No. 12-158

IN THE
Supreme Court of the United States

CAROL ANN BOND, *Petitioner*,
v.
UNITED STATES, *Respondent*.

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

BRIEF *AMICUS CURIAE* OF U.S. CONGRESSMAN STEVE STOCKMAN, GUN OWNERS FDN., GUN OWNERS OF AMERICA, CITIZENS UNITED'S AMERICAN SOVEREIGNTY ACTION PROJECT, U.S. JUSTICE FDN., THE LINCOLN INSTITUTE, INSTITUTE ON THE CONSTITUTION, THE ABRAHAM LINCOLN FDN., DOWNSIZE DC FDN., DOWNSIZEDC.ORG, POLICY ANALYSIS CENTER, CONSERVATIVE LEGAL DEF. AND ED. FUND, AND TENTH AMENDMENT CENTER IN SUPPORT OF PETITIONER

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Steve Stockman is a Member of the United States Congress representing Texas' 36th Congressional District. Among other committee assignments, of particular relevance to the constitutional treaty power at issue in this case, he serves as a Member of the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the House Foreign Affairs Committee.

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Downsize DC Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Citizens United (and its American Sovereignty Action Project), The Abraham Lincoln Foundation for Public Policy Research and Downsize DC.org are exempt from federal income tax under IRC section 501(c)(4). The Institute on the Constitution and the Tenth Amendment Center are educational organizations.

Each of the organizational *amici curiae* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

national concern, such as the construction of state and federal constitutions, and criminal and regulatory statutes, federal and state issues.

Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund filed an *amicus curiae* brief (Dec. 10, 2010) in support of the petitioner in Bond v. United States, 546 U.S. ___, 131 S.Ct. 2355 (2011).[2]

SUMMARY OF ARGUMENT

This case involves an everyday crime, involving an attempt by one person to injure another, and which fully justified normal state prosecution. There was no reason to make a federal case out of it, as the prosecution did below.

Betrayed by her best friend, Carol Anne Bond attempted to injure the woman through the use of toxic chemicals. Instead of turning the case over to local authorities for investigation and prosecution, the United States Postal Inspection Service, acting outside its narrow authority, turned a local offense into a federal chemical weapons crime, under a statute purportedly enacted by Congress pursuant to the treaty power conferred upon the President and the Senate by Article II, Section 2, Clause 2.

Unfortunately, this federalization of the criminal law has become commonplace. Instead of staying

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[2] http://lawandfreedom.com/site/constitutional/Bond_Amicus.pdf.

within the boundaries of its constitutionally enumerated powers, Congress has acted as if it has plenary police power to penalize inherently state and local conduct.

That is precisely what happened here. Bond was convicted under a statute that was allegedly designed to enforce the nation's obligation under the "Geneva Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons," but was written so incredibly broadly as to reach ordinary household cleaning products. Although she had done nothing even remotely connected to the purpose of the treaty, she was convicted under a statute that requires no evidence of any disregard for the value of human life.

Bond's prosecution not only was misdirected, but also is the product of an unconstitutional abuse of power. The Geneva Convention is a non self-executing treaty. While it is the law of the land, it is not legally enforceable against an individual, but only morally enforceable based on the good faith of the signatory nations. In order for it to apply to a person, Congress must enact a criminal statute pursuant to one of its enumerated powers. Here, the Government argued, and the courts accepted, that the Necessary and Proper Clause permits Congress to punish individual conduct so long as there is a "rational relationship" between the statute and the treaty. This is error. In order for Congress to have the power to act, the purpose of the statute must coincide with the purpose of the treaty. Here, the statute does not prevent any nonstate activity that could lead to the development

and use of chemical weapons in warfare. To the contrary, the language of the statute sweeps so broadly that it makes it a federal crime to pour bleach in another person's fish tank.

Not only is the statute outside any enumerated power, it also violates the Tenth Amendment, which prohibits the federal government from exercising powers reserved to the states and to the people. The Tenth Amendment makes express what is otherwise implied by the structure of the Constitution. As this Court so eloquently stated in 2011 in Bond v. United States, the Amendment's express prohibition on the use of power protects individual liberty. It ensures that the people of each State will not be governed by some remote national or international government entity about matters concerned with their safety, health, and welfare,

Despite this Court's decision in Bond, the court below decided that it was bound by Missouri v. Holland, a case decided, eighty-six years before. The court read Holland's expansive language expansively, and held that the treaty power vests in the federal government a plenary "acquirable police power" to do just about anything it wants.

Petitioner argues that Holland can be read narrowly and, by ignoring certain parts, minimized, so as to permit a Tenth Amendment victory in this case. Petitioner's sanguinity is misplaced. Holland sweeps away any constitutional barrier to the reach of the treaty power, treats the Tenth Amendment as if it did not exist, and grants Congress plenary power to enact

any law on any subject covered by a treaty. In short, the Holland opinion is a blatant and unavoidable affront to a constitutional government of limited powers. It must be confronted — and overruled.

