No. 12-158

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Government's Sweeping Vision Of Congress' Treaty-Implementing Power Underscores The Need For This Court's Review 1

II. The Government's Statutory Construction Creates Difficult Constitutional Questions That Can And Should Be Avoided 7

III. The Government's Belated Commerce Clause Argument Is No Obstacle To Review 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bond v. United States,
131 S. Ct. 2355 (2011) 3, 4, 5

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 6

Gonzales v. Raich,
545 U.S. 1 (2005) 11

Heller v. Doe,
509 U.S. 312 (1993) 10

Jones v. United States,
529 U.S. 848 (2000) 6, 7

Medellin v. Texas,
552 U.S. 491 (2008) 4

Missouri v. Holland,
252 U.S. 416 (1920) 1, 4

Power Auth. v. Federal Power Comm'n,
247 F.2d 538 (1957) 3

United States v. Bass,
404 U.S. 336 (1971) 5, 7

United States v. Lopez,
514 U.S. 549 (1995) 7, 11

United States v. Lue,
134 F.3d 79 (1998) 3

United States v. Morrison,
529 U.S. 598 (2000) 7

Statutes

18 U.S.C. § 299 1

18 U.S.C. § 229A(a)(2) 5

18 U.S.C. § 229F(7)(A) 8

Other Authorities

Transcript of Oral Argument,
Bond v. United States
(U.S. No. 09-1227) 7, 11

Transcript of Oral Argument,
Golan v. Holder
(U.S. No. 10-545) 2

REPLY BRIEF

The government's opposition embraces an extreme reading of *Missouri v. Holland*, 252 U.S. 416 (1920), that only underscores the need for this Court's review. While the Solicitor General previously disclaimed the rather remarkable proposition that the President, the Senate, and a foreign nation may by their mutual agreement expand Congress' power beyond its enumerated limits, the government now endorses that position. Equally troubling, the government rejects any effort to construe 18 U.S.C. § 229 to give it a sensible and constitutional scope. And although the government attempts to revive its abandoned Commerce Clause defense, that argument was expressly waived long ago and with good reason: Section 229 was manifestly an effort to implement the Chemical Weapons Convention, not to regulate commerce. In short, the government's opposition highlights the point Judge Ambro made in his concurrence: The government's sweeping interpretation of *Holland* is untenable, and only this Court can clarify that there is no treaty power exception to our basic system of limited and enumerated congressional power.

I. The Government's Sweeping Vision Of Congress' Treaty-Implementing Power Underscores The Need For This Court's Review.

The government does not and cannot dispute that the Third Circuit recognized the importance of the issues presented. Indeed, the Third Circuit acknowledged that its interpretation of *Holland* "runs a significant risk of disrupting the delicate balance

between state and federal authority," which is why it invited this Court to "elucidate" *Holland*'s "uncompromising language." Pet.App.18-19, 31 & n.18, 33. And Judge Ambro emphatically "urge[d]" the Court to "clarify (indeed curtail) the contours of federal power to enact laws that intrude" on local matters when implementing treaties. Pet.App.45, 47.

Although the government ignores the Third Circuit's request for guidance and does its best to downplay this case's significance, its unambiguous embrace of the most sweeping interpretation of *Holland* highlights the importance of the questions presented. When previously confronted with the untenable consequences of a broad reading of *Holland*, the Solicitor General appeared to recognize the need for restraint. Asked whether Congress could acquire additional powers "by simply obtaining the agreement of the Senate, the President, and Zimbabwe," the Solicitor General rejected the notion that "a treaty can expand the powers of the federal government." Tr.31:21-32:04, *Golan v. Holder* (U.S. No. 10-545). Without even acknowledging its change in position (although the petition invoked this colloquy, Pet.22), the government now insists that "federalism principles do not impose a limit on the subjects that can be addressed in … treaty-implementing legislation." Resp.23. The government's full embrace of that extreme position reinforces the need for this Court's intervention.

