NO. _____

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two years ago, this Court held that petitioner had standing to challenge her criminal conviction as a violation of the Constitution's structural limits on federal authority. *See Bond v. United States*, 131 S. Ct. 2355 (2011). The Court rejected the argument that Congress' reliance on the treaty power somehow defeated petitioner's standing. On remand, however, the court of appeals held that, while petitioner had standing, her constitutional challenge was a non-starter because the basic limits on the federal government's power are not "applicable" to statutes purporting to implement a valid treaty. App. 36 n.21. Although it had grave misgivings about its decision, the Third Circuit viewed this startling result as compelled by dictum in *Missouri v. Holland*, which states that "if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] 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 thus broadly construed *Holland* as allowing the Senate and the President to expand the federal government's constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress' enumerated powers.

The questions presented are:

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state

prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations?

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

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PETITION FOR WRIT OF CERTIORARI

Two Terms ago, in *Bond v. United States*, 131 S. Ct. 2355 (2011), this Court unanimously held that petitioner had standing to argue that the Chemical Weapons Convention Implementation Act exceeded Congress' enumerated powers as applied to her conduct. Although the argument then properly focused on the standing question, the breadth of both the government's view of the statute's reach (covering the poisoning of a neighbor's goldfish) and its legal theory (defending even that hypothetical as a valid exercise of the Commerce and Treaty powers) was on full display. Nonetheless, on remand, the court of appeals rejected any effort to limit the statute's application and embraced a view of the federal treaty power that would give Congress unlimited authority to implement a valid treaty.

That cannot be the law. The Framers did not empower the Senate and the President to expand Congress' power by negotiating a valid treaty with a foreign nation. While the Constitution clearly empowers federal authorities to negotiate and ratify treaties, it nowhere suggests that the federal government alone is responsible for implementing them or that the normal structural limits do not apply to treaty-implementing federal legislation. The Third Circuit, and especially Judge Ambro in his concurrence, was not happy with the implications of this expansive view of the treaty power, but it viewed itself bound by this Court's 92-year-old decision in *Missouri v. Holland*, 252 U.S. 416 (1920).

A domestic dispute culminating in a thumb burn is not an obvious candidate for a federal prosecution,

let alone one under a statute designed to implement the Chemical Weapons Convention. But such prosecutions are the inevitable result of the government's view of its unlimited authority under the treaty power. The court of appeals endorsed the government's view, but made clear that it considered its hands tied by this Court's decision in *Holland*. Whether or not that is the best reading of *Holland* or whether *Holland* needs to be reconsidered, it is clear that only this Court can correct this injustice and clarify that statutes enacted to implement valid treaties, like all other laws, must comply with the Constitution's bedrock structural limits on our system of limited but enumerated federal powers. The Court should grant this petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 681 F.3d 149 and reproduced at App. 1–47. The earlier opinion of the court of appeals, denying petitioner's standing, is reported at 581 F.3d 128 and reproduced at App. 48–72. This Court's decision reversing that opinion is reported at 131 S. Ct. 2355. The district court's unpublished bench ruling denying petitioner's motions to suppress and dismiss is reproduced at App. 84–85.

JURISDICTION

The court of appeals issued its opinion on May 3, 2012. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause, the Treaty Clause, and the Tenth Amendment to the United States Constitution are reproduced at App. 135–37.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention") are reproduced at App. 146–61 and *available at* http://www.opcw.org/chemical-weapons-convention.

The relevant portions of the Chemical Weapons Convention Implementation Act are codified at Title 18, section 229 of the United States Code and reproduced at App. 138–45.

STATEMENT OF THE CASE

This is the second time this case has come before the Court. The case arises out of a domestic dispute seemingly unlikely to provoke a federal prosecution, let alone a novel invocation of a statute designed to implement a major international treaty.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 42-year-old woman who, until her incarceration, lived with her husband and adopted child in Lansdale, petitioner lived most of her life in Barbados. App. 109–10. She was raised by her mother and, as a young child, remembers her father having multiple affairs and children outside of marriage. App. 109. In 1995, petitioner moved to the United States and became close friends with Myrlinda Haynes, another

Barbados immigrant who lived in nearby Norristown, Pennsylvania. Petitioner came to consider and treat Haynes as a sister. App. 100, 110.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was initially excited for her closest friend. App. 49. But that excitement vanished when petitioner discovered that her own husband was the child's father. *Id.* This double betrayal brought back painful memories of her father's infidelities, and petitioner suffered an emotional breakdown. App. 116–17. She was depressed, her hair fell out, and she suffered panic attacks. *Id.*

In the midst of this breakdown, petitioner decided to punish Haynes. App. 91. She purchased a vial of potassium dichromate from a photography equipment supplier on Amazon.com, and stole a bottle of 10-chloro-10-H-phenoxarsine (an arsenic-based chemical) from her employer. App. 49. Petitioner knew the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. App. 101. Although both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal, App. 49 n.1, the undisputed evidence shows that petitioner had no intent to kill Haynes, App. 101, 104.