ARGUMENT

I. A PERSONAL VENDETTA HAS BEEN UNJUSTIFIABLY PROSECUTED AS A FEDERAL CRIME.

A. A Domestic Dispute Was Needlessly Made into a Federal Case.

The facts of this case read like an Agatha Christie novel, in that "[m]urder by poisoning was the theme of more than half of [her] novels, plays and short stories."[3] As Agatha Christie learned "a lot about poisons from her work ... in a hospital pharmacy,"[4] Carol Anne Bond, a "trained microbiologist" employed by a chemical manufacturer, learned that certain "chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact." United States v. Bond, 581 F.3d 128, 131-32 (3d Cir. 2009) ("Bond I").

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[3] "Agatha Christie's Murders by Poisoning," A Blog for English Lovers, Dec. 18, 2009, http://speakin-colors.blogspot.com/2009/12/blog-post_7208.html ("Christie Murders Blog").

[4] *Id.*

However, unlike Christie who applied her knowledge of poisons to writing fiction,[5] Bond applied her knowledge to a real-life effort to harm her former closest friend, who had been impregnated by Bond's husband. *Id.* Vowing revenge, in a highly personalized vendetta, Bond "attempted to poison" her adulterous neighbor "at least 24 times over the course of several months." *Id.*, 581 F.3d at 132. Bond "spread [chemicals] on [her neighbor's] home doorknob, car door handles, and mailbox." *Id.* Her neighbor suffered no injury until "on one occasion [when she] sustained a chemical burn to her thumb." *Id.* Initially, the neighbor reported these "chemical attacks" to the local police, who apparently took no action. *Id.* Dissatisfied, the neighbor "complained to her local postal carriers about the chemicals on her mailbox." *Id.*

Based on this single complaint, the United States Postal Inspection Service swung into action, and decided to make a federal case out of a domestic dispute, "placing surveillance cameras in and around [the target neighbor's] home." *Id.* The cameras caught Bond "opening [the neighbor's] mailbox, stealing a business envelope, and placing potassium dichromate inside [the neighbor's] car muffler." *Id.* Prompted by the muffler discovery, the postal inspectors successfully "trace[d] the origin" of the chemical to Bond's employer, and "determined that nearly four pounds of potassium dichromate were missing from a common storage area to which Bond had access." *Id.*

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[5] *See, e.g.,* Christie Murders Blog.

Armed with this evidence, the postal inspectors obtained both an arrest warrant for Bond and a search warrant for her car and home. *Id.* While searching Bond's home, other postal inspectors seized "a piece of [the neighbor's] mail and amounts of the chemicals in Bond's home and car." After arresting Bond, the postal inspectors "took her to a holding cell in the Philadelphia Post Office." *Id.*

Thereafter, federal prosecutors obtained a grand jury indictment against Bond, charging her "with two counts of mail theft, in violation of 18 U.S.C. § 1708," and two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. section 229(a)(1). In the district court, Bond moved unsuccessfully to suppress the evidence seized from her home and to dismiss the two chemical weapons counts. *Id.* After her motions were denied, Bond pled guilty to all charges, reserving the right to appeal. Bond was sentenced to six years imprisonment.

B. The Investigation of a Private Mailbox Metamorphosed into a Chemical Weapons Case.

Although 18 U.S.C. section 3061(a) authorizes postal inspectors "to investigate criminal matters related to the Postal Service and the mails," that authority is expressly limited by 18 U.S.C. section 3061(b), which states that these investigative powers "shall be exercised **only** ... in the enforcement of [i] laws regarding property in the custody of the Postal Service, property of the Postal Service, the use of the mails, and other postal offenses," or [ii] other laws that, as

agreed to by the Attorney General, "have a detrimental effect upon the operations of the Postal Service." (Emphasis added.)

The Postal Inspection Service investigation stretched well beyond these limitations. From the outset of its investigation into Bond's neighbor's complaint, it began with surveillance cameras "in and around" the neighbor's home, and included a search of the premises of Bond's employer. Bond I, 581 F.3d at 132. The postal inspectors obtained an arrest warrant for Bond and search warrants for Bond's car and home, with incarceration occurring, remarkably, in a post office. *Id.*

In the end, Bond's indictment was only tangentially related to "the Postal Service and the mails." To be sure, Bond was indicted on two counts of mail theft in violation of 18 U.S.C. section 1708, but those charges were based upon the happenstance discovery of (i) a business envelope Bond took from her neighbor's mail box, and (ii) a piece of the neighbor's mail found in Bond's house. These two mail counts in the indictment provided thin cover for postal inspectors having exceeded their statutory authority. The Postal Inspection Service reports that its inspectors "enforce more than 200 federal laws in investigations of crimes that may adversely affect or fraudulently use the U.S. mail, the postal system or Postal Service employees."[6] Yet, from this lengthy list, the Postal Service could

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[6] *See* http://about.usps.com/publications/pub278/welcome.htm.

find only incidental mail theft of a couple of envelopes on which to base charges.

