9

A. For More Than Two Centuries This Court Has Affirmed And Reaffirmed Congress' Enormous Powers To Effectuate The Nation's Treaty Commitments 10

B. There Is No Reason To Overturn More Than Two Hundred Years Of Precedent As It Has Served The United States Well, Stands On Sure Jurisprudential Footing, And Its Reversal Would Call Into Question Hundreds Of Treaties And Thousands Of Laws 15

II. THE UNAMBIGUOUS INTERPRETATION OF THE ACT CLEARLY ENCOMPASSES PETITIONER'S CONDUCT AND RAISES NO MEANINGFUL CONSTITUTIONAL DOUBTS 22

A. The Act Unambiguously Criminalizes Petitioner's Conduct And Fails To Trigger The Avoidance Canon 23

B. Properly Construed, No Serious Constitutional Question Exists Regarding The Act 27

C. Even If This Court Harbored Constitutional Doubts, Petitioner's Proposed Reading Of "Peaceful Purpose" Stretches Those Words Beyond Recognition 33

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES

Alamendarez-Torres v. *United States*,
523 U.S. 224 (1998) 23

Ali v. *Federal Bureau of Prisons*,
552 U.S. 214 (2008) 29, 30

Bond v. *United States*,
131 S. Ct. 2355 (2011) 1, 3, 4

Burnet v. *Coronado Oil & Gas Co.*,
285 U.S. 393 (1932) 32

Carneal v. *Banks*,
23 U.S. (10 Wheat.) 181 (1825) 13

Chirac v. *Chirac's Lessee*,
15 U.S. (2 Wheat.) 259 (1817) 13

Citizens United v. *Federal Election Commission*,
130 S. Ct. 876 (2010) 16

Commodity Futures Trading Commission v. *Schor*,
478 U.S. 833 (1986) 24

Crowell v. *Benson*,
285 U.S. 22 (1932) 33

Dames & Moore v. *Regan*,
453 U.S. 654 (1981) 15

Fairfax's Devisee v. *Hunter's Lessee*,
11 U.S. (7 Cranch) 603 (1812) 13

Federal Communications Commission v. *American Broadcasting Co.*,
347 U.S. 284 (1954) 25

Garcia v. *San Antonio Metropolitan Transit Authority,*
469 U.S. 528 (1985) 20

Georgia v. *Brailsford*,
3 U.S. (2 Dall.) 1 (1794) 13

Gonzales v. *Carhart*,
550 U.S. 124 (2007) 23

Gonzales v. *Raich*,
545 U.S. 1 (2005) 28, 29, 30

Harris v. *United States*,
536 U.S. 545 (2002) 31

Hilton v. *South Carolina Public Railways Commission*,
502 U.S. 197 (1991) 31

Holmes v. *Jennison*,
39 U.S. (14 Pet.) 540 (1840) 13

Hopkirk v. *Bell*,
7 U.S. (3 Cranch) 454 (1806) 13

Hughes v. *Edwards*,
22 U.S. (9 Wheat.) 489 (1824) 13

In re Ah Fong,
1 F. Cas. 213 (C.C.D. Cal. 1874) 13

James v. *United States*,
127 S. Ct. 1586 (2007) 35

Jones v. *United States*,
526 U.S. 227 (1999) 36

Keiningham v. *United States*,
287 F.2d 126 (D.C. Cir. 1960) 34

Lattimer's Lessee v. *Poteet*,
39 U.S. (14 Pet.) 4 (1840) 13

McCulloch v. *Maryland*,
17 U.S. (4 Wheat.) 316 (1819) 9, 10, 13, 28

Miller v. *French*,
530 U.S. 327 (2000) 37

Missouri v. *Holland*,
252 U.S. 416 (1920) ... passim

National Federation of Independent Business v. *Sebelius*,
132 S. Ct. 2566 (2012) ... 13

New York v. *United States*,
505 U.S. 144 (1992) ... 20, 21

NLRB v. *Catholic Bishop of Chicago*,
440 U.S. 490 (1979) ... 24

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989) ... 31

Planned Parenthood of Southeastern Pennsylvania v. *Casey*,
505 U.S. 833 (1992) ... 15, 17, 32

Printz v. *United States*,
521 U.S. 898 (1997) ... 20, 21

Reid v. *Covert*,
354 U.S. 1 (1957) ... 10, 15, 17

Reno v. *ACLU*,
521 U.S. 844 (1997) ... 33

Rust v. *Sullivan*,
500 U.S. 173 (1991) ... 27, 33, 36

South Carolina v. *Baker*,
485 U.S. 505 (1988) ... 20

United States ex rel Attorney General v. *Delaware & Hudson Co.*,
213 U.S. 366 (1909) ... 27, 33

United States v. *Bond*,
581 F.3d 128 (3d Cir. 2009) ... passim

United States v. *Bond*,
681 F.3d 149 (3d Cir. 2012) ... passim

United States v. *Comstock*,
130 S. Ct. 1949 (2010) ... 9

United States v. *Curtiss-Wright Export Corp.*,
299 U.S. 304 (1936) 16, 21

United States v. *Ferreira*,
275 F.3d 1020 (11th Cir. 2001) 19

United States v. *Jin Fuey Moy*,
241 U.S. 394 (1916) 23

United States v. *Lara*,
541 U.S. 193 (2004) 10

United States v. *Lopez*,
514 U.S. 549 (1995) 28

United States v. *Lue*,
134 F.3d 79 (2d Cir. 1998) 19

United States v. *Nixon*,
418 U.S. 683 (1974) 30

United States v. *Oakland Cannabis Buyers' Cooperative*,
532 U.S. 483 (2001) 23

United States v. *Stevens*,
130 S. Ct. 1577 (2010) 37

Virginia v. *American Bookseller's Ass'n, Inc.*,
484 U.S. 383 (1988) 34

Ware v. *Hylton*,
3 U.S. (3 Dall.) 199 (1796) 13

Welch v. *Texas Department of Highways & Public Transportation*,
483 U.S. 468 (1987) 31

Whitman v. *American Trucking Associations*,
531 U.S. 457 (2001) 29, 35

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 14

Zadvydas v. *Davis*,
533 U.S. 678 (2001) 33

STATUTES, REGULATIONS, AND RULES

U.S. Const. art. I, § 8, cl. 18 .... 7, 8, 9, 15

U.S. Const. amend. X 10

18 U.S.C.
§ 229(a)(1) .... passim
§ 229F(1)(A) .... i, 24
§ 229F(7)(A) .... i, 24, 25, 34
§ 229F(8)(A) .... i, 24
§ 801(7) 19
§ 1708 .... 1, 4