Between November 2006 and June 2007, petitioner went to Haynes' home on several occasions and spread chemicals on Haynes' car door, mailbox, and apartment doorknob. App. 49–50. None of these attempted assaults was sophisticated or successful. Haynes avoided the easy-to-spot chemicals (potassium dichromate is bright orange) on all but

one occasion when she sustained a minor chemical burn on her thumb. App. 97. This one-time thumb burn is the only physical injury Haynes ever sustained. *Id.*

When Haynes complained to the local police and the postal service, postal inspectors installed surveillance cameras in and around her home. App. 50. The cameras captured petitioner opening Haynes' mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes' car. *Id.* On June 8, 2007, postal inspectors arrested petitioner. App. 87.

Petitioner's arrest shocked her family and friends, who considered the attempted assaults completely out of character. App. 111–15. A doctor performed a mental health evaluation and concluded that petitioner was "not likely to recidivate." App. 117. In the doctor's view, petitioner was "unable to control behavior she knew was wrongful" because she was suffering from an "intense level of anxiety and depression." *Id.*

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. Petitioner's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see id.* § 2702, and harassment, *see id.* § 2709. Petitioner accepted full responsibility for her actions and, under state law, likely would have faced a prison sentence of 3 to 25 months.

Instead of allowing local law enforcement to handle this domestic dispute, however, federal prosecutors opted for a novel, heavy-handed approach and charged petitioner with violations of, *inter alia*, 18 U.S.C. § 229(a)(1), a statute designed to implement the United States' treaty obligations under the 1993 Chemical Weapons Convention. App. 146–61.

B. The Convention And Implementing Legislation

The Chemical Weapons Convention is an international arms-control agreement that is intended to address the proliferation of weapons of mass destruction by outlawing the production, stockpiling, and use of chemical weapons. App. 146–61. The treaty requires signatory states to pledge never to develop or use chemical weapons, to destroy any existing stockpiles, and to avoid militarizing chemicals or using riot control agents as a method of warfare. App. 148. The treaty reinforces the 1924 Geneva Protocol prohibiting chemical and biological warfare and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." ICRC Advisory Serv. on Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR8F.

Article I of the treaty requires signatory states "never under any circumstances" to use, develop, or stockpile chemical weapons or engage in military preparations to use chemical weapons. App. 148. Articles II and IV establish an elaborate reporting and verification process, requiring signatory states to destroy any chemical weapon stockpiles, and to set up

inspection and monitoring processes to be conducted by an international organization based in The Hague, Netherlands. App. 149–59. In conjunction with these other provisions, Article VII prohibits individuals from engaging in activities that would violate the Convention if undertaken by signatory states. App. 160–61. That provision does not, however, seek to interfere with signatory states' internal constitutional processes. The treaty mandates that each state "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations," including "enacting penal legislation" to ensure that no "natural and legal person[] anywhere on its territory or in any other place under its jurisdiction" undertakes "any activity" prohibited to the signatory state. App. 160 (emphasis added).

The U.S. Senate ratified the Convention in April 1997 and, because it is not self-executing, Congress passed implementing legislation. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856, *codified at* 22 U.S.C. § 6701; Executive Order 13128, 64 Fed. Reg. 34,702 (June 28, 1999). Congress established criminal and civil penalties for statutory violations. *See* 18 U.S.C. §§ 229 *et seq.* The criminal provisions make it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." *Id.* § 229(a)(1).

While the statutory provisions largely track the Convention, they go further in some respects. For example, the statute prohibits possessing or threatening to use chemical weapons, while the

Convention does not. The statute defines "chemical weapon" broadly to mean any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). "Toxic chemical[s]" are thus presumptively swept into the definition of "chemical weapon[s]" unless they are intended for a non-prohibited purpose. In turn, the statute broadly defines "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A).

In light of the broad sweep of the term "toxic chemicals," the key to the statute's definitional coverage is the extent of purposes "not prohibited under this chapter." *Id.* § 229F(1)(A). That phrase cuts back on the presumptive classification of every toxic chemical as a chemical weapon and, properly interpreted, would prevent countless household cabinets from being full of potential "chemical weapons." The Convention makes clear that a toxic chemical is "intended for purposes not prohibited" and, therefore, does not qualify as a "chemical weapon" when it is used for "industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." App. 149, 152. The statute contains the same exclusion in a slightly different formulation: A toxic chemical does not qualify as a chemical weapon if it is used for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. § 229F(7)(A).

Unlike other federal statutes that address assaultive conduct, the statute includes no

requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault impact interstate commerce, that the victim have a recognized federal status, or that some other legitimate federal interest be involved. *See, e.g.*, 18 U.S.C. §§ 111–15, 1951, 2111, 2113, 2114, 2332a. Nor does it include any requirement that the government prove a federal interest as an element of the offense. *See* App. 54–55. Moreover, consistent with Congress' intent to criminalize activities implicating a major international treaty, the statute carries substantial penalties and unusual restrictions, such as a prohibition on release pending appeal. *See* 18 U.S.C. § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i). The statute makes a defendant eligible for the death penalty and requires a sentence of no less than life in prison where "the death of another person is the result" of a statutory violation. *Id.* § 229A(a)(2).

C. Procedural History And This Court's Earlier Decision

Petitioner's assault did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the United States decided to prosecute her under 18 U.S.C. § 229 and, in late 2007, a grand jury returned an indictment. The indictment charged petitioner with two counts of knowingly possessing a chemical weapon that is "a toxic chemical" not intended "to be used for a peaceful purpose" within the meaning of 18 U.S.C. § 229F(7)(A).