Remarkably, the Postal Inspection Service never appeared concerned about the lack of a federal predicate for its investigation. From the outset, the Postal Inspection Service did not hesitate to assume plenary police powers, even though its enforcement powers are expressly limited by 18 U.S.C. section 3061. The postal inspectors simply could have referred the case to the local police or county sheriff. Instead, they insisted on taking the lead in the investigation, up to and including incarcerating Bond in their own offices.[7] Failing to honor its limited mandate, the postal investigators turned a local crime, routinely prosecuted by local government authorities, into a federal case, with international implications.

C. Charging and Convicting Bond of a Violation of 18 U.S.C. Section 229(a)(1) Is Disproportionate to and Misdirected from the Blameworthiness of Her Conduct.

The enthusiasm of the Postal Inspection Service to intrude upon the state police power is fully consistent with the modern trend toward federalization of the criminal law. As documented by the American Bar Association Task Force on the Federalization of Criminal Law, "[t]he fundamental view that local

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[7] In 1971, the Postal Service lost its status as a department of government, and was spun off as a quasi-independent entity, described "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201.

crime is, with rare exception, a matter for the states to attack has been strained in practice in recent years"[8]:

> Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably, in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often **lacking a principled basis**. [ABA Report, p. 5 (emphasis added).]

It is clear that this case also lacks that "principled basis." As the court of appeals below observed in a lengthy, and candid footnote: "The government has, at different stages of this case, been willing to jettison one legal position and adopt a different one, as seemed convenient"[9]:

> [i]t expressly disclaimed the *Commerce Clause* as a basis for Congress's power to approve the [Chemical Weapons Convention Implementation Act of 1998].... The government still maintained that position the first time it appeared before us, relying only on the Necessary and Proper Clause in support of the Act's constitutionality. Once before the Supreme Court, however, the government decided that this is really a

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[8] *See* The Federalization of the Criminal Law (ABA: 1998). ("ABA Report"), p. 5 (1998).

[9] United States v. Bond, 681 F.3d 149, 152 n.1 (3d Cir. 2012) ("Bond II").

> *Commerce Clause* case, and that the position it had pressed before us is secondary. [Bond II, 681 F.3d at 152 n.1.]

Indeed, all too often, Congress treats the Constitution's enumerated powers as a grab bag of potential authority to criminalize private behavior, unmoored to either constitutional text or history. Latching primarily upon the Commerce Clause, Congress has criminalized behavior based on a person merely crossing a state line. For example, in 1913 the Supreme Court upheld the Mann Act's prohibition of transportation of women for immoral purposes across a state line without requiring any evidence that the activity was commercial, or the law was a regulation of commerce, explaining that "Congress has power over transportation 'among the several states' [and] may [adopt] means [that] have the quality of police regulations." Hoke v. United States, 227 U.S. 308, 323 (1913). So, when this Court struck down the federal law against possession of a firearm in a school zone as outside the power of Congress under the Commerce Clause,[10] Congress responded with a new statute requiring proof that the firearm had moved in, or otherwise affects, interstate commerce. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009 (18 U.S.C. § 922(g)).

The ABA Report documented that 40 percent of all federal crimes enacted since the Civil War have been enacted since 1970. *Id.* at 7. That report also

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[10] *See* U.S. v. Lopez, 514 U.S. 549 (1995).

established that "[n]ew crimes are often enacted in a patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14–15. Instead of honoring the "deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited —" Congress continues to criminalize more and more conduct, in disregard of "the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct...." *Id.* at 17.

Similarly here, 18 U.S.C. section 229 was enacted as part of the Chemical Weapons Convention Implementation Act of 1998, and yet the prohibitory language employed by Congress offers no indication that the section was adopted pursuant to any constitutionally enumerated power. *See* Bond I, 581 F.3d at 134. As the court of appeals below remarked in its examination of the statutory text, "[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 155 n.7.

As Petitioner amply demonstrates, the potential penalties for violation of section 229, and related statutes, are disproportionate to the blameworthiness of Bond's conduct. Brief of Petitioner ("Pet. Br.") at 7. Moreover, the sentence imposed upon Bond for violation of section 229 is much more severe when the sentence that she likely would have received under state law. *See* Pet. Br. at 11-12.

Further, the *mens rea* required to commit the offense defined by section 229 can be met by wholly innocent behavior. The *mens rea* required is the knowing possession or use. The prosecution need not prove that the user or possessor knew, or even should have known, that the chemical possessed or used was "toxic" within the meaning of the statute. As Petitioner points out, the statutory definition of a "toxic chemical" is "extraordinarily capacious," such that even ordinary household cleaning substances would be "presumptively a prohibited chemical weapon." *See* Pet. Br. at 8. While a defendant could rebut that presumption under either the exclusion or the exception for chemicals "intended for peaceful uses," the burden would be on the defendant, not the prosecution. By design, the "peaceful use" exception or exclusion is an affirmative defense.

