No. 12-158

IN THE

Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Chemistry Council (ACC) is the nation's premier trade association for chemical manufacturers. Founded in 1872 as the Manufacturing Chemists' Association and known from 1979 until 2000 as the Chemical Manufacturers Association (CMA), ACC represents industry leaders and innovators who, through the science of chemistry, manufacture consumer products essential to everyday life. This $760 billion industry—a cornerstone of the nation's economy—accounts for 12 percent of all U.S. exports, employs nearly 800,000 Americans, and generates one-fifth of the world's chemical products. The chemical industry also contributes to more than 96% of all manufactured goods: ACC member firms, for instance, provide the chemistry used to produce life-saving medications and medical devices, the body armor used by our armed forces and law enforcement, light-weight components for vehicles that help improve gas mileage, and the durable, light-weight wind turbine blades that help provide green energy.

Many of the industrial and laboratory chemicals used in these advances, however, are toxic or produce toxic by-products. As a result, they have the potential to be diverted from their intended, beneficial uses—in manufacturing, agriculture, industry, education, and the arts—and converted into chemical weapons. To prevent that diversion and to protect both the national security and the national and international trade in

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

chemicals, U.S. industry—represented by, among others, ACC—emphatically supported the Chemical Weapons Convention (CWC) and its implementing legislation. The strict uniform controls on the *mis*use of toxic chemicals imposed under the comprehensive regime established by the CWC are essential not only to the eradication of trafficking in chemical weapons, but also to the promotion of free trade in chemicals in today's global economy.

ACC writes to underscore that the CWC, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. 103-21, at 278-451 (1993), and its implementing legislation, the Chemical Weapons Convention Implementation Act of 1998, *see* Pub. L. No. 105-277, 112 Stat. 2681-856 (codified at 18 U.S.C. §§ 229 *et seq.*), reasonably and necessarily seek both to eradicate the interstate and foreign markets in chemical weapons and to promote the national and international trade in chemicals. The implementing legislation is therefore a valid exercise of Congress's commerce power.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal statute at issue here, 18 U.S.C. § 229, is a permissible exercise of Congress's authority to "regulate Commerce" "among the several States" and "with foreign Nations," U.S. Const. art. I, § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its power to regulate interstate and foreign commerce, *id.* art. I, § 8, cl. 18. Section 229, which implements U.S. treaty obligations under the Chemical Weapons Convention (CWC), makes it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indi-

rectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). Wholly apart from Congress's constitutional authority to enact necessary and proper legislation under the treaty power, Section 229 represents an appropriate exercise of Congress's commerce power, whether the statute is judged on its face or as applied to the specific facts of this case.

I. Section 229 is facially constitutional because it is part and parcel of a comprehensive regime enacted by Congress to eradicate the interstate and foreign markets in chemicals weapons and to promote the interstate and foreign commerce in chemicals.

Like the federal statute considered by this Court in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), Section 229 is a component of a "comprehensive framework" for prohibiting the "production, distribution, and possession," *id.* at 24, of chemical weapons. That the statute may reach the intrastate production, transfer, possession, or use of such weapons in order to extinguish the interstate market for them is of no constitutional significance. Congress could reasonably have concluded that eradicating the interstate and foreign markets in chemical weapons required prohibiting intrastate activity. As this Court has determined, "[t]he notion that … a discrete activity … [may be] hermetically sealed off from the larger interstate … market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." *Id.* at 30. That is decidedly the case here: Like the possession or consumption of homegrown marijuana, the intrastate manufacture, possession, or use of chemicals for illicit purposes could easily affect interstate or foreign markets.

To be sure, many chemicals within the ambit of the CWC and Section 229 are "dual-use": they have the potential to be used as chemical weapons or as precursors to chemical weapons, but they also have extensive beneficial uses in manufacturing, agriculture, industry, education, and the arts. That fact, however, does nothing to alter that Section 229 is a pillar in a comprehensive scheme to eradicate the national and international market in chemicals for illicit purposes. Under this Court's Commerce Clause precedents, it does not matter that Congress is attempting to suppress a market for the manufacture, transfer, and possession of certain chemicals only for particular purposes and not commerce in such chemicals altogether.

Section 229, moreover, is not merely part of a larger regulatory framework aimed at *eradicating* a commercial market; it is also squarely aimed at *fostering* the lawful national and international trade in chemicals for their beneficial uses. Petitioner's narrow focus on the disarmament objectives of the CWC ignores this vital commerce-enhancing objective. *See Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942) ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937). Indeed, the text and history of the CWC and its implementing legislation make clear that one of its principal goals was the promotion of "free trade in chemicals." Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). Encouraging that commerce, the signatories ("States Parties") agreed, required a comprehensive prohibition on the use, production, or acquisition of chemicals for illicit purposes, not only by signatory nations but also by corporations and individuals. Otherwise, the everyday commerce in chemicals would be in constant jeopardy

of piecemeal trade-restricting measures aimed at securing what only uniform controls could accomplish. Such was the importance of the prohibition's scope that "[v]arious chemical industry spokespersons consider[ed] the CWC a *trade enabling regime* that could counteract trends in the future, in which U.S. chemical trade and investment could be constricted under even tighter export controls." *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 25 (1996) (statement of Sen. Lugar) (emphasis added).

