

No. 12-158

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**In The  
Supreme Court of the United States**

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**CAROL ANNE BOND,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA.**

*Respondent.*

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

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**AMICUS BRIEF OF THE AMERICAN  
CENTER FOR LAW AND JUSTICE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS<sup>1</sup>

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), addressing a variety of issues of constitutional law.

The decision below essentially holds that the Treaty Power, together with the Necessary and Proper Clause, gives the federal government *carte blanche* to enlarge its own domestic authority, in complete disregard of principles of federalism. This case therefore gravely implicates a whole host of issues of interest to the ACLJ.

## SUMMARY OF ARGUMENT

The Third Circuit read this Court's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), as standing for the principle that the federal government can

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<sup>1</sup>Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

bootstrap the scope of its own power simply by negotiating a treaty and then implementing that treaty by statute. Such a theory would nullify the structural limits on federal power in the Constitution.

The Third Circuit also read the chemical weapons statute at issue here as in effect making a federal crime out of any misuse of a chemical, and then categorically held that enormously broad federal statute to be a valid implementation of a treaty under the Necessary and Proper Clause. This holding opens the door to a general federal police power.

This Court should grant review to resolve the important and immensely practical questions this case presents about the Treaty Power, the *Holland* decision, the Necessary and Proper Clause, and the notion of a federal police power.

## ARGUMENT

Amicus does not condone petitioner Carol Bond's attempts to injure her husband's paramour by the use of toxic substances. Such acts properly incur criminal liability under state law. The problem here, however, is that the *federal* government asserts the authority to treat Bond's misconduct as violative of a *federal* statute implementing, of all things, a chemical weapons treaty.

The legal theory the Third Circuit adopted to justify this extravagant exercise of federal power is wholly incompatible with any structural limitation on federal powers. This Court should grant review and, after plenary consideration, reverse.

**I. THE QUESTION WHETHER *MISSOURI v. HOLLAND* AND THE TREATY POWER AUTHORIZE THE LIMITLESS EXPANSION OF DOMESTIC FEDERAL POWER BY TREATY IS WORTHY OF REVIEW.**

The provisions of the Constitution must be read in harmony with each other. Just as it would make no sense to construe the Free Speech Clause (U.S. Const. amend. I) in a way that would negate the Copyright Clause (U.S. Const. art. I, § 8, cl. 8), likewise it would make no sense to construe the Treaty Power (U.S. Const. art. II, § 2, cl. 2) as negating the structural features that pervade the Constitution and create a federal government of only limited powers (*e.g.*, U.S. Const. art. I, § 8; *id.* amend. X). Insofar as the decision below reads *Missouri v. Holland*, 252 U.S. 416 (1920), as creating such a constitutional contradiction, this case strongly merits review.

The Treaty Power cannot be unlimited. If it were, this would negate the remainder of the Constitution. Therefore, the Treaty Power cannot constitutionally authorize entry into an *international* treaty that would aggrandize the *domestic* powers of any branch of the federal government beyond the scope otherwise authorized by the Constitution. For example, a treaty could not confer legislative power on the federal executive; confer one-house veto or pardon power on the Congress; or confer advisory opinion authority on the federal judiciary. For the same reason, a treaty could not abrogate federalism by conferring a general police power on the federal government. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (Roberts, C.J.)

(constitutional powers “must be read carefully to avoid creating a general federal authority akin to the police power”).

To be sure, unconstitutional exercises of the Treaty Power as such may not readily be justiciable. Here, for example, the federal government is not prosecuting petitioner Bond directly under the pertinent chemical weapons treaty, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Convention) (Pet. App. 146). But implementing statutes can, as in this case, produce justiciable cases and controversies. And a constitutional challenge to the implementing statute can place in question the underlying treaty. Indeed, one of the key premises for the Third Circuit’s holding in this case is the constitutional validity of the Convention itself. Pet. App. 6-7, 15, 20-26. As the court below noted, the key passage in *Missouri v. Holland*, 252 U.S. at 432, begins with the phrase, “If the treaty is valid . . .” Thus, review of the validity of legislation implementing a treaty necessarily implicates with the validity of the treaty itself.

As explained above, a treaty could certainly be constitutionally invalid, like the hypothetical treaty conferring legislative power upon the executives of signatory nations. And if it would be unconstitutional to confer general police power upon the federal government by treaty in one fell swoop, it logically must likewise be unconstitutional to confer such power one step at a time. Violations of this latter kind are limited only by the imagination and the willingness of treaty negotiators. Moreover, such violations know no

political boundaries, i.e., they could advance (and correspondingly impair) agendas of any ideological stripe. Thus, nations could agree by treaty universally to require -- or forbid -- each of the following:

- publicly funded education vouchers for private schools;
- parental notice for abortion;
- restrictions on handgun possession near schools or churches;
- various regulatory limits on home businesses, home schools, or personal hobbies.

These are all generally matters of choice for state and local governments. The federal government may not dictate a one-size-fits-all result in either direction. Yet it is certainly conceivable that an Administration of one viewpoint or its opposite could negotiate with a like-minded foreign sovereign to agree to the mutual imposition of nationwide rules -- in either direction -- on these matters.