21 U.S.C. § 801a(2) 19

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2013(d) 36

Chemical Weapons Convention Implementation Act of 1997, Pub. L. No. 105-277, 112 Stat. 2681-856 .... i, 2, 8

Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* 28

Hostage Taking Act, 18 U.S.C. § 1203 18

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Federalist No. 75 (Hamilton) ... 12
Federalist No. 78 (Hamilton) ... 31

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 681 F.3d 149. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2012. A writ of certiorari was filed with this Court on August 1, 2012, and the petition was granted on January 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Following a guilty plea, the United States District Court for the Eastern District of Pennsylvania convicted petitioner on two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), and two counts of mail theft, in violation of 18 U.S.C. § 1708. *United States* v. *Bond*, 581 F.3d 128, 132 (3d Cir. 2009). The court imposed a sentence of six years' imprisonment, five years supervised release, a $2,000 fine, and restitution. *Id.* at 133.

On prior appeal, this Court held that petitioner had standing to challenge the Chemical Weapons Convention Implementation Act and remanded to the Third Circuit for relevant proceedings. *Bond* v. *United States*, 131 S. Ct. 2355 (2011). The court of appeals affirmed, and petitioner again appeals her conviction to this Court. *United States* v. *Bond*, 681 F.3d 149 (3d Cir. 2012).

1. In 1993 the Senate approved the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their

Destruction (the "Convention"), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45. The international treaty required that State Parties not "use chemical weapons" or "develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Convention at 319. The treaty obligates signing states to adopt measures domestically prohibiting those activities. Under the Convention's terms, the United States must enact legislation "including * * * penal legislation," prohibiting "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party under [the] Convention." *Id*. at 332.

In order to implement the United States' obligations under the treaty, Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (the "Act"), Pub. L. No. 105-277, 112 Stat. 2681-856. The criminal provisions of the Act reflect the dictates of the Convention: they render it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1).

2. Petitioner, a trained microbiologist, "vowed revenge" when she learned that her close friend, Myrlinda Haynes, had become pregnant by petitioner's husband. 581 F.3d at 131. She "subjected [Haynes] to a campaign of harassing telephone calls and letters"—featuring statements such as "I [am] going to make your life a living hell" and "Dead people will visit you"—that resulted in a state

criminal conviction. *Bond* v. *United States*, 131 S. Ct. 2355, 2360 (2011); Robert Barnes, *Supreme Court Hears Soap Opera Story of Interest to the Tea Party*, Wash. Post, Feb. 22, 2011, http://tinyurl.com/Soap-Opera-Story [hereinafter *Bond Story*].

The state conviction did not deter petitioner; instead, the "bitter personal dispute" between the women escalated. 131 S. Ct. at 2360. In an attempt to poison Haynes, petitioner stole 10-choloro-10H-phenoxarsine from her employer Rohm & Haas and ordered a vial of potassium dichromate over the internet. Each of these chemicals is extremely dangerous and has the ability to poison an individual through "minimal topical contact." 581 F.3d at 132 & n.1. If ingested, as little as one-half teaspoon of 10-chloro-10H-phenoxarsine is lethal to an adult; potassium dichromate is even more dangerous, requiring less than one-quarter of a teaspoon to cause death. *Id*. at n.1.

Petitioner attempted to poison Haynes with these chemicals at least 24 times over the course of several months; she applied the compounds to objects outside the home including doorknobs, car door handles and a mailbox. *Id*. at 132. Though targeting Haynes, petitioner placed toxic chemicals in locations where they could have also injured either Haynes' infant daughter or members of the public at large. See *Bond Story*.

Haynes relayed her concerns regarding the unknown powders to her local mail carrier and the Postal Inspection Service began an investigation. 581 F.3d at 132. The Service installed surveillance equipment that captured petitioner "opening Hayes's mailbox, stealing a business envelope, and placing potassium dichromate

inside Haynes's car muffler." *Ibid*. The officers then used the footage, among other evidence gathered in the investigation, to obtain a search warrant for petitioner's home; upon execution, they discovered a quantity of the chemicals in petitioner's home and car. *Ibid*.

3. A grand jury in the Eastern District of Pennsylvania indicted Bond on two counts of possessing and using chemical weapons, in violation of 18 U.S.C. § 229(a)(1), and two counts of mail theft, in violation of 18 U.S.C. § 1708. App. 13-18. Petitioner moved to dismiss the indictment on the grounds that section 229 was both vague and exceeded Congress' authority. 681 F.3d at 151.

The government responded that the Act should be upheld as a necessary and proper exercise of the treaty power. The district court sided with the government, finding that Congress' power to implement validly-executed treaties provided a valid source of authority for section 229 and that, as written, the statute encompassed petitioner's conduct. *Id*. at 151-152.

On appeal, the Third Circuit affirmed, holding that petitioner "lacked standing to pursue her Tenth Amendment challenge and that the Act was neither unconstitutionally vague nor unconstitutionally overbroad." *Id*. at 152. This Court granted a petition for certiorari and concluded that petitioner "ha[d] standing to challenge the federal statute," remanding the case to the court of appeals to address the narrower "issue of the statute's validity." 131 S. Ct. at 2360.

On remand, the Third Circuit affirmed petitioner's conviction. 681 F.3d at 166.

The court first addressed petitioner's argument that the statute should be narrowed to exempt her conduct. Specifically, petitioner asserted that her conduct fell within the statute's exception for the use of a toxic substance consistent with a "peaceful purpose," as she had not engaged in "warlike" activities. *Id.* at 153-154. The court of appeals, however, concluded that petitioner's "behavior 'clearly constituted unlawful possession and use of a chemical weapon under § 229.'" *Id.* at 154 (quoting 581 F.3d at 139). The opinion explained that petitioner's use of "highly toxic chemicals with the intent of harming Haynes, can hardly be characterized as 'peaceful' under that word's commonly understood meaning;" accordingly, it was not the court's "prerogative to rewrite the statute" to conform with petitioner's suggested interpretation. *Id.* at 154-155.

The court also rejected petitioner's constitutional objection. It first noted that she had conceded that the Convention was a valid treaty. *Id.* at 159; 167 (Rendell, J., concurring) (observing that the petitioner "unequivocally concedes" the point). The court then concluded that "[w]hatever the Treaty Power's proper bounds[,] * * * we are confident that the Convention we are dealing with here falls comfortably within them." *Id.* at 161. See also *id.* at 162 (terming the treaty "valid under any reasonable conception of the Treaty Power's scope").