In proceedings before the district court, petitioner moved to dismiss, arguing that as applied to her section 229 exceeded Congress' enumerated powers, invaded the powers reserved to the States by the Tenth Amendment, and impermissibly criminalized conduct that lacked a nexus to any legitimate federal interest. App. 55. Petitioner also initially challenged the statute as exceeding Congress' power under the Commerce Clause, App. 3–4, but in response the government disclaimed any reliance on the Commerce Clause, App. 4 n.1. As a result, the litigation focused on Congress' power to implement treaties and the Tenth Amendment.

In November 2007, the district court denied petitioner's motions. App. 84. It held that applying section 229 to this local, domestic dispute did not impinge on principles of federalism because the statute "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution" to "comply with the provisions of a treaty." App. 75. Petitioner entered a conditional guilty plea but reserved her right to appeal. App. 89–90. The district court then sentenced petitioner to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and $9,902.79 in restitution. *See* App. 52.

Petitioner timely appealed and, in September 2009, the court of appeals affirmed without resolving petitioner's constitutional objections. *See* App. 48. The court recognized that the constitutional arguments pressed by petitioner raised difficult issues of "first impression" and noted that significant debate exists over the "scope" of *Missouri v. Holland*. App. 57. Instead of reaching the merits of

petitioner's constitutional challenge, however, the court accepted the government's argument that petitioner lacked standing.

This Court granted certiorari and reversed. *See Bond*, 131 S. Ct. 2355. Although the government had argued in the court below that petitioner lacked standing, it confessed error and urged this Court to adopt a new, bifurcated test for Tenth Amendment standing. In light of the government's confession of error, this Court appointed an amicus who argued that private parties lack standing to challenge legislation designed to implement treaties. *See* Br. of Amicus at 38–42, *Bond v. United States*, No. 09-1227 (Jan. 20, 2011). Although the argument focused on standing questions, the Court elicited answers from the government that underscored the breadth of its theory on the merits. *See* Tr. of Oral Argument at 29–31, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1227.pdf

The Court rejected both the government's bifurcated test and the amicus' treaty power argument and ruled in petitioner's favor. It held that she had standing to challenge her conviction because "[f]ederalism secures the freedom of the individual" in addition to preserving the sovereignty of the States. *Bond*, 131 S. Ct. at 2364. As the Court explained, federalism "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States

in competition for a mobile citizenry.'" *Id.* (citation omitted). Federalism's benefits "protect[] the liberty of all persons within a State" and thus afford citizens "a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.*

D. The Decision On Remand

On remand, the Third Circuit recognized that, as interpreted by the government, the statute's "breadth" is "striking." App. 10 n.7. It also viewed the government's decision to employ a statute "designed to implement a chemical weapons treaty" to "deal with a jilted spouse's revenge on her rival" as, "to be polite, a puzzling use of the federal government's power." App. 35 n.20. The court nonetheless refused to interpret the statute to avoid constitutional doubt and, believing itself bound by dictum in *Holland*, affirmed petitioner's conviction.

The Third Circuit first concluded that the statute unambiguously applies to petitioner's conduct and rejected petitioner's effort to construe the statute to avoid turning every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." App. 10 n.7. The court rejected petitioner's suggestion that it follow the lead of this Court's precedents requiring a "plain statement" when Congress seeks to interfere with traditional state prerogatives or to change the federal-state balance in the prosecution of crimes. *Jones v. United States*, 529 U.S. 848, 858 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). It also failed to note

the many authorities cited by petitioner establishing that Congress did not intend the statute to reach non-warlike conduct—*i.e.*, conduct that would not violate the Convention if undertaken by signatory states. Instead, the court held that the statute's language speaks "with sufficient certainty" that only one interpretation was permissible. App. 12.

The Third Circuit then considered the constitutionality of 18 U.S.C. § 229 as applied to petitioner's conduct. App. 12–20. The court resolved that question by concluding, first, that the statute in general is rationally related to a valid treaty and, second, that under dictum in *Holland* "there can be no dispute about the validity of [a] statute that implements a valid treaty." App. 20. The court thus brushed aside concerns that, as applied to petitioner, section 229 goes far beyond what is necessary to implement the Chemical Weapons Convention and intrudes on matters of traditional state concern. That a failure to reach petitioner's conduct would not put the United States in violation of its treaty obligations was deemed immaterial. So too was the fact that state-law prohibitions and prosecutions could fully discharge any treaty obligation. Because the treaty was valid and the legislation rationally related to the treaty, further constitutional inquiry was foreclosed by the Third Circuit's reading of *Holland*.

The court held that, under *Holland*, "principles of federalism will ordinarily impose *no limitation* on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid." App. 6–7 (emphasis added). The court interpreted *Holland* to hold "that

Congress may … legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state's traditional province." App. 14. Taking this reasoning to its logical conclusion, the court stated that "the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture." App. 17.

The court of appeals was not comfortable with the implications of its holding, but viewed itself as bound by *Holland*. The court also recognized tension between its reading of *Holland* and this Court's "renewed attention on federalism over the last two decades." App. 19 n.10. And it expressed concern about the implications of its position in light of the virtually unlimited range of subjects addressed by modern treaties: "Juxtaposed against increasingly broad conceptions of the Treaty Power's scope, reading *Holland* to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power runs a significant risk of disrupting the delicate balance between state and federal authority." App. 18–19. With considerable understatement, the court noted that "it may well be worth taking seriously" the notion that "judicial review" of treaty-implementing legislation should "be undertaken to preserve the federal structure of our government." App. 33 n.18. The court also recognized that its bright-line interpretation "may be viewed as

simplistic." App. 33. But it believed itself bound: "If there is nuance" in *Holland* "that has escaped us, it is for" this Court "to elucidate." *Id.* "[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say." App. 31. The court of appeals thus left it to this Court to "clarify whether principles of federalism have any role in" this context. App. 33 n.18.

