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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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

REPLY BRIEF

The government's strained efforts to defend its prosecutorial overreach confirm that neither the Constitution nor the statute permits it. The government's lead argument is the Commerce Clause defense it wisely and expressly abandoned below. The Chemical Weapons Convention Implementation Act, as its very name proclaims, was enacted to implement the Chemical Weapons Convention, not to regulate commerce in chemicals. Unsurprisingly, then, the government's Commerce Clause rationale is a complete misfit. The absence of a commerce-related jurisdictional element and the statute's focus on criminal uses of chemicals without regard to their commercial status defeat the government's desperate and belated effort to fit a square peg into a round hole. And its attempt to analogize this situation to its need to reach fungible home-grown marijuana is absurd; Congress is not trying to eliminate vinegar or the countless other household chemicals that can be used for criminal purposes from interstate commerce.

The government's felt-need to resurrect a commerce power argument only underscores the difficulties with its limitless conception of Congress' power to implement treaties. The government never defends its broad conception of section 229 as necessary to implement the Convention. Nor could it. The Convention expressly allows signatories to implement it consistent with their varying constitutional systems, and no one—not even the government—thinks the United States' treaty compliance depends on petitioner's prosecution, let alone her prosecution by federal, rather than state,

officials. Instead, the government contends that simply because section 229 is designed to implement a valid treaty, it is therefore, *ipso facto*, constitutional. That proposition is every bit as extraordinary as it sounds. It ignores the fundamental distinction between self-executing and non-self-executing treaties. But far more troublingly, it ignores the Framers' deliberate decision to withhold from the federal government the kind of police power necessary to reach every malicious use of chemicals nationwide. The ratification of a valid non-self-executing treaty cannot change that bedrock constitutional principle. If section 229 really does reach petitioner's conduct, it is unconstitutional.

This Court need not reach that conclusion, however, because section 229 can be interpreted to avoid both the grave constitutional difficulties and the troubling consequences of the government's limitless conception of its treaty-implementing powers. Congress enacted section 229 to implement the Nation's obligation to prohibit individuals from undertaking activities the Convention prohibits signatory states from undertaking. Construed to apply only to the kind of warlike activity in which a nation-state could engage, the statute discharges that obligation while respecting the basic structure of our Constitution. Construed to federalize every malicious use of chemicals nationwide, the statute radically alters the federal-state balance in a manner the Convention does not contemplate, Congress did not intend, and the Constitution does not allow. Section 229 need not and should not be interpreted to reach the use of toxic chemicals to exact revenge on a romantic rival.

ARGUMENT

I. The Government's Commerce Clause Argument Is Waived And Meritless.

The government begins its defense of section 229 with an argument it expressly and wisely abandoned below. Notwithstanding the self-evident purpose of a statute denominated the Chemical Weapons Convention Implementation Act, the government gamely contends that section 229 is simply part of a comprehensive federal regime to regulate commerce in chemicals. That argument is risible. When the government previewed this late-breaking theory during the first argument in this case, it met with skepticism bordering on incredulity. Oral Argument Tr. 31:15-17, *Bond v. United States*, No. 09-1227 (2011) ("You're trying to drive vinegar out of the interstate market? Do the people know you're trying to do this?").

Even the government previously recognized that the Commerce Clause is a nonstarter. The government did not simply fail to "initially invoke" the commerce power. U.S.Br.26. It unambiguously waived and expressly abandoned any Commerce Clause defense of section 229. Waiver is an overused term, often conflated with forfeiture, *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004), but waiver properly describes the government's deliberate litigation choice below. When petitioner invoked *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), in her motion to dismiss to argue that section 229 is not a valid exercise of Congress' commerce power, JA24-28, the government disavowed any contrary argument,

insisting that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties." JA31.