The court of appeals further concluded that section 229 was "necessary and proper to carry the Convention into effect" under *Missouri* v. *Holland*, 252 U.S. 416 (1920). *Ibid.* ("'If the treaty is valid there can be no dispute about the validity of the [implementing] statute . . . as a necessary and proper means to execute the powers

of the Government.'" (quoting *Holland*, 252 U.S. at 432)). Accordingly, the court found that the Act's application to petitioner's conduct did not "disrupt[] the balance of power between the federal government and the states." *Id.* at 166. The court held in the alternative that even without *Holland*, petitioner's claim still failed. *Id.* at 165-166 & n.18 ("[A]ny attempt to precisely define a subject matter limitation on the Treaty Power would involve political judgments beyond [courts'] ken."). Even if it were to attempt to place limits on the treaty power, the court held, the Tenth Amendment would still have "nothing meaningful to say" regarding the implementing legislation at the core of federal treaty bounds, such as those "dealing with war, peace, foreign commerce, and diplomacy directed to those ends." *Id.* at n.18.

Judge Rendell concurred, emphasizing that the Convention was within the treaty power and section 229 a valid implementation of its terms. She explained that an inquiry into the scope of Congress' powers under the Necessary and Proper Clause was not required on the facts of this case because the Act was constitutional pursuant to the treaty power. *Id.* at 166-169.

Judge Ambro also concurred, "urg[ing] the Supreme Court to provide a clarifying explanation of its statement in *Holland* that '[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.'" *Id.* at 169 (alterations in original) (quoting *Holland*, 252 U.S. at 432).

This Court granted certiorari review.

SUMMARY OF THE ARGUMENT

In the area of foreign affairs, the federal government's constitutional powers reach high tide. It is the duty of the federal government to ensure that the Nation meets its obligations to other nations and speaks with one voice in its foreign relations. The powers of the federal government ensure that no state possesses the authority to involve the Nation in calamitous foreign wars, disruptive international embarrassments, or fraught and precarious external entanglements. In more than two centuries, this Court has never struck down a treaty as unconstitutional, and it has never struck down a statute implementing a valid treaty on federalism grounds. Yet the petitioner in this case asks for both. The Petitioner argues simultaneously that the Chemical Weapons Treaty grants unconstitutionally broad authority to Congress, and that Congress has exceeded its constitutional powers under the Necessary and Proper Clause in implementing the treaty according to its plain terms.

The Constitution's text, history, precedent, and policy diametrically oppose the doctrine petitioner advances. The Necessary and Proper Clause of the United States Constitution delegates to Congress the power to implement a valid treaty. Evidence from the framing era points overwhelmingly to this conclusion. Two and a quarter centuries of this Court's precedents explicitly endorse the Framers' view. It would be unsound in principle and unworkable in practice to craft a judicially-imposed substantive limit on the power of Congress to effectuate the Nation's treaty

commitments. Even if such a standard could be devised, the Chemical Weapons Implementation Act would fall squarely in its core.

The Chemical Weapons Convention Implementation Act cannot be "interpreted" to avoid the "constitutional question." The text of the Chemical Weapons Convention Implementation Act clearly encompasses the petitioner's criminal conduct. This is not a case where Congress has sailed close to the constitutional line; indeed several of the "constitutional" issues that petitioner raises—including the Act's breadth, the capability of state authorities, and an appeal to avoid the question of a prior precedent's vitality—have previously been resolved by this Court, leaving no doubt as to their import. Moreover, petitioner's proposed interpretation of the implementing statute is not a fairly possible construction of the Act, and accepting its precepts would collapse the statutory scheme in a manner tantamount to repealing the treaty itself. It would as much frustrate the exercise of Congress' legitimate powers under the Necessary and Proper Clause for this Court to rewrite its legislation as it would for this Court to strike that legislation down. Because the text of the treaty and statute are both clear, and the treaty and its implementation legislation abundantly constitutional, the application of the constitutional avoidance canon is inapposite here.

The petitioner claims to ask for something less than a wholesale revision of the United States' constitutional scheme in the area of foreign affairs. But in asking this Court to overturn over two hundred years of settled precedent, or for an interpretation of the underlying statute that would do so in all but name, the

petitioner here asks for nothing less. Some wolves come dressed in sheep's clothing. This wolf comes dressed as a wolf.

ARGUMENT

I. THE CONSTITUTION VESTS CONGRESS WITH THE POWER TO IMPLEMENT A VALID TREATY

This Court has never held a treaty unconstitutional. The Constitution of the United States of America: Analysis and Interpretation 505 (Johnny H. Killian et al. eds., 2004). Nor has it ever struck down a statute implementing a treaty on federalism grounds. Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. Cin. L. Rev. 1243, 1291 n. 296 (2005). Instead, for more than twenty-three decades this Court has not interfered with the United States Congress' authority to draw borders, settle land disputes, seize and extradite individuals, punish crimes, override state laws, mend state court procedures, cancel causes of action, and otherwise ensure that the United States meets its international obligations by giving the Constitution its plainest, most sensible, and intended meaning.

The Necessary and Proper Clause gives Congress the authority "to enact laws that are 'convenient, or useful' or 'conducive' * * * to the 'beneficial exercise'" of the federal government's treaty power. *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819)). In *Missouri* v. *Holland*, this Court declared that, if a treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252

U.S. 416, 432 (1920). The Court in *Holland* held that when "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 433-434.

In *Reid* v. *Covert*, thirty-five years later, this Court again held that to "the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." 354 U.S. 1, 18 (1957); see *Holland*, 252 U.S. at 435. It reiterated these principles less than a decade ago in *United States* v. *Lara*: "The treaty power * * * can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" 541 U.S. 193, 201 (2004) (quoting *Holland*, 252 U.S. at 416). There is a reason these principles appear and reappear in this Court's decisions. They are principles as old as the Constitution itself.

A. For More Than Two Centuries This Court Has Affirmed And Reaffirmed Congress' Enormous Powers To Effectuate The Nation's Treaty Commitments

The Framers' Constitution was a war machine, designed, first and foremost, to effectuate "the great powers * * * [t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation" so as to meet the exigencies of war and peace. *McCulloch*, 17 U.S. at 407. The Constitution they designed invested the preservation of the states' reserved powers to the combined political judgments of Congress, the Senate, and the President.