Judges Rendell and Ambro each filed separate concurrences. In Judge Rendell's view, there is no "principle" that limits the scope of treaty-implementing legislation in our "system of dual sovereignty." App. 41.

Judge Ambro, by contrast, had serious reservations about the court's decision and "wr[o]te separately to urge the Supreme Court to provide a clarifying explanation of" *Holland*. App. 45. Noting the vigorous "academic debate" over *Holland*, Judge Ambro voiced concern that courts have interpreted *Holland* as granting the federal government "a blank check" and, absent this Court's review, the federal government would possess an "acquirable police power" antithetical to "the fundamental principle" that our federal government is one of few and defined powers. App. 45 & n.1. As Judge Ambro further explained, "if ever there were a statute that did test" limits on federal power, "it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct." *Id.* Section 229 provides "a troublesome example of the Federal Government's appetite for criminal lawmaking," which is "in deep tension" with our Constitution's recognition of the States' primary authority to define and enforce criminal law. App. 46.

Judge Ambro thus expressed "hope" that this Court would "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." App. 46–47.

REASONS FOR GRANTING THE PETITION

The decision below candidly acknowledges a treaty power unchecked by the most fundamental structural limits of the Constitution and Our Federalism. While the decision, and especially Judge Ambro's concurrence, expressed substantial concerns about this "acquirable police power," the court of appeals viewed itself as bound by *Holland*. In these circumstances, only this Court can clarify that the treaty power, like every enumerated power granted to the federal government, remains subject to the basic structural limits of the Constitution. Indeed, the decision below warrants this Court's review for at least three reasons. *First*, the panel's separate opinions encapsulate the significant, well-recognized confusion in the lower courts over the scope and continuing validity of *Holland*. *Second*, the decision below misconstrues this Court's precedent in *Holland* and is directly at odds with more recent decisions enforcing the Constitution's structural limits on federal authority. *Third*, the question presented raises an especially important and recurring issue. The prospect of an "acquirable police power" is, indeed, antithetical to fundamental tenets of our federal government of few and defined powers. The Framers did not grant the Senate and the President the authority to expand Congress' limited and enumerated powers based on negotiations with foreign governments. Given the virtually unlimited

scope of modern treaties and the central government's seemingly insatiable appetite for the federalization of traditional state crimes, the importance of the decision below is obvious. The Court should accept the lower court's request to clarify the scope of the federal government's authority to criminalize purely local conduct when seeking to implement treaties.

I. *Missouri v. Holland* And The Contours Of The Treaty Power Are Sources Of Great Confusion Among The Lower Courts.

Nearly a century ago this Court suggested in a single sentence of dictum that the Constitution imposes no limits on Congress' power to enact legislation to implement a valid treaty. Lower courts have struggled ever since to reconcile that seemingly boundless power with the Constitution's structural protections and the principle of enumerated powers. As this Court has reasserted the importance of federalism and the limits of Congress' enumerated powers, the confusion in the lower courts and the need for this Court's review has grown more acute.

The three opinions below reflect the divergent views within the lower courts and the recognized need for this Court's further guidance. Writing for all three members of the panel, Judge Jordan declared the Third Circuit "bound to take at face value" *Holland*'s statement that, "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." App. 27, 36 (citing *Holland*, 252 U.S. at 432). Reading that single sentence without implicit qualifications, contextual limitations, or room

for lower court interpretation, Judge Jordan concluded that "the *only* relevant question is whether the underlying treaty is valid." App. 6–7 (emphasis added). The universe of structurally invalid legislation implementing a valid treaty was viewed as a null set.

Notwithstanding that striking conclusion, the Third Circuit was hardly sanguine about the consequences of its sweeping reading of *Holland*. As the court recognized, to "confer on Congress an unfettered ability to effectuate" any valid treaty, and to combine that power with "increasingly broad conceptions of the Treaty Power's scope," "runs a significant risk of disrupting the delicate balance between state and federal authority" and creates serious tension with this Court's "renewed attention on federalism over the last two decades." App. 18–19 & n.10. The court conceded that when *Holland* was decided a much narrower view of the treaty power held sway and questioned whether "the *Holland* court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century's changing claims about the limits of the Treaty Power." App. 29. The court thus acknowledged that there may be "more to say about the uncompromising language used in *Holland* than we are able to say," and suggested that this Court should "clarify whether principles of federalism have any role" to play in this context. App. 31 & n.18.

Although she joined the court's opinion, Judge Rendell was markedly less concerned about the implications of the panel's "uncompromising" reading of *Holland* and wrote separately to embrace it wholeheartedly. In Judge Rendell's view, an "appeal

generally to federalism" is not "a workable principle that would limit the federal government's authority." App. 42–43. While Judge Rendell recognized this Court's contrary holdings in cases such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), she viewed those principles as limited to commandeering claims. App. 41.