In contrast, for example, in a prosecution under the Pennsylvania criminal code for a violation of either the assault or aggravated assault statute, it would be the prosecution's burden to demonstrate in a criminal assault trial that the defendant knowingly, intentionally, or recklessly "caused bodily harm." 18 Pa. Cons. Stat. § 2701. Or, in a case such as the one against Bond, a prosecution for aggravated assault would require proof of an "attempt[] to cause serious bodily injury to another ... intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. § 2702. Either charge would be based upon the degree of Bond's culpability in her various attempts to misuse chemicals to cause serious bodily harm to her neighbor.

From the initial investigation, through the prosecution in this case, up to the Supreme Court and back again, there has been no recognition that the substitution of a "possession" or "use" statute — which could extend to the "pouring [of] a bottle of vinegar in [a] friend's goldfish bowl"[11] — cheapens the moral disapproval that otherwise would attach to Bond's conduct. Stripped of the moral foundation of traditional criminal law, the prosecution here undermines the rich moral precepts that undergird the exercise of the police power traditionally exercised by the States in our federal system. Under the American constitutional republic, it is the several states, not the federal government, that are the repositories of that moral capital.

II. 18 U.S.C. SECTION 229 CONSTITUTES AN UNCONSTITUTIONAL ABUSE OF FEDERAL POWER.

A. The Geneva Protocol Concerns the Misuse of Chemical Weapons in Warfare among Nations.

Spurred by the horrors of the use of chemical weapons in World War I, world leaders met in Geneva, Switzerland and, in 1925, as part of the Geneva Conventions, the convening nations signed a document entitled "Protocol for the **Prohibition of the Use in War** of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare" ("Protocol")

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[11] *See* question posed by Justice Alito, Transcript of Oral Argument at 29. Bond v. United States, 131 S. Ct. 2355 (2011).

(emphasis added).[12] However, the Protocol "did not prohibit the development, production or stockpiling of chemical weapons."[13] It was not until September 3, 1992 that the Conference on Disarmament in Geneva adopted the "Convention on the **Prohibition of the Development, Production, Stockpiling and Use** of Chemical Weapons and on Their Destruction" ("the Convention") (emphasis added),[14] which was signed on January 13, 1993.[15] The United States Senate ratified the treaty on April 25, 1997,[16] and the treaty entered into force on April 29, 1997.[17]

Article I, Section 1.a-b of the treaty[18] prohibits State Parties from undertaking activities "[t]o develop, produce, otherwise acquire, stockpile ...use... retain ... or transfer ... chemical weapons...." Article VII, Section 1.a of the treaty, entitled "National Implementation Measures," requires that "[e]ach State

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[12] http://www.un.org/disarmament/WMD/Bio/pdf/Status_Protocol.pdf. Little did the signers of this document know that their warfare treaty between nations would criminalize certain behavior by a scorned Pennsylvania housewife.

[13] http://www.un.org/disarmament/WMD/Chemical/.

[14] *Id.*

[15] 32 I.L.M. 800 (1993).

[16] S.RES.75, 105th Congress, http://www.gpo.gov/fdsys/pkg/BILLS-105sres75ats/pdf/BILLS-105sres75ats.pdf.

[17] http://www.fas.org/nuke/control/cwc/chron.htm.

[18] 32 I.L.M. 800 (1993).

Party shall, **in accordance with its constitutional processes**, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall ... [p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity...."

The Senate ratification (S.Res.75) confirmed that it "advise[d] and consent[ed] to the ratification of the Convention ... subject to the following conditions...." Section 2, subsection (12) of that resolution is entitled "Primacy of the United States Constitution," and states that "[n]othing in the Convention requires or authorizes legislation, or other action, by the United States **prohibited by the Constitution** of the United States, as interpreted by the United States" (emphasis added). Further, Section 2, subsection (28) states that, "[i]n order to protect United States citizens against unreasonable searches and seizures ... for any challenge inspection conducted on the territory of the United States ... the United States National Authority will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized...." This requirement to obey the Constitution while implementing the treaty is echoed by section 305 of Public Law 105-277 (codified at 22 U.S.C. § 6725), the implementing statute. Thus, Congress took steps to ensure the treaty and implementing statute be interpreted consistent with the Constitution.

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act,[19] Congress enacted the Chemical Weapons Convention Implementation Act of 1998, now codified at 18 U.S.C. section 229, *et seq*. 18 U.S.C. section 229(a) mirrors the language of the treaty, while adding certain additional prohibitions, stating 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; or ... to **assist or induce** ... or to **attempt or conspire**..." (emphasis added).