This was no accident. Complaints of the states' repeated treaty violations, and the danger they posed to the peace and prosperity of the Nation, echoed through the Philadelphia Convention Hall. See, *e.g.*, 1 The Records of the Federal Convention of 1787, at 18-19, 24 (Max Farrand ed., 1911) (Edmund Randolph, May 29, 1787, complaining of how "treaties had been [regularly] * * * violated"); *id.* at 164 (Charles Pinckney, June 8, 1787, decrying "a constant tendency in the States * * * to violate national Treaties"); *id.* at 316 (James Madison, June 19, 1787, noting "[t]he tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed[.]"). Madison warned his fellow delegates that they could not leave without a Constitution capable of preventing the states' continuing "violations of the law of nations & of Treaties," *ibid.*

The Framers' harbored no illusions about the scope and magnitude of the power they were investing in the federal government. While sensitive to the concerns of those who feared such a concentration of power in the federal head, they understood that the price of depriving Congress of the power to carry out the Nation's treaty commitments would be a "society everywhere subordinate to the authority of the parts; * * * a monster, in which the head was under the direction of the members." The Federalist No. 44, at 287 (Madison) (Clinton Rossiter ed., 1961). It would be a "system of government founded on an inversion of the fundamental principles of all government," *ibid.*, a "Union * * * continually at the mercy of the

prejudices, the passions, and the interests of every member of which it is composed." The Federalist No. 22, at 151 (Hamilton).

Throughout *The Federalist*, Madison, Hamilton, and Jay spoke forcefully of the federal government's special role in foreign affairs, see The Federalist No. 42 at 264 (Madison), of the need to unite the Nation to maximize its bargaining power, see The Federalist No. 75 at 452 (Hamilton), and of the urgent need to prevent continuing treaty violations by the states. See The Federalist No. 22, at 151 (Hamilton). "If we are to be one nation in any respect," wrote Madison, "it clearly ought to be in respect to other nations." The Federalist No. 42, at 264 (Madison).

The Framers were mindful of concerns about the breadth of this enormous federal treaty power. But as Hamilton explained in *The Federalist* No. 34, countering critics who argued there ought to be explicit limits on the federal government's taxing powers, it would be "the extreme of folly" to constitutionally disable the federal government from its duty to protect the Nation and preserve domestic tranquility. The Federalist No. 34, at 207-208 (Hamilton). When it came to foreign affairs, the question was not one of wooden limits but of careful procedures, for "[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." *Id.* at 207. For treaties, the framers created a procedure uniquely protective of state interests, insisting they be negotiated by the President, who answered to a national constituency, and that they be approved by two-thirds of the Senate—the organ in which the states were to be equally represented and whose

members were to be appointed by the state legislatures. The Federalist No. 64, at 395 (Jay).

For more than two hundred years this Court has never questioned the Framers' view. Between 1794 and 1825 it repeatedly and unhesitatingly upheld treaty provisions overriding state property and contract laws to effectuate the United States' treaty obligations. See, *e.g.*, *Carneal* v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825); *Hughes* v. *Edwards*, 22 U.S. (9 Wheat.) 489 (1824); *Chirac* v. *Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 277-278 (1817); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812); *Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454 (1806); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Georgia* v. *Brailsford*, 3 U.S. (2 Dall.) 1 (1794). These interventions go beyond Congress' enumerated commerce powers even today. See *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012).

Between 1825 and 1920 this Court affirmed the federal government's plenary treaty-making authority time and again, even as the Court grew more attentive to states' rights in other areas. See, *e.g.*, *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (opinion of Taney, C.J., joined by Story, McLean, and Wayne, JJ.); *Lattimer's Lessee* v. *Poteet*, 39 U.S. (14 Pet.) 4, 5 (1840). These results obtained even as the Supreme Court began to drift away from the principles set down in *McCulloch*, 17 U.S. at 421, in the shadow of the mounting crisis over slavery. See *In re Ah Fong*, 1 F. Cas. 213, 216-217 (C.C.D. Cal. 1874) (Field, J.) ("[W]e cannot shut our eyes to the fact that much of what was formerly said upon the power of the state in this

respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.").

As of the day this Court decided *Missouri* v. *Holland*, "[n]o treaty ha[d] ever been declared unconstitutional by any court, state or federal." Comment, *The Power of the States to Make Compacts*, 31 Yale L.J. 635, 638 (1922); see also 2 Charles Henry Butler, The Treaty-Making Power of the United States 347 (1902) ("No treaty or legislation based on or enacted to carry out any treaty stipulations has ever been declared void or unconstitutional by any court of competent jurisdiction notwithstanding the fact that in many cases the matters affected both as to the treaty and the legislation are apparently beyond the domain of congressional legislation and in some instances of Federal jurisdiction."). As Charles Butler wrote of this incredible fact, "which necessarily impresses itself most forcibly on the mind" the treaty-making power "is not restricted by any limitation." *Id*. at 347-348.

This long, unbroken history is especially significant here, in the context of foreign affairs, where the Framers envisioned that many constitutional powers would be established by the operation of the government itself. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 424-432 (2012). As influential members of this Court have explained "a systematic, unbroken * * * practice, long pursued * * * and never before questioned" makes "such exercise[s] of power part of the structure of our government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring); see also *Dames & Moore* v. *Regan*,

453 U.S. 654, 686 (1981) (Rehnquist, J.) ("Past practice does not, by itself, create power, but * * * raise[s] a presumption [in its favor].").

In the years since *Missouri* v. *Holland*, this Court has treated its pronouncements on the scope and extent of the federal government's treaty powers as both binding and unambiguous. In *Reid* v. *Covert*, the Court confirmed that pursuant to *Holland*—and one-hundred and seventy years of precedent—"[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." 354 U.S. at 18. And as *Holland* held, "there can be no dispute about the validity of the statute [implementing a treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432.

B. There Is No Reason To Overturn More Than Two Hundred Years Of Precedent As It Has Served The United States Well, Stands On Sure Jurisprudential Footing, And Its Reversal Would Call Into Question Hundreds Of Treaties And Thousands Of Laws

This Court's precedents, most clearly voiced in its decision in *Holland* almost one-hundred years ago, have stood the test of time and exhibit none of the indicia that ordinarily call precedents into question. This Court has held that a precedent should be revisited if it has proven unworkable, if its jurisprudential foundations have been eroded, and if society's reliance on the precedent is not so great that overturning the prior rule would cause special hardship. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854-855 (1992). Though the rule of *stare decisis* is not an inexorable command, it is to "to be respected unless the

most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 876, 911-912 (2010). But none of this Court's settled factors for overturning past precedent point in favor of overturning—or even embroidering—the rule set forth in *Missouri* v. *Holland*. If anything all three factors point strongly toward *Holland*'s continuing vitality.