Petitioner is thus wrong to insist that her conduct is far afield from the goals of the CWC and its implementing legislation. Even one misuse of a toxic chemical for malicious purposes—and certainly such misuses when viewed in the aggregate—could prompt a patchwork of severe domestic or international restrictions on the lawful trade in chemicals. Only by imposing comprehensive criminal controls on the diversion of chemicals into illicit channels and on the subsequent misuse of such chemicals could the CWC fully achieve its objectives. Just as Congress may regulate local wheat production to help stabilize the interstate market in wheat (per *Wickard*), Congress may regulate local misuses of chemicals that could lead to the impairment of lawful interstate or international trade in chemicals for their beneficial uses.

II. Petitioner insists that she challenges Section 229 only "as applied" to her conduct. Even were it permissible under *Raich* or *Wickard* to isolate her conduct and consider its specific nexus to or effect on interstate or foreign commerce, consideration of the facts of this case only underscores why Congress may regulate Petitioner's conduct. Petitioner has pled guilty to or otherwise admitted facts establishing that her mis-

use of toxic chemicals is tied to a channel of interstate commerce and was facilitated by a transaction in the interstate market. Her criminal conduct is thus well within Congress's commerce power. That Section 229 on its face is not limited to such circumstances does not permit Petitioner to lodge an overbreadth objection. *E.g.*, *Sabri* v. *United States*, 541 U.S. 600, 609 (2004). As this Court has explained, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground" that it might apply "to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

ARGUMENT

I. CONGRESS HAD THE AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT SECTION 229

Congress's constitutional authority to regulate interstate and foreign commerce includes the power to prohibit even wholly local conduct where Congress reasonably decides that doing so is necessary either to eradicate an interstate or foreign market or, conversely, to promote or protect one. Section 229 is facially valid under either theory: The CWC and its implementing legislation establish a comprehensive regulatory scheme that serves both to suppress the national and international market in toxic chemicals for illicit purposes and to promote the lawful market in those chemicals for beneficial uses.

A. Congress's Power To "Regulate" Commerce Includes The Power To Eradicate Or To Promote Commerce

The Constitution commits to Congress the authority "[t]o regulate Commerce with foreign Nations, and

among the several States," U.S. Const. art. I, § 8, cl. 3, and to "make all Laws which shall be necessary and proper for carrying into Execution" that power, *id.* art. I, § 8, cl. 18.[2] In exercising this authority, Congress—in addition to regulating the "channels" or "instrumentalities" of "interstate commerce"—may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," whether Congress's aim is to eliminate the broader market or to promote it. *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005); *Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942).

Congress's authority to "eradicate" or "prohibit commerce in a particular commodity" under a comprehensive regulatory scheme is well established. *Raich*, 545 U.S. at 19 n.29. In *Raich*, the Court upheld Congress's effort in the Controlled Substances Act (CSA) to "extinguish the interstate market in Schedule I controlled substances." *Id.* at 39 (Scalia, J., concurring in judgment). The Court held that to accomplish that legitimate objective, Congress could prohibit the local possession or consumption of homegrown marijuana, in part because the "diversion of [such] homegrown marijuana" to interstate markets could "frustrate the federal interest in eliminating [all] commercial transactions." *Id.* at 19; *see id.* at 39-40 (Scalia, J., concurring in the judgment) (Congress may "prohibit[] almost all intrastate activities related to Schedule I [controlled] sub-

[2] Congress's authority to regulate foreign commerce is at least as broad as its authority to regulate interstate commerce; indeed, it may be broader. *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979) (noting "evidence that the Founders intended the scope of the foreign commerce power to be the greater").

stances" as a "necessary part of a larger regulation" of the interstate market).

Importantly, it did not matter to the Court's reasoning that any single local possession of marijuana might not materially affect the interstate market. "The fact that … [the] impact [of possession of marijuana by one individual] on the market was 'trivial by itself,'" the Court explained, "was not a sufficient reason for removing [the conduct] from the scope of federal regulation." *Raich*, 545 U.S. at 20; *see also United States* v. *Lopez*, 514 U.S. 549, 558 (1995) ("'[T]he *de minimis* character of individual instances … is of no consequence.'"); *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (similar). The Court accordingly "refuse[d] to excise individual components of th[e] larger scheme," concluding that it was "of no moment" that the federal regulation "ensnares some purely intrastate activity." 545 U.S. at 22.

The converse proposition, namely that the commerce power permits Congress to "'promote'" or "'foster'" interstate commerce, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937), is likewise beyond dispute. *Wickard* involved a congressional effort through the Agricultural Adjustment Act of 1938 to stabilize and promote the interstate market in wheat. *See* 317 U.S. at 115; *Raich*, 545 U.S. at 19 n.29. The Court held that Congress, as part of a comprehensive effort to normalize the market for wheat, could regulate the production of wheat grown and consumed on a family farm because such consumption would depress demand for wheat in the interstate market: "wheat consumed" on a family farm "if wholly outside the scheme of federal regulation would have a substantial effect in defeating and obstructing [the statute's] purpose to stimulate [interstate] trade … at increased prices."