While ignoring the "split" in its own position, the government asserts that review is not warranted because "the courts of appeals are not divided on the meaning of *Holland*." Resp.25. That ignores what lower courts have actually said. The D.C. Circuit's

"grave doubt" that the treaty power can be employed to "deal with … matters which normally and appropriately were within the local jurisdiction of the States," *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538, 543 (1957), cannot be squared with the Second Circuit's assertion that the treaty power is "not subject to meaningful limitation under the terms of the Tenth Amendment." *United States v. Lue*, 134 F.3d 79, 85 (1998); *see also* Pet.20-22 (describing confusion in lower courts). In short, the lower courts (and scholars) are confused over the scope and meaning of *Holland*'s dictum. Pet.App.45.

In support of its broad reading of *Holland*, the government contends that treaty-implementing legislation need only "comply with the Constitution's express limitations on government power, such as those found in the Bill of Rights." Resp.25. But this Court has emphatically rejected the view that only the Constitution's negative constraints limit Congress or protect individual rights. One need look no further than this Court's earlier opinion for a ringing endorsement of the principle that the structural limits on federal power are critical both to "protect[] the liberty of the individual" and to "preserve[] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Nowhere does the government explain why the Court would bother to confirm petitioner's standing to vindicate structural limits on federal power if "federalism principles do not impose a limit on … treaty-implementing legislation." Resp.23. Moreover, the Court did not even hint at a treaty power exception to the principle that "[i]mpermissible interference with state sovereignty is not within the

enumerated powers of the National Government," *Bond*, 131 S. Ct. at 2366, even though the court-appointed *amicus* sought a special treaty power rule, *see Amicus Curiae* Br. 38-42.

The government emphasizes petitioner's concession that the treaty is valid. But that just highlights the problem with the government's position and the need for this Court's review. The government assumes the universe of invalid legislation implementing valid treaties is a null set. Resp.19. But that assumption cannot be reconciled with either our constitutional structure or this Court's precedents. There are valid international treaties dealing with matters of traditional state control ranging from alcohol regulation to inheritance law to detention of foreign nationals arrested for local crimes. The government would put litigants and this Court to an artificial choice of attacking the treaty as wholly invalid or conceding that any federal implementing legislation is necessarily valid. Nothing in common sense or precedent supports that anomalous rule. *Holland* certainly does not, as the Court there engaged in the kind of federalism inquiry the government seeks to eliminate. *See* 252 U.S. at 434 (balancing state and federal interests in regulating migratory birds). And *Medellin v. Texas*, 552 U.S. 491 (2008), makes clear that the validity of a treaty does not ensure the validity of the federal government's efforts to implement it—even if the inevitable consequence of invaliding the latter is breach of the treaty.

The government contends that the power asserted here does "not infringe on" any "hypothetical federalism limits" on Congress' treaty-implementing

power because "Pennsylvania remained free to prosecute petitioner for assault." Resp.20. That gets matters backwards: Because the Constitution reserves the police power to the States, a federal law can raise federalism problems even if it duplicates a state exercise of the police power. Moreover, it is precisely because Pennsylvania (and every other State) has laws prohibiting malicious use of chemicals that the federal government could enter into a valid treaty on the subject without necessarily aggrandizing Congress' power. The government's narrow view of federalism is irreconcilable with this Court's precedents. As the Court has repeatedly admonished, Congress "significantly change[s] the federal-state balance" whenever it "renders traditionally local criminal conduct a matter for federal enforcement," regardless of whether it preempts state law in the process. *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

That is particularly true here, as "[t]he law to which petitioner is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about if the matter were left for the Commonwealth of Pennsylvania." *Bond*, 131 S. Ct. at 2366. And by the government's reading, the statute not only displaces state authority to decide whether to prosecute, but even overrides sensitive decisions whether poisonings resulting in death warrant the death penalty. *See* 18 U.S.C. § 229A(a)(2). The government's blithe insistence that the federal-state balance remains undisturbed because Congress did not go the final mile and preempt state law cannot be squared with this Court's skeptical review of comparable efforts to federalize "paradigmatic

common-law state crime[s]." *Jones v. United States*, 529 U.S. 848, 858 (2000).