The rule of *Holland*, that Congress may implement a treaty the Nation may validly enter, is precisely coextensive with the authority expected of a sovereign nation in its foreign affairs, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936), grants the United States maximum leeway to enter into complex multilateral commitments, and has not unduly trammeled on the retained rights of the states. Unlike the United States, in which treaties are *ex vi termini* the law of the land, a significant number of nations implement treaties through a two-step procedure in which the treaty is agreed to externally and then implemented legislatively. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 391 n.5 (1998). Moreover, today, "many of the most important treaties are multilateral," involving potentially dozens of nations, making it difficult to craft nuanced treaty-language that conforms to idiosyncratic constitutional requirements. Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 668 (2008).

Thus, far from unworkable, the rule of *Holland* is more necessary today than it has ever been in the past. It allows the United States to enter into treaties—such as the Chemical Weapons Convention—without having to give up valuable concessions simply to procure magic language sufficient to render the treaty consistent with the United States' enumerated legislative scheme. See *ibid.* Such arbitrary and peculiar limitations on the United States' sovereign authority would significantly hinder its foreign relations. This interference would result, moreover, even though *Holland* has not resulted in anything more than *de minimis* encroachment on the considerable powers still possessed and freely exercised by the states.

Even as the rule of *Holland* has proven itself indispensable to the United States' standing abroad, its jurisprudential underpinnings have remained firmly rooted at home. Courts have not by gloss or annotation sought to qualify the powers set forth in *Holland*. Far from a situation in which "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," *Casey*, 505 U.S. at 855, the rule of *Holland* remains clear and precise. Indeed, any attempt by this Court to ornament *Holland* with vague qualifications or limitations would itself be the first step in nearly one-hundred years away from *Holland*'s unadorned simplicity. See, *e.g.*, *Reid* v. *Covert*, 354 U.S. at 18 (rearticulating the rule in a single sentence). Loosening the rule would be both perilous and unnecessary given *Holland*'s sound jurisprudential moorings.

Finally, and most critically, the United States' enormous reliance interest in the continuing viability of *Holland* calls for unusual caution. The sheer number and importance of the commitments that will be disrupted is beyond count. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 396 (1998) ("[T]reaty-making has now eclipsed custom as the primary mode of international law-making."); Oona A. Hathaway, *The Cost of Commitment*, 55 Stan. L. Rev. 1821, 1822 (2003) (noting that "[o]ver the last half-century, the number of treaties that address issues of human rights has grown from a handful to hundreds"); Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735, 749-750 (2001) ("In recent years, the subject matter of treaties and other international agreements has expanded to encompass nearly every part of what used to be considered the exclusive domain of state law."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 151 (2004) ("International law deals increasingly with the relationship between the government and its citizens, which has led to considerable overlap between the subject matter of treaties and the regulatory concerns of state governments.").

Not only does upsetting *Holland* thus threaten to critically disrupt America's participation in international lawmaking, but treaties that the United States has already entered in reliance on *Holland* are numerous. They include, for example the International Convention Against the Taking of Hostages, implemented by the Act for the Prevention and Punishment of the Crime of Hostage-Taking. See *United*

States v. *Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (upholding the Act under *Holland*); *United States* v. *Lue*, 134 F.3d 79, 82, 84 (2d Cir. 1998) (same); the Single Convention on Narcotic Drugs implemented by the Controlled Substances Act. See 21 U.S.C. § 801a(2); *id.* § 801(7); the Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3; the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted Oct. 20, 1988, 28 I.L.M. 150; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113; and the Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13, to name only a few. Overturning *Holland* would make it impossible for the United States to fulfill its obligations under these treaties and call into question the constitutionality of their implementing legislation.

In framing the *Holland* precedent as *empowering* the federal government, the petitioner mistakes its role in American foreign affairs lawmaking. *Holland* is not a federal encroachment into the sovereign authority of the states. Rather, it recognizes a narrow and necessary compromise, providing the federal government the legislative space to fulfill its international commitments flexibly and effectively. To overturn or even embellish *Holland* would threaten the United States' ability to fulfill its international obligations and call into question hundreds of commitments the Nation has already made. Given the consequences of such an act, and given *Holland*'s continuing jurisprudential vitality, it should not be disturbed.

This Court's understanding of the Tenth Amendment set forth in *Holland* is unremarkable. It stands symmetric with this Court's settled federalism jurisprudence respecting the Commerce Clause. In *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), and *South Carolina* v. *Baker,* 485 U.S. 505 (1988) the Court held that when Congress acts pursuant to the Necessary and Proper Clause, "States must find their protection * * * through the national political process, not through judicially defined spheres of unregulable * * * activity." *Id.* at 512. This Court rejected as "unsound in principle and unworkable in practice" any limitations on Congress' powers derived solely from the invisible radiation of the Tenth Amendment's terms. *Garcia,* 469 U.S., at 546. "If there are to be limits on the Federal Government's power * * * we must look elsewhere to find them." *Id.* at 547. The Tenth Amendment does not place an independent limit on legislation enacted to implement a valid treaty just as it does not place an independent limit on legislation enacted pursuant to the Commerce Clause.

Printz v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992) are not to the contrary. As the Court in *Printz* explained, the Tenth Amendment is merely declaratory of principles of residual sovereignty that already operates as an independent limit on the scope of the Necessary and Proper Clause without recourse to the Tenth Amendment. *Printz*, 521 U.S. 898, 923-924 (1997) ("What destroys the dissent's Necessary and Proper Clause argument * * * is not the Tenth Amendment but the Necessary and Proper Clause itself."). This Court in *Printz* explained that this understanding was also the rationale in *New York* v.

United States. *Id*. at 924 (quoting *New York* v. *United States*, 505 U.S., at 166). Both *Printz* and *New York* acknowledge that the Tenth Amendment has no independent valence, but depends for its force on other features of the Constitution's structural scheme—in those cases the "[r]esidual * * * sovereignty" of the states in the constitutional design. *Id*. at 919. But there is no evidence that the Framers anticipated that the states would retain *any* residual sovereignty in matters touching upon foreign affairs, and there is considerable evidence they thought the opposite. See, *e.g.*, The Federalist No. 42, at 264 (Madison) ("If we are to be one nation in any respect it clearly ought to be in respect to other nations."); *Curtiss-Wright*, 299 U.S. at 317 ("The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.").