The treaty discusses "state parties," not individuals; it clearly has the purpose to stop chemical warfare, and prevent the use of chemical weapons by state actors. It does not appear to envision affecting individuals, other than the requirement for legislation prohibiting non-state actors from acquiring and using chemical weapons. However, Congress erroneously assumed that it had plenary power to enact section 229 pursuant to the treaty power, subject only to certain express prohibitions protecting individual rights in the Bill of Rights. *See* Reid v. Covert, 354 U.S. 1, 16-18 (1957).

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[19] 105 P.L. 277; 112 Stat. 2681, http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.

B. Section 229 of the Chemical Weapons Convention Implementation Act Is an Unconstitutional Means to Meet the U.S. Treaty Obligation.

The Convention is not a self-executing treaty. *See* Pet. Br., at 3-5. Rather, it is simply an "agreement[] between sovereign and sovereign." *See Federalist No. 75*, p. 388 (G. Carey and J. McClellan, eds., Liberty Fund: 2001). Therefore, "[i]ts object[] [is a] CONTRACT with foreign nations which ha[s] the force of law, but derive[s] it from the obligation[] of good faith." *Id.* The Convention's provisions, then, "are not rules prescribed by the sovereign to the subject." *Id.* In summing up this original understanding of the nature of the legal obligation of a non-self-executing treaty, Joseph Story explained:

> The power of making treaties is plainly neither [legislative] nor [executive]. It relates neither to the execution of subsisting laws, nor to the enactment of new ones; and still less does it relate to the exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law with us, but, as to foreign sovereigns, have only the obligation of good faith. Treaties are not rules prescribed by the sovereign to his subjects; but agreements between sovereign and sovereign. [2 J. Story, Commentaries on the Constitution, § 1519, p. 346 (5th ed., Little, Brown 1891).]

To be sure, as a treaty made under the authority of the United States, the Convention is the Supreme Law

of the Land, legally binding upon the nation, but that does not mean that it is anything more than a contractual obligation, enforceable against the United States.[20] As St. George Tucker observed, a treaty "should be regarded as a part of the supreme law of the land [and] the honour and peace of the nation certainly require that its compacts should be duly observed, and carried into effect with perfect good faith." St. G. Tucker, View of the Constitution of the United States, p. 270 (Liberty Fund: 1999) ("Tucker's View"). In short, a treaty is "an inchoate act" (*id.*), the international enforcement of which depends upon the good will among nations, and the domestic enforcement by laws enacted by Congress according to the powers vested in it by the Constitution:

> [W]hen a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of Congress, it must depend on its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or inexpediency, of carrying the treaty in effect, and to determine and act thereon, as in their good judgment, may be most conducive to the public good. [*Id.* at 271-72.]

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[20] *See* Medellin v. Texas, 552 U.S. 491, 505 (2008) ("A treaty is, of course, 'primarily a compact between nations' ... it ordinarily depends for enforcement of its provisions on the interest and honor of the governments which are parties to it.").

Tucker concluded that any "contrary construction would render the power of the president and senate paramount to that of the whole congress, even on those subjects upon which every branch of congress is, by the constitution, required to deliberate." *Id.* at 277.

In Bond I, and in recognition that Congress does not have plenary power to enact laws enforceable against the people, the government argued that Congress was empowered by the Necessary and Proper Clause to enact section 229 "as a law enforcing its Treaty Power." *Id.*, 581 F.3d at 134. Remarkably absent the lower court's first opinion is any effort to analyze this claim pursuant to the well-established rule in McCulloch v. Maryland, which requires a court to assess the purpose of the law and the legitimacy of that purpose.[21] *See* Bond I, 581 F.3d at 134-35, Instead, the court focused exclusively upon the Tenth Amendment claim, dismissing it on the ground of lack of standing. *Id.*, 581 F.3d at 135-38.

In Bond II, the court of appeals below addressed the Necessary and Proper question, but dismissed it by reference to a single statement in Missouri v. Holland,[22] that purportedly established that "the ...

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[21] 17 U.S. (4 Wheat) 316, 421 (1817) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[22] 252 U.S. 416 (1920).

relevant question is whether the underlying treaty is valid"[23]:

> In *Missouri v. Holland*, the Supreme Court declared that, if the treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." [Bond II, 681 F.3d at 152.]

Having relied solely upon Holland, the Bond II court below omitted the purpose analysis required by McCulloch. Instead, it assumed that Holland foreclosed any inquiry related to the purpose of section 229. Thus, the court ruled that the provision was constitutional under the Necessary and Proper Clause solely because it was "rationally related" to the implementation of a treaty. *See* Bond II, 681 F.3d at 157-58 and n.9. While the court below relied upon two decisions from its sister circuits, it did not — indeed, it could not — find any language in McCulloch to justify the dispensing of its purpose inquiry in the application of the Necessary and Proper Clause to congressional legislation implementing a treaty. Nor is there any good reason for such a dispensation. Rather, there is a very good reason to examine carefully the claimed purpose of a law purportedly enacted under the Necessary and Proper Clause as a means of enforcing a treaty domestically.