As the government reluctantly acknowledges, this was no mere description of the authority Congress consciously invoked; it was an express abandonment of any reliance on the Commerce Clause in direct response to petitioner's contention that section 229 could not be justified as an exercise of the commerce power. That is why the courts below accurately described the government as having "affirmatively" "[a]bandoned" a Commerce Clause defense. JA101. The government's contention that petitioner bears the burden "'to negative every conceivable basis which might support'" the statute is misplaced. U.S.Br.25. That burden applies to equal protection challenges to legislative classifications; it is not an exemption from ordinary waiver rules. In any event, petitioner shouldered that burden by explaining why section 229 is not valid Commerce Clause legislation; rather than disagree, the government disclaimed any argument otherwise.

The government offers no authority supporting its effort to immunize itself from the consequences of that decision. In fact, this Court routinely subjects the government to the same waiver rules as any other litigant. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 954 (2012). This Court can leave for another day whether the government can defend a statute based on a constitutional power neither invoked nor abandoned below, but in a world where criminal defendants routinely lose their liberty because of their litigation choices, there is absolutely

no justification for allowing the government alone to resurrect arguments it has affirmatively abandoned when its preferred theory proves untenable.

In any event, the government abandoned the Commerce Clause for good reason. This is not a case in which Congress invoked one power even though another readily supports the statute. The Commerce Clause is a complete misfit with section 229. As its name attests, the statute was enacted to implement the Chemical Weapons Convention, not to regulate interstate commerce in chemicals. The government's contrary contention is belied by the statute and foreclosed by precedent.

This Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. The use of chemical weapons is "not, in any sense of the phrase, economic activity." *Id.* It is conduct that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. To be sure, some activities involving chemicals undoubtedly implicate interstate commerce. But section 229 "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the" use in question does. *Id.* That is no oversight—in its effort to implement the Convention, Congress deliberately drafted a statute that reaches all warlike uses of chemical weapons without regard to their nexus to interstate commerce. That statute, which criminalizes noneconomic activity, cannot be defended as

Commerce Clause legislation under *Lopez* and *Morrison*.

Nor does the government advance its argument by insisting that chemicals are articles of commerce subject to "a comprehensive regulatory scheme." U.S.Br.20. Firearms are articles of commerce subject to comprehensive federal regulation as well, but that did not stop this Court from striking down a firearms statute that "neither regulate[d] a commercial activity nor contain[ed] a requirement that the" activity "be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551.

The stubborn problem for the government is that, in enacting 229, Congress' stated and actual concern was with uses of chemicals that implicate the Convention, not uses of chemicals that substantially affect interstate commerce. If Congress had the latter purpose in mind, it would have enacted a very different statute. For example, while the government attempts to analogize section 229 to provisions of the Toxic Substances Control Act, U.S.Br.22, the latter statute contains exactly the kind of commerce nexus section 229 lacks: It authorizes restrictions only on "*commercial* use" of toxic substances. 15 U.S.C. § 2605(a)(5) (emphasis added). And section 229 looks nothing like criminal statutes that facilitate regulation of interstate commerce. It does not, for example, criminalize failure to properly label or safely transport chemicals traveling in interstate commerce. *Cf., e.g.*, 21 U.S.C. §§ 823(f), 844(a) (establishing registration requirements for dispensing and obtaining controlled substances).

Instead, it criminalizes noneconomic activity without regard to whether it implicates interstate commerce.[1]

The government suggests section 229 is analogous to provisions of the Controlled Substances Act upheld in *Gonzales v. Raich*, 545 U.S. 1 (2005). But *Raich* is wholly inapposite. *Raich* involved an attempt to eradicate a product from interstate commerce, which the Court emphasized "is a rational (and commonly utilized) means of *regulating commerce* in that product." *Id.* at 26 (emphasis added). Precisely because there was no lawful interstate market in marijuana, there were no labeling requirements that would allow federal authorities to determine whether marijuana had traveled in interstate commerce. Given the fungible nature of the regulated product, Congress could reach even home-grown marijuana as part of a rational scheme for regulating "quintessentially economic" activity. *Id.* at 25; *id.* at 19 (excising local conduct would "frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety").[2]

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[1] The government's argument might fare better if section 229 applied only to the exceptionally dangerous and easily weaponized chemicals subject to stringent trade restrictions under the Convention, *see* Conv., Verification Annex, Part VI, but the government offers no such limiting construction.