Wickard, 317 U.S. at 129. As in *Raich*, the Court concluded that although an individual farm's "contribution to the demand for wheat may be trivial," that was "not enough to remove [it] from the scope of federal regulation." *Id.* at 127-128.[3]

Read together, these precedents establish that whether Congress's purpose is to eradicate an interstate or foreign market or to protect and stabilize it, Congress may regulate even wholly local activity where doing so is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The difference between eliminating an interstate market or fostering interstate commerce is "of no constitutional import." *Raich*, 545 U.S. at 19 n.29. "[T]he commerce power permits Congress … to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants." *Id.* at 35 (Scalia, J., concurring in the judgment).

Furthermore, Congress's determination that regulation is necessary to achieve either end is subject to only "modest" review. *Raich*, 545 U.S. at 22; *see Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981). "[T]he rele-

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[3] The Court in *Lopez* distinguished *Wickard* from its examination of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), on the ground that Section 922(q) was not "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *see also United States* v. *Morrison*, 529 U.S. 598, 610 (2000). Here, however, "[b]ecause the [Act] is a statute that directly regulates economic, commercial activity … [there is] no doubt on its constitutionality." *Raich*, 545 U.S. at 26. Indeed, such economic activity is doubly present—the statute suppresses the market involving the misuse of toxic chemicals and promotes the market for those chemicals' proper and beneficial uses.

vant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power[.]'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)); *see also United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2502-2503 (2013).[4]

B. Section 229 Is Facially Valid Under Either A Market-Eradication Theory Or A Market-Promotion Theory

Under these principles, Congress had the constitutional authority to enact Section 229 as part of a comprehensive regime regulating interstate and foreign commerce in toxic chemicals, whether its purpose was to eradicate a market or to promote one. Here, those markets are interrelated because some toxic chemicals are dual-use—they can be used as weapons to harm (or as precursors to such weapons), or they can be used for many beneficial purposes in industry, agriculture, education, medicine, and the arts. For example, thiodi-

[4] Nor can there be an "objection to the assertion of the [commerce] power … that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *see also Raich*, 545 U.S. at 41 (that Congress "regulates an area typically left to state regulation … is not enough to render federal regulation an inappropriate means") (Scalia, J., concurring in the judgment). The Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. *See Cleveland* v. *United States*, 329 U.S. 14, 16, 19 (1946) (Mann Act's criminalization of interstate transportation of women for "'purpose of prostitution or debauchery, or for any other immoral purpose'" not unconstitutional invasion of traditional area of state regulation); *compare* Pet. Br. 21-22 ("the federal government may step into the States' traditional criminal realm … when it targets conduct that implicates matters of national or international, not just local, concern").

gycol is a sulfur-containing solvent that is a common component in legitimate products (such as ballpoint pen ink) but can also be converted into a mustard agent.

There are, accordingly, two relevant national and international markets for toxic chemicals—a predominant market for legitimate commercial and other beneficial purposes, and a black market involving chemical weapons (including chemicals knowingly manufactured, possessed, transferred, or used for illicit purposes). The text and history of the Convention and its implementing legislation make clear that Section 229's animating objectives were to suppress the illicit market and to promote the legitimate one. Congress has the power under the Commerce Clause to advance both of these interrelated aims, placing Section 229 squarely in the heartland of Congress's Commerce Clause authority.

1. Market eradication

A principal objective of the CWC, of course, is to prohibit the international distribution or transfer of chemical weapons. *See* Conv. pmbl. ¶ 10 (noting the goal of "complete and effective prohibition … of chemical weapons") (Pet. App. 147). And when Congress enacted Section 229, it was fulfilling the obligation of the United States as a party to the CWC to enact domestic legislation, "including … penal legislation," prohibiting individuals "from undertaking any activity prohibited to a State Party" under the Convention, Conv. art. VII (Pet. App. 160)—namely, making 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," 18 U.S.C. § 229(a)(1).

That comprehensive prohibition has the potential, of course, to reach local activity—for example, the wholly local manufacture, possession, or use of a chemical for illicit purposes. But that does not render Congress's exercise of authority constitutionally infirm. "Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Raich*, 545 U.S. at 26; *see also id.* at 27 ("use[] 'for personal medical purposes' … [not] a distinguishing factor"). And where Congress regulates a noneconomic intrastate activity because "the failure to do so 'could … undercut' its regulation of interstate commerce"—"[that] is not a power that threatens to obliterate the line between 'what is truly national and what is truly local.'" *Raich*, 545 U.S. at 38 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 567-568).[5]

Moreover, given that chemicals for illicit purposes could easily be drawn into interstate commerce, Congress's determination that eradicating the interstate and foreign markets for chemical weapons also required the regulation of their intrastate possession and use is well founded. In *Raich*, the Court explained that Congress could reasonably have determined that regulating intrastate, even medicinal, use of marijuana was reasonably necessary to control illicit trafficking in that commodity because law enforcement officials often cannot ascertain whether it traveled in interstate commerce or not. Excepting certain intrastate conduct