Judge Ambro also wrote separately but, in stark contrast to Judge Rendell, expressed his deep reservations over the implications of the opinion he felt compelled to join. As he explained, the Third Circuit's reading of *Holland* creates "a blank check" for Congress "to enact any laws that are rationally related to a valid treaty." App. 45. This "acquirable police power … run[s] counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are 'few and defined.'" *Id.* (quoting The Federalist No. 45 (Madison)). Noting section 229's "shockingly broad" scope and its *coverage* of "purely local, run-of-the-mill … conduct," Judge Ambro viewed the statute as "a troublesome example of the Federal Government's appetite for criminal lawmaking" that "test[s] the outer bounds of [Congress'] treaty-implementing authority" and is "in deep tension with" the Constitution's "important structural feature[s]." App. 45–47. Judge Ambro thus "urge[d]" this Court to reconsider *Holland* and to "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." App. 45, 47.

Judge Ambro is not alone in struggling to reconcile an expansive reading of *Holland* with the

basic structural protections inherent in the Constitution and explicit in this Court's more recent jurisprudence. Indeed, in contrast to the Third Circuit's approach, other courts of appeals have recognized that legislation implementing treaties is not exempt from the Constitution's structural protections. While some of those courts have found limits in the power to make treaties, and others in the power to implement them, each has recognized that "[f]idelity to principles of federalism," *Bond*, 131 S. Ct. at 2364, compels a conception of those powers that does not render the Constitution's structural protections a dead letter.

For example, the Ninth Circuit has concluded that "treaty provisions which create domestic law" and "have the same effect as legislation" must be "subject to the same substantive limitations as any other legislation." *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1309 (9th Cir. 1982). A fortiori, legislation implementing such treaty provisions must be so as well. "Were this not so," the court reasoned, "a constitutional limitation on governmental power could be circumvented by means of a treaty, although the same objective could not be accomplished through legislation." *Id.* As a result, the Ninth Circuit concluded that "there are ends which may not be accomplished either by statute or by treaty, however compelling the foreign policy interests may be." *Id.*; *see also Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981).

For largely the same reasons, the D.C. Circuit has rejected the view that *Holland* means "there is no apparent limit to what may be done under the treaty

power." *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538, 542 (D.C. Cir. 1957), *vacated sub nom. Am. Pub. Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957). Emphasizing that (at that time) no court had ever said "that the treaty power can be exercised without limit to affect matters which are of purely domestic concern," the court expressed "grave doubt" about the constitutionality of using "the treaty-making power to deal with … matters which normally and appropriately were within the local jurisdiction of the States." *Id.* at 543.

The Fourth Circuit has also concluded that, because "treaty obligations cannot justify otherwise unconstitutional government conduct," the government "must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution." *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983). In the same vein, the D.C. Circuit has noted that it cannot "be doubted that our Nation's *performance* as well as its making of international compacts must observe constitutional mandates." *Holmes v. Laird*, 459 F.2d 1211, 1217 (D.C. Cir. 1972) (emphasis added).

In contrast, the Second and Eleventh Circuits have employed a sweeping reading of *Holland* akin to that adopted by the Third Circuit. Upholding a statute implementing the International Convention Against the Taking of Hostages, those decisions rely on reasoning that directly parallels the Third Circuit's reasoning here: "If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause." *United*

States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (citing *Holland*, 252 U.S. at 432); *accord United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001).

Like Judge Rendell, the Second Circuit has concluded that, at most, the Constitution demands only a loose connection between a valid treaty and an implementing statute. *See Lue*, 134 F.3d at 84 (finding it sufficient that statute "bears a rational relationship to the Convention"). The Second Circuit dismissed the grave federalism concerns that such a rule creates by declaring the treaty-implementing power "not subject to meaningful limitation under the terms of the Tenth Amendment." *Id.* at 85.

Confusion over the meaning and wisdom of this Court's dictum in *Holland* is hardly limited to the courts of appeals. Scholars, too, have long debated the "scope and persuasiveness" of *Holland*, App. 45, with many echoing Judge Ambro's plea that this Court revisit it. *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 415–23 (2003) (arguing that *Holland* must be understood in light of this Court's more recent federalism jurisprudence); Curtis A. Bradley, *The Treaty Power and American Federalism,* 97 Mich. L. Rev. 390 (1998); *see also* App. 45 n.1 (collecting articles). Indeed, even the federal government has recognized that *Holland* cannot possibly mean what the Third Circuit thinks it means. *See* Tr. of Oral Argument at 31:21–32:04, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545) ("I do not think a treaty can expand the powers of the federal government.") (Argument of Solicitor General).

It has been nearly a century since this Court set forth arguably "[t]he most important sentence in the most important case about the constitutional law of foreign affairs." Rosenkranz, 118 Harv. L. Rev. at 1868. And in the course of that century, lower courts have become increasingly confused as to the meaning of that sentence and the limits, if any, it allows on the proper scope and application of treaty-implementing legislation. As this Court has reasserted the limits on Congress' enumerated powers and the subject matter of international treaties has expanded, the importance of this "uncompromising" sentence has only grown. The Court should grant review to provide the lower courts with much-needed guidance on what that sentence means.

II. The Decision Below Cannot Be Reconciled With The Constitution's Structural Protections Or With This Court's Precedent.