The government fares no better with its contention that requiring Congress to respect state sovereignty when implementing treaties would require unduly burdensome inquiries into state law. Resp.21-22. Nothing would have been more efficient than granting Congress a police power, such that whether implementing treaties, regulating commerce, or assembling a standing army, Congress would never need to consult state law before legislating. But nothing would have been more antithetical to the Framers' design, which elevated many values above the efficiency of the national legislature. The Constitution grants Congress only limited and enumerated powers precisely because doing so makes it harder for Congress to interfere with matters best left to governments closer and more responsive to the people. To say that constitutional constraints on federal power are "to be governed by Congress's need for 'legislative flexibility'" or efficiency "is to deny federalism utterly." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999). Indeed, to the extent the federal government is increasingly negotiating treaties on subjects traditionally the province of state and local governments, the need to stop and consider relevant state laws before deciding whether federal treaty-implementing legislation is wise, necessary, or even constitutional is a welcome check, not a regrettable inconvenience. In any event, it does not take a 50-state survey to confirm that States already criminalize garden-variety poisoning and assault.

II. The Government's Statutory Construction Creates Difficult Constitutional Questions That Can And Should Be Avoided.

There can be no serious dispute that the constitutional questions at hand are sufficiently difficult and the consequences of the government's position sufficiently alarming to warrant consideration of any construction of the statute that might avoid them. Serious constitutional questions arise *whenever* the federal government asserts jurisdiction over "paradigmatic common-law state crime[s]." *Jones*, 529 U.S. at 858 (applying narrowing construction to avoid question whether Congress could criminalize every arson); *see also Bass*, 404 U.S. at 349 (same as to firearm possession). Those concerns are particularly acute when, as here, the statute does not contain a jurisdictional element. *See United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000). The same grave constitutional concerns that warranted a limiting construction to avoid giving the federal arson statute an unlimited sweep should apply with full force to avoid construing section 229 to reach garden-variety poisoning and assault.

The government resists petitioner's limiting construction, but fails to grapple with the consequences of its own extraordinarily broad reading of the statute. As Justice Alito pointed out at oral argument, the government's reading would make it a federal crime, potentially punishable by life imprisonment, to pour vinegar into a goldfish bowl. Tr.29:15-31:31, *Bond v. United States* (U.S. No. 09-1227). Such absurd results certainly counsel in favor of a limiting construction that would minimize

constitutional concerns while still implementing Congress' intent. Section 229 may be broad, but Congress plainly did not intend to make every assault or poisoning a federal crime. Instead, Congress intended to implement the Chemical Weapons Convention by making conduct forbidden to a signatory state unlawful if undertaken by a private individual. It is in that context that the term "peaceful purpose[s]," 18 U.S.C. § 229F(7)(A), permits a limiting construction. While neither poisoning a goldfish nor inflicting a thumb burn on a romantic rival is "peaceful" in one sense, neither is it the kind of warlike conduct that implicates an international arms-control agreement. Construing "peaceful purpose" to mean non-warlike would not just avoid constitutional concerns and absurd results, but would be more respectful of legislative intent.

The government's assurance that section 229 prosecutions are rare does not undercut the need for a limiting construction or the broader importance of the issues presented. To the contrary, the rarity of prosecutions weakens any claim that reaching conduct like petitioner's is somehow necessary to implement the treaty. Surely the rarity of comparable federal prosecutions is not owing to a sharp drop-off in poisoning crimes or assaults involving chemicals. Nor has the absence of such prosecutions been greeted with outcries and denunciations from our co-signatories to the Chemical Weapons Convention. To the contrary, poisonings and assaults occupy the time of state and local prosecutors, and no one thinks the decision whether to prosecute petitioner implicates the Convention or

the kind of horrific war-like acts a signatory could undertake.

In fact, there is no better illustration of the total misfit between the Convention and the government's unnecessarily broad statutory construction than its strained effort to analogize petitioner's conduct to a nation's stockpiling of chemicals to use against its adversary. Resp.29. This Court should not lightly presume Congress intended to equate exacting revenge on a romantic rival with stockpiling chemical weapons to use against a foreign nation when it approached the delicate task of translating the Convention's prohibitions on nations into meaningful prohibitions and punishments for individuals. And if Congress really was so totally blind to the federalism implications of its actions, that is all the more reason to make clear that pausing to consider the federalism implications of treaty-implementing legislation is not an inconvenience but a constitutional necessity.