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[23] Bond II, 681 F.3d at 153.

Until the enactment of the Convention in 1998, the Geneva Convention on chemical weapons was enforceable only internationally as a contract between the United States and the other signatory nations. As a non-self-executing treaty, the Convention contained no rule enforceable against an American citizen. Section 229 changed that, its broad language "turn[ing] each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache ... [and] expos[ing] a person to years in federal prison." *See* Bond II, 681 F.3d at 155 n.7.

The far-reaching language of section 229 refutes on its face any notion that the section was enacted by Congress for the purpose of strengthening the nation's contractual obligation in the Geneva Convention. Section 229 does not read like a statute designed as a preventive measure or preemptive strike against nonstate activity that could lead to the development and use of toxic chemicals by the United States in warfare. On its face, section 229 is not designed as a prophylaxis to the misuse of chemicals in warfare, but as a pretext "for the accomplishment of objects not entrusted to the [federal] government" and, therefore, outside the power vested in Congress by the Necessary and Proper Clause. *See* McCulloch, 17 U.S. at 423.

C. Section 229 Violates the Tenth Amendment.

In his Commentaries on the Constitution, Joseph Story warned that the treaty power vested in the President and the Senate, although "general and

unrestricted," it is "not be so construed to destroy the fundamental laws of the State"[24]:

> A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. [*Id.* at 339.]

There is no more fundamental provision in the United States Constitution than the Tenth Amendment in the Bill of Rights. As this Court unanimously concluded in Bond v. United States[25]:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government ... and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. [Bond III, 131 S. Ct. at 2366.]

Feeling bound by Missouri v. Holland's crabbed view of the Tenth Amendment, the court below departed from this high view of the Tenth Amendment's

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[24] 2. Story's Commentaries, § 1508, at 339. *See also* St. G. Tucker, Limitations on the Treat-Making Power, § 122, p. 139 (Law Book Exchange, N.J.: 2000).

[25] 564 U.S. __, 131 S. Ct. 2355 (2011) ("Bond III").

protective reach. However, the Holland court neglected the Amendment's history and original purpose. *See* Bond II, 681 F.3d at 156. As noted above, Joseph Story warned against an expansive interpretation of the treaty power that could "annihilate" other authorities, "chang[ing] the organization of government [or] overturn[ing] its republican form." *See* Story's Commentaries at 339. Confidently, Story contended that any such treaty would be found "void; because it would destroy, what [the constitution] was designed ... to fulfill, the will of the people." *Id.* St. George Tucker likewise worried that, because "there is no[] restriction as to the subjects of treaties," there were only two constitutional guarantees that protected the States, the one securing to the states "a republican form of government" and the other securing the States' authority to self-protection against invasions. Tucker's View at 269. In sum, both Story and Tucker cautioned that the treaty power not be read in a way that, in Tucker's words, would "dismember[] the federal republic." *Id.*

But that is precisely what the court below seems to have decided in its reliance on Justice Holmes's opinion in Holland, ruling that, while there is "[n]o doubt the great body of private relations usually fall within the control of the State ... a treaty may override its power." Holland, 252 U.S. at 434.

At the heart of the constitutional guarantee of a republican form of government to every state is the principle that the laws are to be enacted by the representatives of the people of each State. *See* W. Rawle, A View of the Constitution of the United

States, reprinted in 4 The Founders' Constitution, Item 13, pp. 571-72 (Kurland, P. & Lerner, R., eds.: Univ. Chi. Press: 1987). In turn, the Tenth Amendment reserves to the States powers not delegated to the federal government. Traditionally, the powers reserved to the States are commonly known as the police powers, including public safety, health, and welfare. Under the guise of implementing the Convention against the use of toxic chemicals in warfare among nations, Congress has enacted section 229, utilizing such broad language that it invades the States' sovereign police powers. If allowed to stand, it will introduce a wholly new chapter of the transfer of power from the States to the federal government via the treaty power, in a world that is increasingly trending toward the internationalization of human rights, imposing upon states "obligation[s] to protect ... civil and political rights or economic, social and cultural rights." *See* T. Buergenthal, D. Shelton, & D. Stewart, International Human Rights in a Nutshell, p. 27 (4th ed. 2009). In this contemporary drive for increasingly transnational enforcement of universal norms is the "widespread international political acceptance of the proposition that democracy is a precondition for the effective protection of human rights." *Id.* at 26.

At stake, then, in the setting of constitutional parameters to the treaty power is whether the American federal republic, in which powers are divided between a national and several State governments, will survive, or whether the treaty power will be used to "annihilate" our system of checks and balances that otherwise would stand in the way of a national

democracy unlimited by independent and sovereign States.