As this Court reiterated the last time this case was before it, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. The Court unanimously concluded that "an individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States," and remanded for consideration of petitioner's argument that section 229, as applied here, is one such law. *Id.* at 2364, 2367. The Court rejected amicus' invitation to adopt a special rule for the Treaty Clause. Nonetheless, the court of appeals interpreted *Holland* to require an exception for legislation enacted to implement a treaty: let the treaty be valid, and any legislation

enacted to rationally further the treaty must also be valid, no matter how inconsistent with our baseline assumptions about the proper and properly limited role of the federal government. That is not and cannot be the law.

This Court has recognized that many treaties are non-self-executing and that in some circumstances it is state and local officials who must ensure compliance with our international obligations. In light of those realities, there is absolutely no reason to assume that any federal legislation enacted to implement a valid treaty is automatically valid. Nor is there any reason to think that the Senate and President can reconfigure the most basic structural safeguards in our federal system by reaching an agreement with a foreign government. As Judge Ambro correctly observed, the notion of an "acquirable police power" is antithetical to our founding document and basic constitutional structure. App. 45. But despite its expressed doubts about the wisdom of this constitutional rule, the court below viewed its hands as tied by *Holland*. It is thus clear that only this Court can clarify the confusion and confirm the correct constitutional rule.

A. The Decision Below Misinterprets *Missouri v. Holland* And Adopts A Rule Inconsistent With More Recent Precedents.

According to the Third Circuit, a single sentence in *Holland* amounts to a wholesale "rejection of federalism as an applicable concept as far as [valid] treaties are concerned." App. 36 n.21. That is a rather remarkable consequence to attribute to a

single sentence of dictum. A careful review of *Holland* makes clear that this sentence cannot carry the weight attributed to it by the Third Circuit. Equally important, such a reading would conflict with more recent precedents, not to mention with the Constitution itself.

Holland involved a facial challenge to the Migratory Bird Treaty Act of 1918, *codified* at 16 U.S.C. §§ 703–12. Missouri contended that the statute violated the Tenth Amendment because it interfered with the State's sovereign right to regulate the killing of migratory bids within its territory. 252 U.S. at 430–31. In rejecting that argument, the Court applied "established rules," *id.* at 435, and did not purport to overturn earlier cases holding that Congress' legislative authority cannot "be enlarged under the treaty-making power." *Mayor of New Orleans v. United States*, 35 U.S. 662, 736 (1836); *see also Holden v. Joy*, 84 U.S. 211, 243 (1873) (treaty power must be exercised consistently "with the nature of our government and the relation between the States and the United States"). To the contrary, the Court simply rejected the argument that in answering the question before it favorably to the State "it is enough to refer to the Tenth Amendment." *Holland*, 252 U.S. at 432. And it is in the context of rejecting that extreme position that the dictum in the next sentence must be understood.

Nor did *Holland* treat federalism as irrelevant to the inquiry; quite the contrary, the Court carefully balanced the relevant state (which it viewed as *de minimis*) and national (which it deemed paramount) interests. *See id.* at 435 (balancing "slender reed" of State's pecuniary interest in migratory birds only

temporarily in the State against "national interest of very nearly the first magnitude").

That could not be further from the facts of this case. Here, the state interest in policing garden-variety crimes is paramount, and the federal interest in treaty-compliance non-existent. Applying section 229 to petitioner's conduct marks a radical intrusion into the State's sovereign prerogative to administer "private justice between" its citizens and to determine the appropriate punishment for local crimes. The Federalist No. 17, at 118 (Hamilton) (Clinton Rossiter ed., 1961); *Montana v. Engelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is … the business of the States" (alteration and internal quotations omitted)). By contrast, petitioner's conduct does not implicate the concerns of the Convention at all and, in any event, the fact that Pennsylvania prohibits the conduct would fully satisfy any treaty obligations.

Moreover, unlike the State in *Holland*, petitioner is not arguing that federal regulation of chemical weapons impermissibly intrudes on state sovereignty. A non-self-executing convention addressing that subject—especially one that provides for implementation by signatories consistent with their respective constitutional systems—is neither invalid nor the source of the constitutional problem. The problem here is precisely that Congress, rather than implementing the treaty consistent with our constitutional system of federalism, enacted a statute that, if construed to apply to petitioner's conduct, would violate basic structural guarantees and exceed Congress' enumerated powers.

Under those circumstances, it makes no sense to conclude that just because the treaty itself is a valid exercise of the treaty power that any legislation rationally related to it is necessarily consistent with the basic structural provisions of our Constitution. As this Court recognized in *Medellin v. Texas*, 552 U.S. 491 (2008), many treaties are non-self-executing and demand subsequent action by the federal *or* state and local governments. As *Medellin* dramatically demonstrates, the validity of a non-executing treaty and the federal action that purports to implement it are distinct questions. *Medellin* invalidated the latter while assuming the validity of the former. Equally important, there is nothing anomalous about the federal government entering a valid treaty that depends on state officials or state laws for compliance. Here, Pennsylvania laws criminalizing petitioner's conduct fully discharged any treaty obligation the United States had to criminalize her conduct. Having vindicated federalism principles in *Medellin* even though it put the United States into irrevocable breach of its treaty obligations, it would be more than passing strange to ignore federalism limits when Pennsylvania's exercise of its police power to criminalize garden-variety poisoning eliminated any possibility of breach.

