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 THE GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Third Circuit should be reversed because Congress does not have implied power to regulate entirely local matters under the authority of a Chemical Weapons Treaty. This conclusion results from this Court's repeated recognition that all powers of the federal government are limited by the principle of state sovereignty, which guarantees the States both structural autonomy and exclusive jurisdiction over entirely local matters. In view of this limitation, it is patently inconsistent with the letter and spirit of the Constitution for Congress to claim implied power to regulate entirely local matters to implement a treaty.

ARGUMENT

The overreach of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, is best illustrated by a footnote in the Third Circuit's decision: "The Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *U.S. v. Bond*, 681 F.3d 149, 154 n.7 (3rd Cir. 2012). The congressional power grab at issue in this case obviously has nothing to do with a core exercise of the Treaty Power. Rather, this case involves the federal government somehow claiming implied power under a Chemical Weapons Treaty to intervene in entirely local matters.

Despite the lower court's decision, the reserved power of the states under our system of dual sovereignty is not so ephemeral as to yield to the Act. Federal regulation of kitchen cupboards and cleaning cabinets cannot arise by mere implication from a treaty that has nothing to do with such matters.

After all, Congress has no textual authority to implement treaties independently from its Article I enumerated powers. The Treaty Power is consigned by Article II of the Constitution to the Executive Branch, subject to being checked and balanced by the Senate. By being premised somehow on Congress' implied Article I power, the Act already rests upon a penumbra of power that is entirely an artifact of precedent, rather than first principles. *Compare Missouri v. Holland*, 252 U.S. 416 (1920), *with Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842) ("the power is nowhere in positive terms conferred upon [C]ongress to make laws to carry the stipulations of treaties into effect").

For this reason alone, the Third Circuit should have hesitated before yielding to the federal government's prosecution of Petitioner based on implied congressional power. In any event, whatever the source of Congress' supposed power to implement treaties, the background principles that animate our Constitution certainly compel the conclusion that Congress does not have implied power under a Chemical Weapons Treaty to regulate entirely intrastate domestic disputes.

THE THIRD CIRCUIT SHOULD BE REVERSED BECAUSE CONGRESS DOES NOT HAVE IMPLIED POWER TO EXERCISE JURISDICTION OVER ENTIRELY LOCAL DOMESTIC MATTERS BASED ON A CHEMICAL WEAPONS TREATY.

This Court ruled in *Alden v. Maine* that all federal powers are limited by the principle of state sovereignty as a background assumption of the Constitution. 527 U.S. 706, 713-14 (1999). In reaching this ruling, this Court reviewed a federal law that was cleverly drafted to force states to defend themselves from citizen's lawsuits for monetary damages in their own courts – instead of hauling the states into federal court, which would clearly violate the Eleventh Amendment. Despite the law's technical compliance with the literal text of the Eleventh Amendment, and colorable grounding in Congress' enumerated powers, the law would have denied the States one of the most basic attributes of sovereignty. In striking the law down, this Court underscored that the Constitution cannot be construed to threaten a viable system of dual sovereignty. Similarly, the Third Circuit's decision should be reversed because the Act cannot constitutionally apply to Ms. Bond.

The background principles of the Constitution preclude construing the Treaty Power as somehow

bestowing upon Congress the implied power to invade a field of law that is a basic attribute of state sovereignty, and, therefore, necessarily within the exclusive jurisdiction of the States. It should be recalled that the Act is not a core exercise of the Treaty Power. Its constitutionality hinges entirely upon it being swept within the scope of whatever implied congressional power may be associated with the Treaty Power as confirmed by the Necessary and Proper Clause. However, as illustrated by the cogent analysis of the Necessary and Proper Clause in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the scope of Congress' implied power under the Constitution is not unlimited. 132 S. Ct. 2566, 2591-92 (2012) (Roberts, J.). Rather, Congress' implied power conforms to basic principles of agency law. Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007).

In agency law, a grant of "authority to do whatever acts or use whatever means are reasonably necessary and proper to the accomplishment of the purposes for which the agency was created" means that "an agent has implied authority to do that which the nature of the business would demand in its due and regular course." *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 947 (Ala. 1988). Thus, Congress' implied power should be regarded as circumscribed by the agency principle that the Constitution authorizes only those actions that the nature of our system of dual sovereignty would demand in

its due and regular course. In other words, it is limited by the "letter and spirit" of the Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3167 (2010) (Breyer, J., dissenting).

The nature of our system of dual sovereignty precludes the notion that Congress has implied power to implement a Chemical Weapons Treaty by regulating intrastate domestic disputes. As underscored in Federalist No. 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite." (James Madison) (Gideon ed., 1818). The Constitution thereby established a system "of complete decentralization." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878).

In our system of complete decentralization, "States are not mere political subdivisions of the United States." *New York v. U.S.*, 505 U.S. 144, 161-66, 186 (1992). Rather, "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden*, 527 U.S. at 714 (citations omitted); *see also Printz v. U.S.*, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered

many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text . . . ") (citing U.S. Const. art. I, § 4 (granting power to state legislatures over congressional elections); *id.* art. IV, § 4 (guaranteeing states a republican form of government); *id.* art. V (incorporating states into the amendment process); *id.* amend. X (reserving to states powers not delegated); *id*. amend. XI (making states immune to suit in federal court)). Such decentralization necessarily includes the reservation of an exclusive field of law to the States consisting of those matters that are entirely local, such as domestic disputes involving pescacide.

After all, the States would be transformed into nothing more than glorified student governments if the federal government were prohibited from "commandeering" their political structures, but could otherwise occupy the entire field of local substantive law within a state's jurisdiction. By its nature, the political system established by the Constitution cannot countenance such a concentration of power in the federal government. As explained by Thomas Jefferson,

> The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to everyone exactly the functions he is competent to. Let the national government be entrusted with the defence [sic] of the nation and its foreign

> and federal relations; the state governments with the civil rights, laws, police and administration of what concerns the state generally. . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France or of the aristocrats of a Venetian Senate.

Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in The Jeffersonian Cyclopedia 131 (J. Foley 1900). This basic principle of state sovereignty stands against Congress claiming implied power under a Chemical Weapons Treaty to regulate an entirely intrastate domestic dispute. *U.S. v. Lopez*, 514 U.S. 549, 577 (1995) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

CONCLUSION

This brief is being finalized shortly after reports that the State Department cited international agreements to shut down a website that distributed information about how to build a useless plastic gun. The Guardian, *State Department Orders Firm to Remove 3D-Printed Guns Web Blueprints*, http://www.guardian.co.uk/technology/2013/may/09/3d-printed-guns-plans-state-department (May 10, 2013). The censored information did not involve an incitement to violence or the equivalent of yelling fire in a theater. It was being distributed to make an adolescent statement about the absurdity of federal gun control. Such censorship is but a small taste of what the future holds if the Third Circuit's decision is not reversed.

If legislative implementation of an otherwise valid treaty is unbound by the Tenth Amendment, there is no principled argument to stop the federal government from displacing any other constitutional guarantee or structure through the combination of international agreement and legislation. This is because the vertical separation of powers is not a second class constitutional protection.

Our system of dual sovereignty is just as essential to protecting liberty as the Constitution's horizontal separation of powers and its affirmative guarantees of individual liberty. These features are interlocking components of an overall mechanism that cannot function as designed without each component maintaining its integrity. A threat to one is a

threat to all. That is why a bright line must be drawn at the threshold of kitchen cupboards, cleaning cabinets, and fishbowls when it comes to Congress' supposed implied power under a Chemical Weapons Treaty.

Respectfully submitted,

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