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[5] Indeed, to illustrate this point, the Court in *Raich* cited several treaty-implementing criminal statutes materially indistinguishable from Section 229, including the Biological Weapons Statute, 18 U.S.C. § 175(a); the Nuclear Materials Statute, 18 U.S.C. § 831(a); and the Plastic Explosive Statute, 18 U.S.C. § 842(n). *See Raich*, 545 U.S. at 26 & n.36.

from the statute would undermine Congress's ability to protect public safety and the national security. *See* 545 U.S. at 22 (noting both "enforcement difficulties" in distinguishing between local and interstate marijuana and "concerns about diversion into illicit channels"); *see also id.* at 40 (Scalia, J., concurring in the judgment) ("impossible to distinguish" intrastate manufacture and distribution from interstate manufacture and distribution). The same is true under Section 229. There is no question that the market in chemicals is national, indeed international, in character. The overall statutory scheme to eliminate chemical weapons in all their forms would be undermined if Congress could not reach certain fabrications or uses of chemicals as weapons merely because they occurred intrastate.

To be sure, in seeking to eradicate the interstate and foreign markets in chemical weapons, the CWC and its implementing legislation reach not only fully constituted chemicals loaded into a bomb or munitions shell, but also toxic, dual-use chemicals that are manufactured, transferred, used, or possessed for illicit purposes.[6] But the fact that Congress is not seeking to extinguish commerce in such chemicals altogether, but only commerce in chemicals manufactured, transferred, or possessed for illicit purposes, does not alter the constitutional analysis. It is well established that Congress has plenary authority to prohibit the interstate or foreign transfer of particular items or persons for specific harmful purposes, even when it does not prohibit such

[6] Under the statute, a "chemical weapon" includes the "knowing" misuse of all chemicals that "can cause death, temporary incapacitation or permanent harm to humans or animals," 18 U.S.C. § 229F(8)(A), and the statute prohibits all non-exempt persons from acquiring, producing, possessing, transferring or using such weapons. *Id.* § 229(a)(1).

interstate and foreign activity altogether. *See*, *e.g.*, *Hoke* v. *United States*, 227 U.S. 308 (1913) (upholding constitutionality of Mann Act as applied to interstate transportation of a woman for purposes of prostitution); *cf. McElroy* v. *United States*, 455 U.S. 642, 659 (1982) (Stevens, J., dissenting) (noting that "a host of federal criminal statutes … prohibit the interstate transportation of stolen motor vehicles, forged checks, prostitutes, explosives [for improper purposes], … counterfeit phonograph records, and numerous other items"). Nothing in the circumstances here requires a different result.

2. Market promotion

Conversely, but relatedly, Congress could reasonably have concluded that, by prohibiting the local possession, manufacture, or use of chemical weapons, Section 229 would "'foster,'" "'promote,'" or "'protect'" national and international commerce in chemicals for their many beneficial uses. *Jones*, 301 U.S. at 36-37.[7] Absent comprehensive criminal interdiction of the misuse of chemicals, the lawful domestic and foreign trade in chemicals could be undermined by piecemeal regulations that restrict the trade in chemicals with even a potential for harm.

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[7] As a report prepared for Congress explained, "because of the large size and economic importance of the U.S. chemical industry and allied sectors, the CWC has important implications not only for national security but also for the health of the American economy." U.S. Congress, Office of Technology Assessment, *The Chemical Weapons Convention: Effects on the U.S. Chemical Industry*, OTA-BP-ISC-106 (Aug. 1993) (noting that "[t]he United States is home to roughly 20,000 chemical manufacturing plants, or about a third of the world's total chemical production capacity" and that, "[i]n 1992, *net* exports of U.S. chemical products were worth about $16 billion").

Before the advent of multilateral controls, there was substantial concern throughout the industry that misuses of toxic chemicals for harmful purposes, whether carried out by nations or by individuals, could substantially affect the national and international chemical markets by prompting piecemeal restrictions and other barriers to trade. Petitioner's conduct in this case illustrates that concern. Petitioner acquired highly toxic chemicals through the Internet and from her industry employer, and she used those chemicals to repeatedly carry out attacks on another person.[8] Such conduct, whether considered alone or in the aggregate, might well lead governments to restrict the Internet sale of chemicals or to prohibit trade in certain chemicals given the ease with which Petitioner was able to obtain them for criminal purposes.

Comprehensive multilateral regulation of the misuse of chemicals was the answer to this problem—and it proved extremely effective. Under a precursor regime to the Convention, controls agreed to by nations collectively known as the Australia Group resulted in more than a doubling of investments in developing countries by American chemical manufacturers, "from $4.05 billion to $9.98 billion" annually. *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 85-86 (1996) (statement of Dr. Brad Roberts, Institute of Defense Analysis)

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[8] The two chemicals Petitioner used in the attacks—potassium dichromate and 10-chlorophenoxarsine (an arsenic derivative)—are undeniably "toxic chemicals" under the Act. *See* 18 U.S.C. § 229F(8)(A). They are lethal even in small quantities, and the amounts Petitioner used, on even a single occasion, were many times those required for toxic or potentially fatal doses. *See* U.S. Br. 4-5, 13; Pet. App. 49 & n.1; JA 42-64.

(noting the "controls embodied in the CWC are not trade restraints but trade enablers").