Of course, the Treaty Power could not authorize affirmative violations of constitutional rights (e.g., a treaty outlawing churches or banning the carrying of placards). But none of the examples listed above entail such violations. Rather, these examples show how an otherwise unlimited Treaty Power would run roughshod over both the constitutional balance between the three federal branches (separation of powers) and the constitutional balance between the state and federal governments (federalism).

The Third Circuit opined that the solution may be to confine the language in *Holland* referring to the

Treaty Power as presupposing that the Treaty Power retained its original meaning, i.e., as limited to such external objects as war, peace, and international commerce. Pet. App. 20-24. So understood, *Holland* would not stand for the proposition that any and all treaties *ipso facto* can validly authorize the expansion of federal power. Rather, only exercises of the Treaty Power *as originally understood* would authorize federal legislation. On this understanding, *Holland's* broad language would simply not extend to treaties that would dictate domestic matters such as, say, the permissibility of various curricula for public education or, as here, the criminal treatment of poison suspects. The Third Circuit, however, as an inferior federal court, lacked the authority definitely to construe either *Holland* or the Treaty Power. Hence, this Court's review is needed.

**II. THE QUESTION WHETHER THE NECESSARY AND PROPER CLAUSE AUTHORIZES THE FEDERAL GOVERNMENT, IN THE NAME OF TREATY IMPLEMENTATION, TO EXERCISE PLENARY POLICE POWER, IS WORTHY OF REVIEW.**

The Third Circuit concluded not only that the convention represented a valid exercise of the Treaty Power under *Holland*, but also that the Necessary and Proper Clause authorized the incredibly broad implementing statute at issue here. Pet. App. 33-36. This holding also merits review, as it in effect approves the creation of a general federal police power by treaty.

The statute at issue here is 18 U.S.C. § 229, adopted to implement the Convention. That statute makes it a federal crime to “own, possess, or use . . . any chemical weapon.” § 229(a)(1). The statute defines “chemical weapon” to include a “toxic chemical,” § 229F(1)(A), which in turn “means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” § 229F(8)(A). Given the immense variety of animals and their varying vulnerability to different chemicals (e.g., salt can kill slugs, borax can kill ants, garlic oil can kill aphids), it is safe to assume that this statute literally prohibits owning, possessing, or using any chemical substance whatsoever, except where a statutory exception applies.<sup>2</sup>

There is in fact an exception, to the definition of chemical weapons, for chemicals intended for “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity, or other activity,” § 229F(7)(A), so long as the “type and quantity” is “consistent with such a purpose,” § 229F(1)(A). The crucial question of statutory interpretation is whether “purpose” (or “intended”) refers to the *objective* purpose of the *substances* or the *subjective* purpose of the *defendant*.

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<sup>2</sup>In light of the enormous potential breadth of the statute at issue, and its arguable application to virtually every household in America, the question whether a narrowing construction should govern the statute also merits prompt review. *See* Pet. at ii (Question #2).

If the exception is viewed as exempting substances that, objectively, have peaceful purposes and are in quantities consistent with such purposes, then the miscellany of household items in the kitchen, garage, and medicine cabinet fall outside the statute -- but so do the chemicals Mrs. Bond used, which were presumably part of the regular materials the Rohm and Haas chemical company maintained for its peaceful purposes. Pet. App. 3.

But if, on the other hand, a non-peaceful subjective purpose for the particular use by the defendant negates the exemption, then if a malicious purpose took Mrs. Bond outside the statute, such a purpose would also make a federal criminal out of everyone who deliberately misuses chemicals. Adding salt to another person's drink to spoil it, even as a gag, would be federal criminal use of a chemical weapon. Ditto for putting graffiti on a wall (paint is a "toxic substance" to some creatures, including presumably some tiny ones living on the surface being painted), poisoning a neighbor's annoying dog, and tinting purple the hair of a sleeping college roommate. These are wrongful acts of varying severity, the bread and butter of state and local criminal law. But the decision below embraces *federal* authority to proscribe all misconduct using chemicals of any kind.

The rationale of the Third Circuit was that this extraordinary expansion of federal criminal power was "necessary and proper" to implement the Treaty

Power<sup>3</sup> as exercised in the Convention. Pet. App. 33-36. This case therefore presents the question of whether a comprehensive federal ban on “misuse of a chemical” is both necessary and proper to implement a treaty against chemical weapons. In particular, this case asks whether it is “proper” to enlarge federal domestic powers beyond previous bounds in order to comply with an international treaty and “necessary” to go so dramatically beyond the treaty’s focus on stockpiling chemical weapons.

Ultimately, resolution of this issue will determine whether the powers of the federal government are indeed “limited” under our Constitution, or if instead the structural limits on federal power can be negotiated away through agreements with foreign sovereigns. These weighty concerns go to the heart of liberty in America. “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (internal quotation marks and citations omitted).

This Court should grant review.

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<sup>3</sup>The lower court did not address the federal government’s abandoned, and later belatedly proposed, alternative defense under the Commerce Clause, Pet. App. 4 n.1, 27 n.14, and that argument is not before this Court. It bears mention that in any event the implementing statute does not contain any “jurisdictional hook” that might limit its scope to matters of interstate commerce. The statute thus treats salt, vinegar, and every other chemical substance as if it were contraband subject to comprehensive federal regulation. *Cf. Gonzales v. Raich*, 545 U.S. 1 (2005).

**CONCLUSION**

The decision below embraces a formula for negotiating away, by treaty, any and all structural limits upon federal authority. This Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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