The petitioner's proposal that treaties might be limited to principally external objects such as "war, peace, and commerce," *United States* v. *Bond*, 681 F.3d 149, 160 (3d Cir. 2012), would be both ahistorical and unadministrable. But even if this Court were to take the unprecedented step of imposing such subject matter restrictions, and thereby enmeshing the courts in complex and fact-laden policy judgments under this vague and inarticulate standard, "because the [Chemical Weapons] Convention relates to war, peace, and perhaps commerce, it fits at the core of the Treaty Power." *Id*. at 162. The court below accepted this without elaboration—and indeed it is self-evident. The International Chemical Weapons Convention is designed to ensure "the complete and effective prohibition of

the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons." Convention at 319. The United States, in exchange for like promises from other nations, promised that it would, "in accordance with its constitutional process, adopt the necessary measures to implement its obligations under this Convention." *Id*. at 810. This treaty specifically requires a complying nation to "[p]rohibit natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited * * * under this Convention, including enacting penal legislation with respect to such activity." *Ibid*.

If the United States expects every other nation to comply with this commitment—to prevent chemical war and the destabilizing effects that must necessarily follow from the development, production, acquisition, stockpiling, retention, transfer and use of chemical weaponry—there can be no doubt that the Constitution provides the United States the power to fulfill its obligations in exchange for this concession. To the extent, therefore, that this Court might seek to circumscribe the treaty power, the Chemical Weapons Convention and its implementing legislation are at its core, and they would easily satisfy any subject-matter test this Court might devise.

II. THE UNAMBIGUOUS INTERPRETATION OF THE ACT CLEARLY ENCOMPASSES PETITIONER'S CONDUCT AND RAISES NO MEANINGFUL CONSTITUTIONAL DOUBTS

Petitioner urges this Court to construe a non-existent constitutional infirmity out of the Chemical Weapons Convention Implementation Act and replace it with a narrowing construction inconsistent with Congress' clearly expressed legislative

will. Her argument stretches the doctrine of constitutional avoidance beyond recognition.

The constitutional doubt canon provides that a "'statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional but also *grave* doubts upon that score.'" *Alamendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) (emphasis added) (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394 (1916)). Here, as the lower court noted, the constitutional doubt would need to be so great as to present "a serious constitutional question notwithstanding *Holland*." *Bond*, 581 F.3d at n.6. There is no such question here.

Moreover, the avoidance canon is not a method of adjudicating constitutional questions. Rather it is a tool of interpretation triggered *only* by competing, plausible interpretations of a statute. This Court has stated that the "canon of constitutional avoidance has no application in the absence of statutory ambiguity," and the necessary ambiguity does not arise on the facts of this case. *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001).

A. The Act Unambiguously Criminalizes Petitioner's Conduct And Fails To Trigger The Avoidance Canon

A statute "must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled" in order to apply the avoidance canon. *Alamendarez-Torres*, 523 U.S. at 238; see also *Gonzales* v. *Carhart*, 550 U.S. 124, 154 (2007) (reaffirming this proposition). But the ordinary meaning of the Chemical Weapons Convention Implementation Act's terms demonstrates that section 229 is susceptible to only one reasonable interpretation, an interpretation that

unambiguously encompasses petitioner's conduct. Where Congress has spoken clearly, only a finding of unconstitutionality, not mere constitutional doubt, can alter the statutory scheme. *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 841 (1986) ("[T]he avoidance canon "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication."); see also *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (explaining that, if the avoidance canon were not triggered, the Court would embark on a lengthier inquiry to fully "consider[] the constitutional issue").

The Chemical Weapons Convention Implementation Act provides that "it shall be 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). Under the Act, the term "chemical weapon" includes any "toxic chemical and its precursors," *id.* § 229F(1)(A), where a toxic chemical is defined to encompass "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). The prohibitions exclude, however, use for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A).

The statute's initially broad identification of toxic chemicals provides an unambiguous regulatory base, one equal to the "inexhaustible ingenuity" of those who would seek to "circumvent the law." *Federal Communications Commission* v.

American Broadcasting Co., 347 U.S. 284, 292 (1954). Congress then took care to limit the scope of conduct involving those chemicals that it would deem criminal. It prohibited only those uses of toxic agents that would violate the Convention, dubbing them "chemical *weapons*." 18 U.S.C. § 229(a)(1).

The common sense statutory proscription speaks for itself. Black's Law Dictionary defines "weapon" as "[a]n instrument used or designed to be used to injure or kill someone." Black's Law Dictionary 1730 (9th ed. 2009). The definition is consistent with common experience, which shows that almost everything could be used as a weapon when so intended—a frying pan, for example, could cook dinner or hurl through the air to strike a deadly blow. The object itself, like chemicals included under the Act, does not automatically classify as a weapon; rather, it becomes weaponized only when used in a manner consistent with dangerous and illicit ends. Similarly, petitioner's 10-choloro-10H-phenoxarsine and potassium dichromate, though both toxic within the meaning of the statute, were converted into weapons only when petitioner spread them onto surfaces that Haynes and her infant child were likely to touch. No criminal liability would have attached had the chemicals remained safely in the scientific lab at Rohm & Haas.

Recognizing that even weapons have a non-criminal place in American society, Congress provided further qualification of the Act's criminal terms; it exempted the use of toxic chemicals for a "peaceful purpose related to industrial, agricultural, research, medical, or pharmaceutical activity." 18 U.S.C. § 229F(7)(A). Congress' enumerated list confirms that "peaceful" should be understood in its

ordinary sense: "untroubled by conflict, agitation, or commotion," "of or relating to a state or time of peace," or "devoid of violence or force." Merriam-Webster's Collegiate Dictionary 852 (10th ed. 2002); see also The American Heritage Dictionary of the English Language 1296 (5th ed. 2011) (defining the term as "undisturbed by strife, turmoil, or disagreement" or "not involving violence or employing force").

The clear meaning of "peaceful purpose" effectively exempts socially beneficial purposes—such as crop dusting to kill destructive insects and administering experimental cancer drugs in FDA sanctioned proceedings—while criminalizing malicious conduct detrimental to communities. The assurance that constructive, non-violent activities will receive safe harbor ensures that scientific inquiry will not grind to a halt; rather, "achievements in the field of chemistry [will] be used exclusively for the benefit of mankind." Convention at 318.

Instead of epitomizing the scientific values that the Convention intended to further in excluding "peaceful" activities from criminal condemnation, petitioner used her access to dangerous chemicals to the public detriment. Her acts of revenge—the escalation of a prior course of harassment that had already earned her a state criminal conviction—were rooted in profound conflict and aimed to do great violence. Petitioner stole chemicals specifically designed to poison humans through topical application and placed them in locations where they could injure either Haynes, her infant child, or unsuspecting members of the public; no reasonable interpretation of the "peaceful purpose" phrase could include petitioner's conduct.