The CWC was accordingly an effort—not only by States Parties but also by civil industry—to codify and make enduring a comprehensive regulatory regime that would, through a comprehensive prohibition, deter the imposition of piecemeal restrictions and foster the free flow of commerce. The Convention itself, as ratified, provides that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons" is a "necessary step" to "promote the free trade in chemicals." Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). And throughout the drafting and ratification process, U.S. industry—represented by the ACC (formerly the CMA), the Society of Chemical Manufacturers and Affiliates (SOCMA, formerly the Synthetic Organic Chemical Manufacturers Association), the Pharmaceutical Research and Manufacturers of America (PhRMA), the Biotechnology Industry Organization (BIO), and the American Chemical Society (ACS)—strongly supported the chemical weapons prohibition, in part because comprehensive regulation would lift "the cloud of suspicion or concern … from the chemical industry" and because the Convention would put "in place" procedures "to ensure that [the chemical industry's] products and … processes are not used for some illegitimate purpose." *Implementation of the Chemical Weapons Convention: Hearing Before the H. Comm. on Foreign Affairs*, 103d Cong. 24 (1994) (statement of Dr. Will Carpenter, Chemical Manufacturers Association).

"[C]lear rules and fair controls," advocates for the industry informed Congress, were critical to fostering legitimate enterprise. *See Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Re-*

lations, 104th Cong. 85 (1996) (statement of Dr. Brad Roberts, Institute of Defense Analysis) ("Since the creation of the Australia Group … U.S. industry has prospered greatly."). Indeed, because the proposed controls would be uniform across all States Parties, the chemical industry perceived the CWC as a "trade enabling regime." *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 25 (1996) (statement of Sen. Lugar).

By contrast, chemical industry representatives cautioned that Congress's failure to ratify and implement the Convention could have catastrophic effects on national and international trade. Such a failure, representatives testified, could lead U.S. industry to be "'branded as a potentially unreliable supplier of chemicals to the global market,'" and could have "'a devastating impact on the U.S. chemical industry's … balance of trade.'" *The Chemical Weapons Convention*, S. Exec. Rep. No. 104-33, at 219 (1996); *see also Chemical Weapons Convention: Hearing Before the S. Comm. on Foreign Relations*, 103d Cong. 117 (1994) (statement of Hon. Ronald F. Lehman, former Director of the Arms Control and Disarmament Agency) ("[T]he CWC codifies the principle that no nation should trade in dangerous materials with those who will not accept international non-proliferation norms.").[9]

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[9] The industry was also motivated by the simple and laudable desire to ensure that its products would not be put to illicit uses. As the then-President and CEO of the CMA explained, the industry "does not produce chemical weapons … [but] [w]e do … make products used in medicine, crop protection, and fire prevention, which can be converted into weapons agents … [and] [w]e take [our] responsibility [to prevent illegal diversions of our products] very, very seriously." *Chemical Weapons Convention: Hearing*

Indeed, so important was this free-trade objective that States Parties, including the United States, tailored the weapons prohibition in an attempt to exclude "any restrictions … which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." Conv. art. XI; *compare* 18 U.S.C. § 229F(1)(A), (7)(A) (eliminating from the definition of a "chemical weapon" a toxic chemical with an intended "peaceful … industrial, agricultural, research, medical or pharmaceutical" purpose); *see also* ICRC Advisory Serv. On Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/eng/assets/files/other/1993_chemical_weapons.pdf ("the Convention promotes and supervises the development of the chemical industry for purposes not prohibited under its terms").[10]

When the President submitted the Convention to the Senate for its advice and consent to ratification, the State Department's article-by-article analysis of the Convention faithfully explained that the Convention "balances the desire to encourage free trade in chemi-

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Before the S. Comm. on Foreign Relations, 105th Cong. 197 (1997) (statement of Frederick L. Webber).

[10] A provision of the Convention entitled "Economic and Technological Development" elaborates on this relationship. It broadly provides that "[t]he provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of the States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention." Conv. art. XI ¶ 1.

cals, equipment and technology with the desire to prevent the proliferation of chemical weapons" and thus the scope of the prohibition on chemical weapons "represents one of the most difficult compromises reached in the Convention."[11] The Senate Report recommending that the Senate give its advice and consent to ratification of the Convention echoed that the Convention's objective was "to balance free trade in legitimate chemicals with preventing the proliferation of chemical weapons" and that the Convention "should not be implemented in a manner that hampers the economic and technological development of States Parties or international cooperation in chemical activities for [legitimate] purposes." S. Exec. Rep. No. 104-33, at 5.

The record before Congress thus abundantly establishes that fostering the lawful trade in chemicals drove both the presence and the scope of the "penal legislation" required by the Convention. Conv. art. VII, ¶ 1(a), (b). Congress could readily have concluded that an international regulatory floor would help to "liberaliz[e] the existing system of export controls applicable to the [chemical] industry's products, technologies, and processes," S. Exec. Rep. No. 104-33, at 214, and that a comprehensive interdiction of chemical misuse would make market-restrictive efforts—both foreign and domestic—much less likely. Section 229 is thus a necessary part of a comprehensive federal regime aimed at "protect[ing] and stabiliz[ing]" domestic and international commerce in chemicals. *Raich*, 545 U.S. at 19 n.29; *Wickard*, 317 U.S. at 128.