The Third Circuit's reading of *Holland* is also incompatible with this Court's more recent emphasis that federal laws cannot be "enacted in contravention of constitutional principles of federalism." *Bond*, 131 S. Ct. at 2365; *see also NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). The Third Circuit viewed legislation enacted pursuant to the treaty power as fundamentally different. But legislation enacted to

implement a treaty must be a valid exercise of either some specific enumerated power or the Necessary and Proper Clause. To be valid under the latter authority, legislation must be both necessary *and* proper. Legislation that fails to respect the basic structural provisions of the Constitution is not "proper" within the meaning of the Necessary and Proper Clause. *See Printz*, 521 U.S. at 924; *accord NFIB*, 132 S. Ct. at 2623–24 (Roberts, C.J.).

Clearly, legislation designed to implement a valid treaty—no less than any other legislation—would need to respect the basic structural prohibition on commandeering state officials. But there is no reason to adopt a different rule when it comes to the other structural limits on the federal government. This Court has already concluded that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government." *Bond*, 131 S. Ct. at 2366. There is no exception to that rule for statutes implementing a treaty. *See Reid v. Covert*, 354 U.S. 1, 16–18 (1957) (plurality opinion) (holding that federal government may not exploit treaty power to circumvent Bill of Rights).

Finally, and most fundamentally, the Third Circuit's reading of *Holland* would give the President and the Senate the opportunity to expand Congress' powers based on an agreement with a foreign nation. As Justice Scalia colorfully observed, "powers that Congress does not have under the Constitution can[not] be obtained by simply obtaining the agreement of the Senate, the President and Zimbabwe. I don't think that a treaty can expand the powers of the Federal Government." *Golan*, Tr. of Oral Argument at 32:21–33:1. While the Solicitor

General professed his "complet[e] agreement," *id.* at 33, the Third Circuit is in complete disagreement based on its reading of *Holland*. Its notion of "acquirable police powers" is fundamentally at odds with basic notions of federalism and clearly merits this Court's review.

B. The Decision Below Misapplies Basic Principles Of Statutory Construction.

The Third Circuit's approach is particularly troubling because there was no need for it to construe the statute to reach the wholly domestic conduct at hand, or to reach the thorny constitutional question of the scope of Congress' treaty-implementing power. Given the grave constitutional concerns raised by the government's "shockingly broad" interpretation of section 229, it was incumbent on the Third Circuit to consider whether the statute can be construed to avoid those concerns. *See, e.g.*, *Jones*, 529 U.S. at 850; *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Gregory*, 501 U.S. at 460–61 ("plain statement rule"); *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010) (rule of lenity). As petitioner explained, the statute is reasonably susceptible to a common-sense limiting construction that would avoid unintended applications like this one. If the court of appeals had applied this Court's approach in *Jones* (and these other cases), it would have invalidated the conviction on statutory grounds and avoided the constitutional thicket of *Holland* altogether.

The statute defines "chemical weapon[s]" to include "toxic chemicals," "except where intended for a purpose not prohibited under this chapter." 18

U.S.C. § 229F(1)(A). "Toxic chemical[s]" are in turn defined expansively to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A). As the Third Circuit acknowledged, absent some limiting principle, the statute's broad definition of toxic chemical would turn every kitchen cupboard in the country "into a potential chemical weapons cache." App. 10 n.7. Indeed, as Justice Alito memorably remarked at oral argument, the government's interpretation would treat vinegar as a chemical weapon when deployed on a neighbor's goldfish. *Bond*, Tr. of Oral Argument at 29:15–30:9. Fortunately, the statute need not be read so broadly. The statute excludes from the presumptively inclusive sweep of toxic chemicals those included for "[a]ny peaceful purpose." 18 U.S.C. § 229F(7)(A). When read in the context of Congress' objective in implementing the Convention and the background rules counseling against unconstitutional applications that upset the federal-state balance, a saving construction is clearly possible.

The meaning of statutory language is "determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The point of section 229 is to prohibit conduct by private parties that would violate the Convention if undertaken by signatory states, not to prohibit every conceivable malicious use of readily available chemicals. When the Convention exempts chemicals intended for peaceful, non-military uses, it addresses

intent at a broad level, such that chemicals generally intended for peaceful uses are not chemical weapons, even if they are capable of diversion for a different use. But if that prohibition is applied to individuals without subtlety, it risks turning every diversion of common household chemicals into the deployment of chemical weapons, instead of what it is, namely, a matter for local law enforcement. Given the Convention's overarching purpose, interpreting the statute to reach conduct in which no signatory state could possibly engage—such as the diversion of useful chemicals to try to injure a romantic rival—is unnecessary and unintended.

The key to giving the statute a reasonable and common-sense scope is Congress' exclusion of toxic chemicals intended for "[a]ny peaceful purpose." 18 U.S.C. § 229F(7)(A). The Third Circuit insisted that this language must be interpreted broadly and consistent with its "commonly understood meaning." App. 11. But in its most traditional sense—and the one most relevant to the context of agreements between nation-states—"peaceful" means non-warlike. *See* Shorter Oxford English Dictionary 2128–29 (5th ed. 2002); The American Heritage College Dictionary 1005 (3d ed. 1997). Alternatively, if purpose is considered more broadly than the individual defendant's use, the diversion of chemicals clearly intended for peaceful uses could remain the province of state and local law enforcement.

Reading "peaceful purposes" to exclude conduct that is outside the intended scope of the Convention also avoids potentially unconstitutional and unintended applications of the statute—for instance, provisions requiring "destruction" and "coercive

verification" of chemical weapons make no sense if common household chemicals become "chemical weapons" whenever used with malicious intent. *See McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011) (absurd results should be avoided).

