No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES, RESPONDENT

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent in Case 12-158 ("*Bond*").[2] Amicus wishes to expand on the comments on *Bond* in his July 1, 2013 amicus brief, *see id.* at 11-14, supporting Petitioner in *Schuette v. BAMN*.[3]

SUMMARY OF ARGUMENT

To overturn *Missouri v. Holland*, 252 U.S. 416 (1920), or to overturn casually the Third Circuit in this case, may fly from reason, any purported "federalism", "tyranny", or other arguments notwithstanding.

ARGUMENT

Amicus is suspicious of extreme federal power, including, e.g., excessive spying on Americans. However, that does not mean all surveillance of Americans is wrong, nor that NSA employees should defect to Russia. Similarly, the specter of possible federal encroachment on States' power does not imply that the Court should geld the President or Senate, vis-à-vis treaty power or otherwise.

In *Bond*, prosecution of Ms. Bond with a chemical-weapons-related statute ("§ 229") may *arguendo*

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is on record with the Court.
[2] *Bond v. United States*, 681 F.3d 149 (3d Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3408) (No. 12-158).
[3] 701 F.3d 466 (6th Cir. 2012) (en banc) (*cert. granted*, 81 U.S.L.W. 3539) (No. 12-682).

have been ham-handed, if not "bird-brained". However, this does not *ipso facto* imply unconstitutionality. Also, some *amici* (here unnamed) in the instant case, who protest the supposed overexpansion of federal criminal law into traditional State prerogatives, once asked this Court to uphold a partial-birth abortion act, federal criminal law, which "impinged" on States' traditional health-regulation rights. Why protest "overfederalization" now, then? So, the "sauce for the goose, sauce for the gander" principle may help uphold § 229.

And an eagle eye on *Holland*, *supra,* shows Holmes saying not, "The Government can do whatever it wants", but rather, "We do not mean to imply that there are no qualifications to the treaty-making power", *id.* at 433, and, simply, that no "invisible radiation from the general terms of the Tenth Amendment", *id.* at 434, could void the Government's treaty power. Indeed, such "radiation", *id.*, could be like a deadly poison virtually undoing the Union, creating a kind of feudal anarchy[4] whereby a State could avoid cleaning up its own mess (e.g., re birds), and ruin life for everyone.[5] (Are the birds

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[4] *See, e.g.*, Pablo Picasso's *Guernica* (1937), in which, *see id.*, the horror is not only the violence, but also the utter chaos. By contrast, *cf., e.g.*, Niccolò Paganini, *Moto Perpetuo* ("Perpetual Motion"), op. 11 no.6 (1835), which, *see id.*, displays extreme energy and individualistic verve, but avoids chaos and has overarching structure. —Federal supremacy does not equal dictatorship.

[5] Since the Justice fought for the Union in the Civil War, perhaps he felt that no State should drag the Union to destruction. One can almost imagine old Holmes croaking "Nevermore!", *see* Edgar Allan Poe, *The Raven* (1845), against the sort of chaotic, evil, treacherous mess that the War helped solve.

themselves supposed to solve the problem?[6]) So, since the Constitution is no suicide pact: is that supreme Statute flexible enough to let the Government preserve order and equity by needed means?

That idea, of a "living Constitution", is live enough that there is now even an opera being written, *Scalia/Ginsburg* by Derrick Wang, about two Members of the Court and their differing opinions thereof. One former Member, sometimes known as the "Lone Ranger" for his dissents, and also known for his embrace of States' rights, also opined on the issue: *see* William H. Rehnquist, *The Notion of a Living Constitution*, 29 Harv. J. L. & Pub. Pol'y 401, 402 (1976) (citing *Holland* as one acceptable example, "with which scarcely anyone would disagree", of a "living Constitution" that can deal with present-day problems). *See also Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001), where Rehnquist's opinion for the Court overturned a migratory bird rule but left *Holland* intact.[7]

So, if even Rehnquist could stomach *Holland*, one wonders why it must be overturned now. And if one tries to use that Chief Justice's *Gonzales v. Raich* (545 U.S. 1 (2005)) dissent (joining with author Justice Sandra Day O'Connor, and Justice Clarence Thomas) to argue that he would vote to overturn the

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[6] *Cf.* Aristophanes, (Ὄρνιθες ("Ornithes"), *The Birds*) (414 B.C.) (talking birds cause chaos in Olympus and on Earth); Geoffrey Chaucer, *Parliament of Fowls* (c. 1382) (verbose, contentious avians attempt self-government, with mixed results).