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[11] Message from the President of the United States Transmitting The Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and On their Destruction, Opened for Signature and Signed by the United States at Paris on January 13, 1993, S. Treaty Doc. No. 103-21, at 72.

II. SECTION 229 MAY BE CONSTITUTIONALLY APPLIED ON THE FACTS OF THIS CASE

Petitioner has repeatedly stated that she is challenging the statute only "as applied" to her conduct. Even assuming that under *Raich* and *Wickard* an as-applied challenge is coherent, consideration of the specific facts here only underscores why Congress may regulate Petitioner's conduct. Petitioner's malicious use of chemicals had a direct nexus to interstate commerce. She cannot escape the consequences of her crime on the ground that Section 229 might, as applied to different defendants, in separate cases, on dissimilar facts, exceed Congress's Commerce Clause authority.

A. Petitioner Challenges Section 229 Only "As Applied" To Her

There can be no question that Petitioner challenges Section 229 only as applied to her conduct. As the Third Circuit found, in her supplemental briefing after remand from this Court and at oral argument before the court of appeals, Petitioner "abandoned her facial challenge to [Section 229]" and instead "articulated" an "as-applied challenge." Pet. App. 7 n.5. Petitioner maintains that same position here. In seeking this Court's review, Petitioner described her argument in as-applied terms, contending that Section 229 "exceeded Congress' enumerated powers as applied to her conduct." Pet. 1. Her question presented is similarly "as applied." Pet. Br. i. And references to the case-specific scope of Petitioner's challenge abound in her opening brief, making the character of her challenge unmistakable.[12]

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[12] *E.g.*, Pet. Br. 2 (arguing "the underlying facts [in this case] are far removed from … any issues of national or international im-

B. Section 229 May Constitutionally Be Applied To Petitioner's Conduct

Because Petitioner brings only an as-applied challenge to Section 229, she must show that the provision "is invalid as applied to [her] conduct." *Bond* v. *United States*, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring); *accord United States* v. *Salerno*, 481 U.S. 739, 745 n.3 (1987). Petitioner cannot make that showing.

Petitioner pled guilty to a series of malicious uses of chemicals over several months. She admitted purchasing one of the toxic chemicals she used in her attacks, potassium dichromate, over the Internet. *See*, *e.g.*, Pet. Br. 9 (Bond "purchased … potassium dichromate … from Amazon.com"); JA 39 (Plea Colloquy). That purchase connects Petitioner's conduct to two separate lines of Commerce Clause jurisprudence.

1. Channels of interstate commerce

"It is well established that the Commerce Clause gives Congress authority to 'regulate the use of the channels of interstate commerce.'" *Pierce Cnty.*, *Washington* v. *Guillen*, 537 U.S. 129, 146 (2003). In particular, "'it has long been settled'" that Congress has the constitutional "'authority … to keep the channels of interstate commerce free from immoral and injurious uses.'" *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964). This font of congressional authority, the Court has said, "'has been frequently sustained,

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portance"); *id.* at 19 ("The only alternative to th[e] saving constructions is to hold section 229 unconstitutional as applied to petitioner."); *id.* at 21-22 (Congress may "enact criminal statutes," but only when Congress "targets conduct that implicates matters of national or international, not just local, concern").

and is no longer open to question.'" *Id.*; *see Lopez*, 514 U.S. at 558.

That congressional authority is applicable here based on Petitioner's purchase of potassium dichromate through Amazon.com. The Internet is undoubtedly a channel of interstate commerce; indeed, in today's digital age, the Internet is one of the principal means by which interstate and international commerce are carried out. *See Reno* v. *ACLU*, 521 U.S. 844, 853 (1997) (the Internet is comparable to "a sprawling mall offering goods and services"). The courts of appeals have had no difficulty concluding that because the Internet is a "means to engage in commerce and [a] method by which transactions occur,'[t]he Internet is a[] … channel of interstate commerce.'" *United States* v. *Trotter*, 478 F.3d 918, 921 (8th Cir. 2007); *see United States* v. *Sutcliffe*, 505 F.3d 944, 952-953 (9th Cir. 2007); *United States* v. *MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006); *United States* v. *Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004).

Congress thus may regulate Petitioner's conduct based on its recognized authority to keep channels of domestic and international commerce free from "'immoral and injurious uses.'" *Heart of Atlanta Motel*, 379 U.S. at 256. Petitioner's purchase of a chemical over the Internet for the purpose of chemical attacks on Myrlinda Haynes was an immoral and injurious misuse of a channel of commerce. Given Petitioner's admission that she purchased the potassium dichromate "online through Amazon.com," JA 39, Congress may prohibit her conduct under Section 229.