III. The Government's Belated Commerce Clause Argument Is No Obstacle To Review.

Reflecting the weakness of its sweeping treaty-power arguments, the government seeks to revive an argument that section 229 is valid under the commerce power. Resp.13. But that argument is both waived and meritless. When the government raised the argument on remand, the court of appeals, which is intimately familiar with this case and its procedural history, correctly noted that the government had "[a]bandoned it affirmatively in the district court" and declined to consider it. 2011-11-28 C.A.Tr.31; Pet.App.27 n.14 (declining to consider "Government's newly-discovered Commerce Clause

argument"). The government now tries to recast its earlier disavowal as merely a "description of what power Congress expressly invoked at the time of the statute's enactment." Resp.18. But that ignores the context of the government's express waiver. When petitioner challenged section 229's constitutionality in district court, she initially argued that neither the treaty nor the commerce power justified the law and invoked Commerce Clause precedents such as *Lopez* and *Morrison*. The government responded by explaining that petitioner's commerce power arguments were misplaced because "Section 229 was not enacted under the interstate commerce authority but under Congress' authority to implement treaties." Gov't Resp. to Mot. to Dismiss 7 [Dist.Ct.Doc.30]. This language was not a bland recital of the power Congress expressly invoked at the time of passage, but, as the lower courts understood it, an affirmative disclaimer of reliance on the commerce power.

The government suggests that it may never waive an argument it later deems useful in defending the constitutionality of an act of Congress. Resp.17-18. But it does not cite a single case supporting this novel one-way ratchet theory of waiver, in which private litigants suffer the consequences of their litigation decisions but the government is free to revive abandoned arguments. Instead, it relies on inapposite cases holding that, in a facial challenge under the Equal Protection Clause, a challenger must negate any rational basis for a suspect classification, "whether or not the basis has a foundation in the [legislative] record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). That principle of equal-protection jurisprudence addressing whether Congress must

articulate a rational basis when legislating is not a litigation-waiver doctrine at all. While Congress need not invoke a source of legislative power for a law to be upheld on that basis, that does not mean the executive may expressly foreswear reliance on a power only to revive it when its preferred theory encounters trouble.

In any event, the government was wise to disclaim its Commerce Clause argument because it is meritless. This is not a case in which Congress invoked one power but the statute is readily supported by another. The Commerce Clause is a complete misfit with section 229. Congress enacted section 229 to implement the Chemical Weapons Convention, not to regulate interstate commerce in useful chemicals. Indeed, when the government attempted at oral argument to analogize this case to *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court's questions exposed the glaring disconnect: As Justice Scalia emphasized after the government had acknowledged its theory would reach malicious use of vinegar, the government cannot "really argue that this statute was designed to drive vinegar out of the interstate market." *Bond* Tr.31:17-19. Indeed, had Congress intended to regulate chemicals in interstate commerce, it would have included a jurisdictional element. *Cf. Lopez*, 514 U.S. at 561. But section 229 lacks any jurisdictional requirement, presumably because Congress was not concerned about a nexus between chemicals and commerce, but rather about the potential misuse of certain chemicals—whether or not they crossed state lines—in ways that implicate the Convention's concerns.

The government makes much of a footnote in *Raich* citing federal statutes implementing similar arms-control conventions as examples of statutes prohibiting possession or manufacture of articles of commerce. Resp.14. But that Congress has the power to eliminate certain items from interstate commerce does not mean that it has the power to criminalize the misuse of items in lawful commercial circulation. More important, the *Raich* Court had no information about how broadly the government interpreted the statutes it referenced. If the government applied the same limitless construction invoked in this prosecution to the biological weapons statute, the latter would reach a person with a cold who maliciously deployed his saliva to try to sicken another person (or animal). *Raich* neither endorsed such a bizarre construction nor remotely suggested that Congress could reach malicious spitting as a valid regulation of commerce in biological weapons.

The real problem with the government's belated revival of its commerce power argument is the same one that caused its abandonment in the first place. Section 229 is all about implementing the Chemical Weapons Convention and "was not enacted under" Congress' "interstate commerce authority," Gov't Resp. to Mot. to Dismiss 7, and thus does not require any nexus to commerce. Accordingly, section 229 must stand or fall under the treaty power. As construed by petitioner, the statute respects our constitutional structure while fully discharging our Nation's treaty obligations (especially when read against the backdrop of state and local laws criminalizing malicious uses of chemicals). As construed by the government, the statute squarely

implicates the merits of the government's enthusiastic and the court of appeals' reluctant embrace of a limitless reading of *Holland*. Either way, as Judge Ambro recognized, the need for this Court's review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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