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

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

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## INTEREST OF AMICUS[1]

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. Summum*, 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 ACLJ previously filed as amicus in support petitioner at the petition stage of this case.

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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[1] The parties have consented to the filing of this brief. A blanket letter of consent from petitioner is on file with this Court. A consent letter from respondent is 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 virtually any chemical, and then upheld that enormously broad reading of the federal statute as a valid implementation of a treaty under the Necessary and Proper Clause. This holding improperly opens the door to a general federal police power.

This Court should reverse the decision below and clarify that the Treaty Power does not authorize the creation, by treaty, 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 reverse the judgment of the Third Circuit.

## I. *MISSOURI v. HOLLAND* AND THE TREATY POWER CANNOT BE READ TO AUTHORIZE THE LIMITLESS EXPANSION OF DOMESTIC FEDERAL POWER BY TREATY.

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 Court should in no uncertain terms repudiate such a view. To the extent *Holland* represents a departure from this basic constitutional rule, this Court should limit or overrule *Holland*.

The Treaty Power cannot be boundless. If it were, this would negate the remainder of the Constitution. This Court has already rejected that proposition: "treaties . . . have to comply with the provisions of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). As the *Reid* Court explained regarding the Supremacy Clause,

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without

> observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

*Id.* at 17.

Therefore, the Treaty Power cannot constitutionally authorize use of an *international* treaty to 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 through non-self-executing treaties 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. Moreover, even if the treaty is itself valid, that does not mean that the implementing legislation *ipso facto* must be constitutional. *See* Pet. Br. at 29 (giving hypothetical example of law implementing migratory bird protection treaty by banning the taking of *any* bird, whether migratory or not). Thus, the constitutionality of the *implementing statute* is properly at issue here.

Invocation of a treaty does not excuse disregard of the structural provisions of the Constitution. As explained above, a treaty obviously cannot constitutionally confer *legislative* power upon the *executive* of this country or otherwise violate the separation of powers. The same rule holds for violations of federalism. It would be plainly unconstitutional for the federal government to assert legislative authority that "presumes the existence of a federal police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.32 (1981). Consequently, a treaty cannot conjure into being such unconstitutional federal police power, whether in one fell swoop or one step at a time.

Notably, potential violations of the limits of federalism 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. For example, 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. *See*, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school vouchers); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (parental notice for abortion); *United States v. Lopez*, 514 U.S. 549 (1995) (handguns near schools). 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, a treaty that would mutually impose nationwide rules – in either direction – on these matters. On the government's theory, once a willing Senate ratified such a treaty, Congress would suddenly have the new, expanded authority directly to dictate national legislative resolutions of these state-law questions.

It ought to be common ground that the Treaty Power could not authorize affirmative violations of constitutional rights (e.g., treaty-implementing legislation outlawing churches, banning signs and leaflets, abolishing jury trials, or suspending the writ of habeas corpus). *Reid v. Covert*, 354 U.S. at 17. But liberty under the Constitution is not limited to safeguards against affirmative invasions of personal rights. Federalism secures liberties as well. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). In the examples listed above (imposition or prohibition of

school vouchers, parental notice for abortion, etc.), federal legislation would not entail any affirmative violations of personal rights under this Court's precedents. Yet the federal imposition of a single rule upon the nation in one direction or the other would plainly distort the plan of structured, divided government that is the genius of the Constitution. The bulleted examples above, *supra* pp. 4, 6, therefore illustrate how an otherwise unlimited Treaty Power – or congressional power to implement treaties – 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, foreign affairs, 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. Such an approach would effectively forestall the threat posed by an overreading of *Holland* and the unleashing of an overexpanded Treaty Power. Absent such a limited construction of the Treaty Power, however, the duty reposes with this Court to invalidate

implementing legislation that unconstitutionally disregards the limits of federalism.

## II. THE NECESSARY AND PROPER CLAUSE DOES NOT AUTHORIZE THE FEDERAL GOVERNMENT, IN THE NAME OF TREATY IMPLEMENTATION, TO EXERCISE PLENARY POLICE POWER.

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 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.[2]

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). A 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*.[3]

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, *but see* Pet. Br. § II(C), such a purpose would also make a federal criminal out of everyone who deliberately misuses

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[2]In light of the enormous potential breadth of the statute at issue, and its arguable application to virtually every household in America, this Court should seriously consider whether a narrowing construction is available that would restrict the scope of the statute. *See* Pet. Br. § II.

[3]Another key question is the meaning of "peaceful" purpose. *See* Pet. Br. § II(C).

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[4] as exercised in the Convention. Pet. App. 33-36. This approach improperly concludes that a comprehensive federal ban on "misuse of a chemical" is both necessary and proper to implement a treaty against chemical weapons. Under this faulty reasoning, 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

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[4]The Third Circuit 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. *See* Pet. Br. § I(D). 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).

chemical weapons as to make a domestic dispute a serious federal offense.

Resolution of this issue starkly poses the question 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*, 131 S. Ct. at 2364 (internal quotation marks and citations omitted). This Court should firmly reject the notion that the federal government can create for itself a federal police power, either incrementally or all at once, by the device of entering and ratifying treaties.

## CONCLUSION

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

Respectfully submitted,

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