That Petitioner appears to have pled guilty only to the "use" of a chemical weapon, *e.g.*, JA 40-41 (Plea Colloquy), does not foreclose reliance on a channels analy-

sis. Congress's power to prevent the misuse of channels of interstate commerce includes the ancillary authority to regulate the use of items that have travelled in interstate commerce, where doing so would help to keep a channel itself free of immoral or injurious commercial activity. In *Pierce County*, for example, this Court held Congress had the authority, in part under a channels analysis, to prohibit information compiled in connection with federal highway safety programs from being admitted at trial. 537 U.S. at 147-148. Although the statutory provision at issue did not directly regulate channels of commerce, the Court reasoned that the provision could be justified as an effort to reduce hazardous conditions in those channels: "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement … would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 147. By analogy, Congress here reasonably could have believed that prohibiting the use of chemicals for malicious purposes would help to keep channels of commerce free of immoral and injurious transactions that facilitate such uses.

2. Conduct facilitated by an interstate commercial transaction

Independently, Congress may regulate the use of items that have travelled through the channels of interstate commerce—at least where (as here) there is a direct and temporal nexus between the item and interstate commerce—because such items are "things in interstate commerce," *Lopez*, 514 U.S. at 558, or "hav[e] a substantial relation to interstate commerce," *id.* at 559.

This Court's decisions have long held that Congress may regulate the possession or use of products that have travelled in interstate commerce. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), for example, this Court addressed the scope of the federal prohibition on possession of firearms by felons, a statute that required the firearm at issue to have travelled in interstate commerce. Although not addressing a constitutional challenge, the Court concluded, without a word about the constitutional implications, that Congress intended to require nothing "more than a minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. The Court found there was no basis for construing the statute narrowly, as "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred." *Id.* at 577; *see United States* v. *Bass*, 404 U.S. 336, 347-349 (1971) (reading the same statute to require that the interstate nexus be satisfied for any possession conviction, in part, to avoid federalism concerns); *see also Lopez*, 514 U.S. at 561-562 (suggesting that, per *Bass*, Congress may regulate firearm possessions that have "an explicit connection with or effect on interstate commerce").

Congress has followed the Court's lead by enacting numerous federal statutes that require travel in or contact with interstate commerce, including the federal firearms statute amended in the wake of *Lopez*, 18 U.S.C. § 922(q)(2) (applying to firearms that have "moved in or that otherwise affect[] interstate or foreign commerce"); the federal carjacking statute, 18 U.S.C. § 2119 (applying to anyone who, "with the intent to cause death or serious bodily harm[,] takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce … by force and vio-

lence"); and the federal child pornography statute, 18 U.S.C. § 2252(a)(4)(B) (applying to anyone who "knowingly possesses" materials "which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce"). Such statutes have uniformly been upheld by the courts of appeals on the theory that there is a sufficient "case-by-case" connection to or "'effect on interstate commerce.'" *United States* v. *Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (upholding revised 18 U.S.C. § 922(q)); *see also United States* v. *Polanco*, 93 F.3d 555, 563 (9th Cir. 1996) (firearms statute); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (firearms statute); *United States* v. *Cortes*, 299 F.3d 1030, 1035-1037 (9th Cir. 2002) (carjacking statute); *United States* v. *Robinson*, 137 F.3d 652, 655-656 (1st Cir. 1998) (child pornography statute).

This line of Commerce Clause jurisprudence independently forecloses Petitioner's as-applied challenge. Petitioner has admitted to using a toxic chemical, potassium dichromate, that she purchased in interstate commerce to carry out chemical attacks on Haynes. The "explicit connection," *Lopez*, 514 U.S. at 562, between interstate commerce and Petitioner's wrongful conduct makes application of Section 229 to that conduct valid under the Commerce Clause.

C. That Section 229 Sweeps More Broadly Than The Facts Of This Case Does Not Aid Petitioner's As-Applied Challenge

Section 229, of course, is not limited by its terms to the circumstances presented by this case. But the fact that the statute may reach beyond malicious uses of chemicals with a nexus to interstate commerce is of no moment in the context of an avowed as-applied chal-

lenge. Petitioner may not escape criminal prosecution for conduct that Congress may proscribe under Section 229 based on the theory that the statute might in other cases exceed Congress's enumerated powers. As this Court has repeatedly said, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground" it might apply "to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 20 (1960). Indeed, as the Chief Justice recently explained, the "relevant inquiry" in a case raising an as-applied challenge is whether Congress exceeded its "Article I power" as the statute is applied to the particular defendant raising the challenge. *Kebodeaux*, 133 S. Ct. at 2506 (concurring in the judgment); *see id.* at 2505 (Congress had Article I authority to enact SORNA "as applied" to Kebodeaux, who had served in the military, based on the Military Regulation and Necessary and Proper Clauses, although SORNA applies to all sex offenders). The United States Reports are filled with examples of decisions upholding Congress's Article I authority "as applied"—to particular kinds of defendants, types of conduct, or in particular factual circumstances—even where the statute on its face might have other applications that exceed Congress's authority.