The overriding design and purpose of the Tenth Amendment is to secure America's federal structure so as to better secure and preserve "individual liberty." *See* Bond III, 131 S. Ct. at 2364. The Amendment does that by ensuring that "the enactment of positive law [is left] to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* To that end, the treaty power must be made subordinate to the Tenth Amendment, first because it is a power that can be exercised unchecked by the House, which is the legislative branch of the national government closest to the people. Second, the treaty can be misused as a vehicle to transfer the power reserved to the people and to the States to international bodies, disenfranchising the people of the several States and imposing upon the people of the States a totally foreign political or moral standard.

Indeed, on April 2, 2013, the United Nations General Assembly overwhelmingly "approve[d] a pioneering treaty aimed at regulating the enormous global trade in conventional weapons, for the first time linking sales to the human rights records of the buyers." N. MacFaruhar, "U.N. Treaty is First Aimed at Regulating Global Arms Sales," (*New York Times*, Apr. 2, 2013).[26] The object of the treaty is not

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[26] http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html?nl=todaysheadlines&emc=edi

commercial. Rather, it purportedly "reflects growing international sentiment that the multibillion-dollar weapons trade needs to be held to a **moral standard**." *Id.* (emphasis added). Indeed, the treaty "calls for sales to be evaluated on whether the weapons will be used to break humanitarian law." Such an international gun control treaty could not only serve as a pretext for centralizing the regulation of firearms in the United States, but also as a pretext for globalizing gun control, including a ban on so-called "assault weapons." While the Second Amendment would stand as a bulwark against numerous measures that might be enacted by Congress, the Tenth Amendment is the front-line defense of the right of the people of each state to set the moral standards governing the transfer and use of firearms within their respective local jurisdictions.

III. MISSOURI V. HOLLAND SHOULD BE OVERRULED.

A. Missouri v. Holland's Rejection of the Tenth Amendment Cannot Be Ignored as Dicta.

Petitioner's brief minimizes the impact of Missouri v. Holland, arguing only in the alternative that "[t]o the extent *Holland* is to the contrary, it would need to be overruled." Pet. Br. at 18. Petitioner argues that the court below misinterpreted and "broadly construed *Holland*," arguing that "*Holland* does not stand for

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th[e] alarming proposition" that the treaty power can be used to override the "structural constraints on Congress' power." *Id.* at i, 17. Unfortunately, *amici* do not believe Holland can be construed away so easily. It is Holland's language that is expansive, not merely the lower court's reading of it. Holland was plain error. The Court should recognize this error and correct it, rather than rationalizing it away, allowing it to continue to fester.

Petitioner characterizes Holland's expansive view of the treaty power as nothing more than "dictum." *Id.* at i. Petitioner argues that "the constitutional attack and this Court's reasoning [in Holland] focused on the validity of the treaty," whereas the focus of this case is the constitutionality of the implementing statute. *Id.* at 17. Petitioner argues that the Court in Holland addressed the statute "[a]lmost in passing." *Id.* at 17.

But there is not just a single "dictum" in Holland that can be conveniently ignored. Rather, the opinion is chock full of perversely unconstitutional statements. Holland declared that the government's treaty power is, in essence, extra-constitutional, stating that "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." *Id.*, 252 U.S. at 433. Holland explicitly states that there are subjects "that an act of Congress could not deal with but that a treaty followed by such an act could...." *Id.*

On the contrary, the "authority of the United States" is limited to that which is delegated by the

Constitution. Contrary to Holland, the government has no reservoir of "'power which must belong to and somewhere reside in every civilized government....'" *See id*. Simply alleging that something is so obvious that it "must" be true does not make it true. There is nothing "inherent" about federal power — there is only what the Constitution says.

Simply because all other governments historically possess a power does not mean that our federal government possesses that power, especially since our form of government was designed to be a break with history, and a new experiment. Nowhere does the Constitution delegate "all powers which are so obvious that they must reside in every civilized government" — rather it denies the majority of power to the federal government, reserving it to the States, even though that may be power that other "civilized governments" generally possess.

The Holland Court viewed the Constitution as having "called into life a being the development of which could not have been foreseen...." *Id.* at 433. Thus, the Court decried the Constitution, stating that "the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Id.*

This disregard is no wonder, since Holland was written by Justice Holmes, who believed that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which

judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, Jr., The Common Law, Univ. of Toronto Law School, Sept. 21, 2011, p. 5. Holmes embraced this notion, seeming to believe that the law — presumably including even the Constitution — should be used in "degree to which it is able to work out desired results...." *Id.*

In so many words, Holland rejects the Constitution's delineation of what powers the federal government **does** possess, and replaces it with the Court's vision of what powers a "civilized government" **should** possess. Thus, Holland cannot be ignored. It is an affront to a constitutional government of limited powers. It must be confronted — and overruled.

B. Not Only Was Holland's View of the Treaty Power Erroneous, Its Holding Was Based on an Outdated View of the Tenth Amendment.