B. Properly Construed, No Serious Constitutional Question Exists Regarding The Act

Petitioner's objections do not "raise the sort of 'grave and doubtful constitutional question,' that would lead [a court] to assume Congress did not intend to authorize their [import]." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States ex rel Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The constitutional avoidance canon is inapposite in these circumstances.

As described in the prior Part, Congress has the power to pass implementing legislation necessary and proper to carry out the Convention's aims and to comply with its provisions. Since the statute closely tracks a validly executed treaty, its provisions are not constitutionally infirm. Nonetheless, petitioner attempts to characterize the conduct at issue here as an example of an "ordinary poisoning cases," that may be "adequately handled by state and local authorities" and that urge this Court to "avoid the scope of and continuing vitality of this Court's decision in *Missouri* v. *Holland*." These concerns do not raise a grave and substantial constitutional question.

1. In the quest for constitutional doubt, it is not enough to argue that Pennsylvania authorities are equal to the task of discovering and punishing petitioner's actions under state law. This Court has already soundly rejected the argument that state competence ousts Congress' power to pass criminal laws.

Today's United States Code boasts a tremendous number of federal crimes,[1] many of which operate in realms also criminalized under state law. The constitutionality of these provisions is assumed where Congress had a mere rational basis for their enactment. See *McCulloch*, 17 U.S. at 408 ("Can we * * * impute to the [Constitution's] framers * * * , when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?").

The federal drug laws provide an obvious example. In *Gonzales* v. *Raich*, this Court addressed the federal Controlled Substances Act ("CSA"), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*, which provided a "comprehensive regime to combat the international and interstate traffic in illicit drugs." 545 U.S. 1, 13 (2005). In rejecting a claim that the federal law exceeded Congress' authority by improperly crowding out a more permissive California statute, the Court reminded itself of the relevant test: "[i]n assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 15, 22 (citing *United States* v. *Lopez*, 514 U.S. 549, 557 (1995)). Accordingly, the Court found that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would

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[1] The most recent comprehensive report, from 1990, placed the number at roughly 3,000. Report of the Fed. Cts. Study Comm. 106 (1990).

leave a gaping hole in the CSA" regime and upheld the statute as a valid exercise of Congress' legislative power. *Id.* at 22.

Although this case implicates the treaty power, rather than commerce power, the same rational basis standard obtains. Here, the federal law sits atop state law to provide for a two-fold federal interest: the desire to curb the use and proliferation of dangerous chemical weapons and the need to comply with the United States' obligations under a valid treaty. See Convention at 331-332 (requiring that each signing nation adopt measures to implements the treaty's terms). These concerns apply regardless of whether they address chemical weapons distributed in a "domestic dispute" or deployed on the "seats of the New York subway cars." *Bond*, 681 F.3d at 169 (Rendell, J., concurring). Congress had sound basis to believe that its implementing legislation would effectively carry out the pressing aims of the Convention. This Court should not narrow the Act merely because petitioner's underlying conduct arose out of a Philadelphia-based love triangle; rather the statute clearly and coherently reaches all domestic "uses" of "chemical weapons" as the Convention requires. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227-228 (2008); *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 471 (2001).

2. The allegation that the federal statute encompasses "ordinary poisoning cases" similarly does not create a serious constitutional issue capable of surviving rational basis review.

To be sure "toxic chemical" is defined broadly under the Act; however, this wide expanse "faithfully tracks" the language of a treaty that petitioner

"unequivocally concedes" is "valid." *Bond*, 681 F.3d at 166-167 (Rendell, J., concurring). Moreover, the statute's text narrows the scope of criminality twice over; had Congress intended an alternative structure that limited the Act to only the most egregious conduct, it could have so provided. See *Ali*, 552 U.S. at 227-228.

Petitioner has no grounds to elevate disagreement with her prosecution to a constitutional issue. The Supreme Court specifically noted in *Raich* that when "the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." 545 U.S. at 23 (internal quotation marks and citations omitted). Consequently, a statute may constitute a "valid exercise of federal power, even as applied to * * * troubling facts." *Id*. at 9; see *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (explaining that the "Executive Branch has exclusive authority * * * to decide whether to prosecute a case"). It is not for the judiciary to second guess a prosecution that occurs pursuant to Congress' clear and rational enumeration.

3. Finally, petitioner argues that *Missouri* v. *Holland* should not apply if "doubt" exists as to its constitutionality. Petitioner's argument fundamentally misunderstands the doctrine of *stare decisis*. Arguing that a precedent is infirm cannot support a narrowing construction of a statute drafted in reliance on its terms. Rather, if a precedent no longer reflects an accurate understanding of the Constitution, that precedent cannot stand.

This Court has recognized "time and time again" that the doctrine of *stare decisis* has a special place in the American system of government. *Hilton* v. *South*

Carolina Public Railways Commission, 502 U.S. 197, 202 (1991). Indeed, respect for established judicial precedent ensures that our society is governed by a stable rule of law, not by "arbitrary discretion." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, at 471 (Hamilton)). See also *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468, 478-479 (1987) (plurality opinion) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

To use the canon of constitutional avoidance to avoid addressing the continuing vitality of a prior precedent invites arbitrary application of the law. This Court has previously declined to accept such an invitation where its precedent pre-dates the relevant statutory enactment. The recent case of *Harris* v. *United States*, 536 U.S. 545 (2002), characterized a party's invitation to "use the [constitutional avoidance] canon to avoid overruling one of [the Court's] own precedents" as "novel" and "unsound." *Id.* at 556. The proposition is no less unsound today.

The *Harris* Court pointed out that "the statute in that case was passed when the Court's prior precedent "provided the controlling instruction * * * [and] Congress would have had no reason to believe that it was approaching the constitutional line by following [the Court's] instruction." *Ibid.* Accordingly, this Court concluded that "if we stretched the text [of the relevant statute] to avoid the question of [a prior precedent's] continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted [and] yet another if the prevailing view of the Constitution later

changed." *Ibid*. Respect for precedent requires courts to avoid such a dynamic approach, and a litigant's mere argument to the contrary has never been the basis for avoiding a controlling decision of this Court. Rather, when Congress enacted section 229, see Pub. L. No. 105-277, 112 Stat. 2681-856 (1997), it was entitled to rely on *Holland*'s express constitutional analysis. Petitioner's assault on precedent cannot change that fact.