Decisions under the Spending Clause are particularly illustrative. In *Sabri* v. *United States*, 541 U.S. 600 (2004), this Court rejected a facial challenge to the federal bribery statute, 18 U.S.C. § 666. In doing so, the Court emphasized that defendants challenging the scope of Congress's power to enact a criminal statute generally may not rely on the "alleg[ed] overbreadth" of the statute. *Id.* at 609. The Court explained that, on the facts before it, "the acts charged against [the defendant] him-

self were well within the limits of legitimate congressional concern." *Id.* In light of that finding, the Court concluded that the defendant's argument amounted to an improper claim "that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate"—an overbreadth challenge that should be "discouraged." *Id.*

Similarly, in *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court decided whether the same statute, 18 U.S.C. § 666, was "limited to cases in which the bribe has a demonstrated effect on federal funds." *Id.* at 54. The Court held that it was not. In arriving at that conclusion, the Court rejected the theory that the constitutional avoidance canon required such a result, concluding "there is no serious doubt about the constitutionality of" the provision "as applied to the facts of th[e] case." *Id.* at 60. Canvassing the record, the Court determined that the specific conduct of the particular defendant was "a threat to the integrity and proper operation of [a] federal program." *Id.* at 61. The Court reasoned that "[w]hatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to [the defendant] did not extend federal power beyond its proper bounds." *Id.*

This Court has followed a similar path in addressing claims that Congress has exceeded the scope of its powers under the Thirteenth, Fourteenth, and Fifteenth Amendments. *See*, *e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971) (holding that 42 U.S.C. § 1985 was a constitutional exercise of Congress's powers under the Thirteenth Amendment as applied to the case at hand; explaining that the Court's inquiry "need go" no further than "identifying a source of congres-

sional power to reach the private conspiracy alleged … in this case"; and holding that the complaint alleged conduct that "Congress may reach" without a need to "trace out [the statute's] constitutionally permissible periphery"); *Tennessee* v. *Lane*, 541 U.S. 509, 530-531 (2004) (explaining, under the Fourteenth Amendment, that "nothing in our case law requires us to consider Title II [of the Americans with Disabilities Act], with its wide variety of applications, as an undifferentiated whole"; the only relevant application was that of "access to the courts"); *Raines*, 326 U.S. at 26 (applying this rule under the Fifteenth Amendment).

There is no principled basis for treating Commerce Clause challenges differently. Indeed, significant cases in the Commerce Clause canon make clear that the rule should be the same. In *Katzenbach* v. *McClung*, 379 U.S. 294, 295 (1964), for example, the Court upheld the public accommodation title of the Civil Rights Act "as applied to a restaurant" (Ollie's Barbeque). Importantly, in deciding the constitutionality of the title "as applied," the Court did not consider whether any overbreadth in the statute provided the restaurant with a defense against the title's enforcement. Similarly, in the companion case, *Heart of Atlanta Motel*, the Court held that "the action of the Congress in the adoption of [Title II] as applied … to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause." 379 U.S. at 261. Again, the Court did not consider whether other applications of the statute might be unconstitutional or render it facially problematic.

In her brief, Petitioner points to *Lopez* and *Morrison* to argue that the absence of a jurisdictional element is a factor in considering the facial constitutionality of a statute. Pet. Br. 40. That is true, but irrelevant here.

Neither *Lopez* nor *Morrison* held that Congress must enact statutes in which the facts relevant to Congress's Article I authority are formal elements. In fact, *Sabri* teaches the opposite, explaining that it is "not generally true" that "proof of the congressional jurisdictional basis must be an element of the statute." 541 U.S. at 609; *see id.* at 605 (the Court "do[es] not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook").

To be sure, the Court in *Lopez* and *Morrison* held that the relevant statutes exceeded Congress's Article I authority as a facial matter, without considering whether the statute at issue could be applied on the particular facts of the case. But that is unsurprising where "the parties [in both cases] asserted that [the] particular statute or provision fell outside Congress' commerce power in its entirety," *Raich*, 545 U.S. at 23. Neither decision involved, as here, an as-applied challenge. The Court accordingly considered the constitutionality of the relevant statutes on their face. Indeed, the Fifth Circuit in *Lopez* had noted that the "'as applied' issue ha[d] not been briefed or argued" and therefore the court did not address it—though it observed that, "[c]onceivably, a conviction" under the statute "might be sustained if the government alleged and proved that the offense had a nexus to commerce." *United States* v. *Lopez*, 2 F.3d 1342, 1368 & n.53 (5th Cir. 1993).[13]

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[13] Although Petitioner's indictment did not allege a specific tie to interstate commerce, she has pled guilty to or admitted facts that bring her conduct squarely within Congress's Commerce Clause authority. Notably, this Court has sustained convictions even where there were no such findings or admissions, apparently based on the Court's post-trial review of the record. *See, e.g.*, *Salinas*, 522 U.S. at 60-61 (holding that there was "no serious doubt

Thus, contrary to Petitioner's assertion, neither *Lopez* nor *Morrison* stands for the remarkable proposition that a criminal defendant bringing an as-applied challenge may rely on the unconstitutionality of the statute as applied to different defendants, in separate cases, on dissimilar facts to escape punishment. For these reasons, "[w]hatever might be said" about Section 229's "application in other cases, the application" of the provision to Petitioner in the particular circumstances of this case "did not extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61. Petitioner's as-applied challenge thus fails.

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about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case" because the "preferential treatment accorded to [Salinas] was a threat to the integrity and proper operation of the federal program" without discussing whether this threat to the federal program was charged in the indictment or based on a fact found by the jury).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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