Petitioner's actions may have been malicious, but they are not warlike and they are not sensibly covered by a statute designed to prohibit warlike conduct. Indeed, any other conclusion trivializes the concept of chemical weapons and the serious international problem at which the Convention is aimed. When confronted with similar federal incursions on the States' police power, this Court has readily adopted comparable narrowing constructions. *See, e.g.*, *Jones*, 529 U.S. at 850 (construing arson statute not to "render the 'traditionally local criminal conduct' in which" defendant had engaged "a matter for federal enforcement"). If the Third Circuit had adopted the approach of *Jones* it would have invalidated petitioner's conviction and avoided the need to address difficult constitutional questions.

III. The Question Presented Raises Constitutional Issues Of Paramount Importance.

The intersection between principles of federalism and the treaty power raises constitutional questions of the first order. Indeed, the need to enforce constitutional restraints on the treaty power is all the more pressing as a result of two recent trends: (1) the expanding scope and number of international treaties, and (2) the ever-increasing federalization of criminal law. The intersection of those two trends in an unchecked "acquirable police power" threatens the

vitality of this Court's recent federalism jurisprudence and, as the court of appeals recognized, "runs a significant risk of disrupting the delicate balance between state and federal authority." App. 19.

Given the proliferation of treaties covering all manner of subjects, including those not traditionally thought of as matters of international concern, the Third Circuit's broad reading of *Holland* opens a loophole through which Congress can circumvent the limits on its enumerated powers. For example, this Court has held that the Commerce Clause does not empower Congress to criminalize purely local, non-economic activity. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Nor does the Necessary and Proper Clause allow the commandeering of state and local officials, *see Printz v. United States*, 521 U.S. 898 (1997), and neither Clause allows the federal government to compel individuals to enter commerce, *see NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). By the Third Circuit's reasoning, Congress could achieve those verboten results by purporting to enact such laws pursuant to any of the United States' rationally related treaty obligations, thereby effectively arrogating to itself the equivalent of a general police power. *See* Rosenkranz, 118 Harv. L. Rev. at 1871–72 (suggesting Violence Against Women Act invalidated in *Morrison* could be reenacted as implementation of International Covenant on Civil and Political Rights).

That concern is far from hypothetical in light of Congress' desire to federalize crimes traditionally addressed at the state and local levels. There is "no better example of the police power, which the

Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. This division of authority makes sense: Federalization of criminal law puts unnecessary strains on the federal justice system while sapping the ability of States to "exercise discretion in a way that is responsive to local concerns." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 646 (1997) (federalizing crimes can create "dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court"). Members of this Court have thus "repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility." *Morrison*, 529 U.S. at 636 n.10 (Souter, J., dissenting).

Nonetheless, the federal government's "appetite for criminal lawmaking" remains insatiable. App. 46 (Ambro, J); *see also, e.g.*, John C. Eastman, *The Outer Bounds of Criminal Law: Will Mrs. Bond Topple* Missouri v. Holland*?*, 2011 Cato. Sup. Ct. Rev. 185, 193 (2011); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). Section 229 typifies this overreach, at least arguably rendering an act as quintessentially local as pouring

a bottle of vinegar into a romantic rival's goldfish bowl a matter of federal concern. *See* p. 31, *supra*.

Indeed, the "shockingly broad" scope of section 229 (at least as interpreted by the federal government and Third Circuit) injects federal power into every household cleaning cabinet to the detriment of individual liberty and any sensible understanding of the federal-state balance. Under the government's view, every attempted poisoning—whether of a human or a neighbor's pet—and every assault using any toxic chemical, no matter how localized the dispute, is subject to federal prosecution under the heavy artillery of the Convention's implementing statute and its harsh penalties. That the government asserts such authority even though it concedes the relevant treaty does not even require it is all the more reason to fear the consequences of the Third Circuit's approach. Moreover, the decision below is particularly troubling given that violators of section 229 have committed a "Federal crime of terrorism." 18 U.S.C. § 2332b(g)(5). Left standing, petitioner's conviction is an invitation to abuse, as it offers federal prosecutors perverse incentives to pursue similar local crimes in hopes of securing easy "terrorism" convictions, even though such convictions do nothing to further the purpose of section 229 or the treaty it was intended to implement, let alone the global war against terrorism.

When Congress criminalizes conduct already "denounced as criminal by the States," it effects a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396, 411–12 (1973) (citation

omitted). Accordingly, federal crimes should be reserved for those crimes that implicate either a broader federal regulatory regime or an indisputable national interest. The Third Circuit's interpretation of section 229 as applying to every malicious use of chemicals departs from that principle and dramatically expands federal power in a quintessential area of state criminal law. Cases of poisoning were not unknown to the Framers, and the notion that these offenses, and the sensitive determination whether they warrant the death penalty, would be anything but a core concern for the States would have been unthinkable. The Third Circuit's conclusion that the States have lost that sovereign prerogative whenever a chemical agent—no matter how common—is used in a crime implicates state interests of the highest order. This Court's review is needed to eliminate this threat to "the integrity, dignity, and residual sovereignty of the States" and the individual liberty that the Constitution's division of powers was intended to protect. *Bond*, 131 S. Ct. at 2364.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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