To be sure precedents are at their most potent in cases involving statutory construction. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).[2] Nevertheless, the power of judicial pronouncement in all areas, including constitutional domains, is great. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992) (applying *stare decisis* to the constitutionality of *Roe* v. *Wade*). Even if this Court entertained reservations regarding *Holland*'s validity, avoiding the precedent would hardly constitute the correct path. To the contrary, where a court has misinterpreted the Constitution, it owes a duty to correct that interpretation, not avoid it.

Petitioner posits arguments that are of "some force" at best; these tired objections cannot "raise the sort of 'grave and doubtful constitutional question,' that

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[2] At least one scholar has questioned the validity of these varying levels of *stare decisis* strength: "I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules." Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1988) (emphasis in original).

would lead [a court] to assume Congress did not intend to authorize" its text's clear import. *Rust*, 500 U.S. at 191 (quoting *Delaware & Hudson Co.*, 213 U.S. at 408). The constitutional avoidance canon is inapposite in these circumstances.

C. Even If This Court Harbored Constitutional Doubts, Petitioner's Proposed Reading Of "Peaceful Purpose" Stretches Those Words Beyond Recognition

Even if this Court finds that the text of section 229 is ambiguous and raises a substantial question of constitutional validity, it remains "'a cardinal principle of statutory interpretation * * * that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas* v. *Davis*, 533 U.S. 678 (2001) (quoting *Crowell* v. *Benson*, 285 U.S. 22 (1932)). Petitioner's asserted construction fails this most basic test. No "fairly possible" narrowing construction of the statute would exempt her conduct from its terms.

The proposed alternative construction focuses on the "peaceful purpose" exemption, arguing that the phrase should be read in contradistinction to "warlike" purposes to exclude "'conduct that no signatory state could possibly engage in—such as using chemicals in an effort to poison a romantic rival.'" *Bond*, 681 F.3d at 154 (quoting appellant's brief below).

To the extent that the words "peaceful purposes" are open to interpretation, they nonetheless cannot bear the meaning petitioner seeks to foist upon them. See *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (explaining that a statute may be narrowly construed to sustain its constitutionality, but only if "readily susceptible" to that

construction (quoting *Virginia* v. *American Bookseller's Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

First, as previously described, the ordinary meaning of "peaceful" stops far short of war-like aggression. Rather, the word indicates an absence of violence, not conflict in an abated form. The Court of Appeals for the D.C. Circuit noted this distinction while examining a statute that allowed officers to engage in "peaceful entry" of an individual's home without a warrant. *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960). There the court observed that the term "peaceful" could not encompass all entries short of physically breaking into a dwelling. *Id.* at 130 ("We think that a 'peaceful' entry which does not violate the provisions [of the relevant statute] must be a permissive one, and not merely one which does not result in a breaking of parts of the house.") Once a court decides to narrow an Act's provisions, it need not pick an unfair interpretation merely because that construction would exempt a party's conduct.

Second, the term "peaceful purposes" does not appear in isolation. Rather, the legislature provided a list of activities to which an individual's "peaceful purpose" must "relate." The enumeration includes any "industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. § 229F(7)(A). Since the petitioner's actions were not industrial, agricultural, research, medical or pharmaceutical activities—but rather intended merely to inflict fear and violence upon a romantic rival—petitioner must be understood to argue for an extreme over-reading of "other activity."

The Act's listed peaceful purposes clarify the legislature's intent to ensure that dangerous chemicals are used only in legitimate, routine venues where appropriate precautions are observed. The canon of *ejusdem generis* (or "of the same kind") stands for the proposition that "when a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated." *James* v. *United States*, 127 S. Ct. 1586, 1592 (2007). To hold that petitioner's vicious assaults against Haynes constituted an "other activity" among the list of peaceful endeavors would hide an elephant in a mousehole. See *Whitman*, 531 U.S. at 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). The Convention's preamble reveals that the treaty, and legislation implementing it, was meant to deter; it recognizes that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives." Convention at 319. Adjusting the statute's meaning after the fact to rewrite "other activity" as "other non-warlike activity" disrespects the enacted text by subverting the statutory scheme to an aggressive judicial construction.

Moreover, construing "peaceful purpose" to embrace anything short of out-and-out warfare would have far-reaching consequences on the regulation of unconventional weapons. If Haynes' postal carrier had received a toxic dose of the chemical weapons lacing her mailbox, it may have been unclear to the federal

officials whether the exposure was caused by an isolated vendetta or an act of domestic terrorism. Indeed our country's experience with anthrax sent through the mail demonstrates that the national security apparatus of the United States is implicated whenever an attack appears to have occurred. See Steve Bowman, Cong. Research Serv., RL31332, Weapons of Mass Destruction: The Terrorist Threat 3 (2002) (noting that investigations had revealed that the anthrax may have been sent by a "lone wolf" rather than a terrorist cell). In the face of this potentially massive mobilization, Congress is justified in criminalizing even those actions that do not, upon investigation, pose an imminent threat of war. Further, this problem is not limited to chemical weapons—the federal law governing the use of nuclear materials also uses the term "peaceful purpose" to permit nuclear power plants and research labs while criminalizing other uses of fissile materials. See 42 U.S.C. § 2013(d). Any construction of the phrase would likely permeate into that context as well, generating untold difficulties for the containment of nuclear materials in safe and secure hands.

The doctrine of constitutional avoidance stems from "respect for Congress, which [courts] assume legislates in the light of constitutional limitations" to achieve important goals. *Jones* v. *United States*, 526 U.S. 227, 239-240 (1999) (quoting *Rust*, 500 U.S. at 191). The canon "is not," therefore, "designed to aggravate th[e] friction [between the legislature and judiciary] by creating (through the power of precedent) statutes foreign to those Congress intended, simply through a constitutional difficulty that, upon analysis, will evaporate." *Ibid.*; see also *United States* v.

Stevens, 130 S. Ct. 1577, 1592-1593 (2010) (refusing to rewrite the statute under review). To construe "peaceful purpose" more strictly than the statute's text and purpose allow would constitute a disingenuous evasion of the constitutional question. *Miller* v. *French*, 530 U.S. 327 (2000).

* * *

The Constitution vests the power to enter and effect the Nation's most important foreign commitments in the combined political judgments of Congress and the President. For more than two hundred years this Court has deferred to those branches' in this realm of special competence. To interfere now would entangle the judiciary in complex and fact-laden policy questions, mark a new and unprecedented departure from the principles upon which the Constitution was framed, and set the powers of government upon a sea of doubt.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted.

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