In one of the most poorly reasoned opinions ever to be handed down by the Supreme Court, Missouri v. Holland, the Court held that the express delegation of the power to enter treaties meant that Congress could legislate — pursuant to a treaty — about anything which "does not contravene any prohibitory words to be found in the Constitution." 252 U.S. 416, 434 (1920). In other words, the Holland Court believed that the founders went to great trouble to craft an entire constitution of limited, enumerated powers —

and then undid it all through the grant of the treaty power.

According to Holland, all that a President and the Senate would need do is sign and ratify a bogus treaty with Canada, stating that each nation will "enact all statutes which are beneficial to the international community." Congress would then be free to enact any statute it wished, without limitation, so long as it did not contravene Congress' understanding of some "express prohibition" found in the Constitution.

But, of course, the Chemical Weapons Convention Implementation Act, like the Migratory Bird Treaty Act, does contravene prohibitory words disregarded by the Holland Court — specifically, those found in the Tenth Amendment — that "[t]he 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." The Constitution grants to Congress neither the power to regulate birds in Missouri nor the power to regulate Bond's domestic misuse of a common photography chemical. The Holland Court chose to overlook this, instead mocking the Tenth Amendment's prohibition on federal power as mere "invisible radiation from ... general terms...." *Id.* at 434. At the time, the Tenth Amendment was regarded as nothing more than a "truism,"[27] simply an editorialization on the Constitution's federal structure of limited powers. Of course, that idea flies in the face of the most basic of tenets of constitutional

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[27] United States v. Darby, 312 U.S. 100, 124 (1941).

interpretation that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. 540, 570-571 (1840).

As the Court below recognized, Missouri v. Holland stands for the proposition that Congress may use the treaty power to circumvent any limitation imposed by the Tenth Amendment, along with the "structural limitations on federal power."[28] Were it not for the treaty power, Congress never would have had the authority to enact the chemical weapons statute under which Bond was convicted.

The result in Missouri v. Holland may have seemed desirable to the Court — but it was hardly constitutional. The outcome of this case is neither desirable nor constitutional, but is simply the ruthlessly logical result of what Holland set into motion. Holland blessed the idea that, through the simple enactment of a treaty, our entire form of government could be transmorphed from one of limited, enumerated powers, to one where the President and the Senate hold plenary, "acquirable police power[s]." 681 F.3d at 170.

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[28] 681 F.3d 149, 151, 155 (3rd. Cir. 2012) ("Missouri v. Holland ... is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress' ability to legislate in furtherance of the Treaty Power....").

This Court in other cases has rejected such an absurd principle. In Reid v. Covert,[29] this Court recognized that "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Id.* at 14.

The Court continued that "[t]he obvious and decisive answer to this, of course, is that no 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." Reid further stated that "[i]f our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there." *Id.*

To be fair, Reid v. Covert distinguished Holland, noting that "the treaty involved was not inconsistent with any specific provision of the Constitution." *Id.* at 18. But it did so based on a view of the Tenth Amendment which is now outdated, and should be

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[29] 354 U.S. 1, 15 (1957) ("At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.").

explicitly rejected by this Court. When Holland was written, the Court viewed the Tenth Amendment as "intended to confirm the understanding of the people at the time the Constitution was adopted.... It added nothing to the instrument as originally ratified and has no limited and special operation ...." United States v. Sprague, 282 U.S. 716, 733-734 (1931).

However, since the days of cases like Darby and Sprague, the Court has discarded such dismissive language, perhaps coming to recognize (but not yet admit) that the Tenth Amendment might be something more than superfluous language. In Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (overruled on other grounds), the Court stated that it "recognized that an express declaration of this limitation [on federal power] is found in the Tenth Amendment...." *Id.* at 842. In Fry v. United States, 421 U.S. 542 (1975), the Court wrote that "[w]hile the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered' ... it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7.

The Third Circuit below ignored these more recent discussions of the Tenth Amendment, holding that it "need .... not ... determine whether the Tenth Amendment is a tautology ... or ... an independent

check on federal power,"[30] since Holland already had foreclosed the Tenth Amendment argument. Even as recently as this Court's first decision in this case, Bond v. United States, 131 S. Ct. 2355 (2011), the Court still has not decided "[w]hether the Tenth Amendment is regarded as simply a 'truism' ... or whether it has independent force of its own...." *Id.* at 2366.

If the Tenth Amendment is a meaningful and independent prohibition on the extent of federal power, then the treaty power may not be used to circumvent it. If the structure of our federal system, where the national government enjoys only enumerated powers, has any meaning, then the treaty power cannot override it.

It is far past time for the Court decide whether the Tenth Amendment is a toothless truism, and whether there really is any limit on the reach of federal power. Thus, the Court should overrule Missouri v. Holland.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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[30] *Id.*, 681 F.3d at 155 n.8.

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May 15, 2013

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