[7] Also, *Holland* offers 93 years of valuable precedent, despite any claims that recent legal research somehow totally, irredeemably uproots the case.

lower court in *Bond*, one should remember that there may at least be some possible positive use for marijuana, e.g., helping glaucoma victims, whereas there is no positive use for smearing 10-chlorophenoxarsine on doorknobs, as in *Bond*. (*See* the dissent in *Raich*, *supra*, on "the difficult and sensitive question [and experiment] of whether marijuana should be available to relieve severe pain and suffering". *Id.* at 43.)

Moreover, while *Engineers*, *supra*, overturned a mere regulatory rule, the statute in *Bond* was passed by the Congress itself. (If some complain that the statute impinges on States' traditional interests, such as arresting poisoners: if the statute were thus invalidated, then a terrorist could claim to be a mere poisoner and thus escape federal charges—quite an escape trick.)

Also, as for the objection that § 229 defines "chemical" without limitation, and could include harmless household items: has the Government, e.g., prosecuted every (or any) drowning as a chemical-weapons attack, since water is a chemical? ("H_2O") If not, then perhaps the Government is not so fanatical as to use the statute to implement the paraded horrible of a "federal police power".

In addition, one should not laugh off Ms. Bond's incompetence in doing serious physical damage to her victim. What if the victim had had a fatal allergy to the dangerous powder? Moreover, what if the wind blew some of the powder around the neighborhood, increasing local morbidity? The powder wasn't anthrax, but we may not want our children breathing it in, either. …If a gunman were an absurdly poor shot and shot himself in the foot

rather than successfully massacring someone else, should he be given a free pass from criminal prosecution?

But even if the Court absolves Ms. Bond, that does not mean § 229 itself should be struck down. If some copycats to the Tsarnaev brothers use chemical weaponry to terrorize Americans at an athletic event, that statute could come in handy.

And the Government itself, frankly, often "comes in handy", despite its failures. It is extremely powerful, true—but big isn't always bad; if it were, the separate States would not have "United" into a greater entity, a Nation, in the first place. Even if the Government resembles "Big Bird" at times—often benevolent, but not always very bright—, that does not make it into Big Brother.

* * *

Speaking of "Lone Ranger", *supra*, and also the recent film, *The Lone Ranger*,[8] featuring, *inter alia*, actor Johnny Depp as Tonto, wearing a dead bird on his head, *see id.*:[9] *The New Yorker* has lampooned this honorable Court—"mercilessly", even—on its July 8 & 15, 2013 cover, portraying, *id.*, *Sesame*

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[8] Directed by Gore Verbinski (Walt Disney Productions 2013).

[9] The dead or injured bird has often served as a symbol of woe or menace: *see, e.g.*, the medieval legend of the pelican which, Christ-like, wounds itself to feed its young with its own blood; Robert Shea & Robert Anton Wilson, *The Illuminatus Trilogy* (1975), at the conclusion of which, *see id.*, insane hunter "Smiling Jim" Trepomena kills the last American eagle, and a cataclysmic earthquake immediately results; and William Shakespeare, *The Phoenix and the Turtle* (1601), which concludes, *id.*, "For these dead birds sigh a prayer." Not to mention Harper Lee's *To Kill a Mockingbird* (1960).

Street characters Bert and Ernie on a couch[10] watching a black-and-white television screen showing the 2010 official photograph of the Court's nine Members; though the photo's background is not monochrome as in real life, but somewhat rainbow-striped (variegated), like the traditional gay "rainbow flag".

On that note: if this Court goes so needlessly far as to overturn *Holland* and thus strip the Government of effective treaty-making power (and power to regulate birds), the *New Yorker*, or other medium, might once again wax imaginative . . . perhaps with a cartoon of the Court's Members sporting frightening avian hair-dos like Mr. Depp's, *supra*.[11] But the Court should not give them the chance.

CONCLUSION

Amicus respectfully asks the Court to uphold both *Holland* and as much of the court of appeals' judgment as seems reasonable; and humbly thanks the Court for its time and consideration.

August 16, 2013 Respectfully submitted,

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[10] Named "Muppets" *supra* are shown in "romantic embrace".
[11] And note all the hurt-bird-related bad omens in n.9, *supra*.