[2] The government also invokes a trio of statutes mentioned in *Raich*, including the biological weapons prohibition. But *Raich* cited those statutes as efforts to eradicate prohibited items from interstate commerce, which is clearly not what section 229 seeks to do to the vast array of commercially useful chemicals it implicates. And, as explained, Petr.Br.45 n.2, some of those statutes are also in dire need of limiting constructions lest, for

The situation here is fundamentally different. Congress affirmatively welcomes interstate commerce in chemicals and imposes numerous requirements to regulate that commerce. Section 229 is just not one of them. It is in a different chapter of the code and addresses quintessentially *noneconomic* activities—namely, the use of chemical weapons without regard to any effect on commerce. That class of noneconomic activities cannot be characterized as substantially affecting interstate commerce without "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.[3]

In short, the government was right to abandon the Commerce Clause below. Its Commerce Clause argument is a complete misfit with the statute Congress actually enacted. It fails not because the government is estopped from invoking sources of congressional authority that did not, in fact, occur to Congress, but because, in the case of section 229, form followed function. Congress enacted a statute that prohibited uses of chemicals that implicated a non-self-executing treaty, without regard to their effect on commerce. That statute cannot be defended as something it is not and never pretended to be.

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instance, malicious spitting with a head cold be equated with deployment of biological weapons.

[3] *Raich*'s distinction between facial and as applied challenges does not help the government. Petitioner has argued that if section 229 is viewed as Commerce Clause legislation, it is invalid both facially and as applied. JA24-28.

II. The Chemical Weapons Convention Does Not Empower Congress To Federalize Petitioner's Conduct.

The government's defense of its broad view of section 229 thus must stand or fall on its remarkable contention that Congress need not abide by the federalist structure of our Constitution when it legislates to implement a valid non-self-executing treaty. Rather than reconcile that startling proposition with the Constitution or precedent, the government principally defends an entirely different one—that federalism principles impose no limits on the power to *make* treaties. While that proposition is highly debatable, it is of little consequence here. This case is not about the scope of the power to *make* treaties; petitioner concedes that the Convention is a valid treaty. This case is about the scope of Congress' power to *implement* treaties, specifically, *non-self-executing* treaties.

That makes the government's detailed discussion of the history of the treaty-making power largely beside the point. U.S.Br.29-33. To be sure, one problem with the Articles of Confederation was the new government's inability to enforce treaties. But the Framers addressed that problem by vesting the President and Senate with power to make self-executing treaties that would operate as "the supreme Law of the Land," U.S. Const. art. VI, not by vesting Congress with plenary power to enact legislation to implement non-self-executing treaties. The government's lengthy diversion into early exercises of the treaty-making power and cases recognizing that self-executing treaties had

preemptive force is therefore of little relevance, as not one of its examples involves federal legislation *implementing* a treaty (let alone a *non-self-executing* treaty). U.S.Br.32-38.

The government nevertheless proceeds on the assumption that if it can establish a plenary treaty-making power, it necessarily follows that Congress has plenary power to implement non-self-executing treaties. But that does not remotely follow. If anything, the government's robust conception of its treaty-making power only underscores the problems with an unchecked treaty-implementing power. If there is nothing to limit the modern imagination concerning the subjects non-self-executing treaties may address, and nothing to limit the measures Congress may enact to implement such treaties, then "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

Part of the answer is recognizing that the treaty-making power is no more unlimited than any other federal power. *See Reid v. Covert*, 354 U.S. 1, 16-18 (1957) (plurality opinion). But an equally important (and more judicially administrable) part of the answer is recognizing that legislation designed to implement non-self-executing treaties is not immune from the constitutional restraints that govern all other federal legislation. That principle would seem to flow directly from the very nature of non-self-executing treaties. Non-self-executing treaties specifically contemplate subsequent governmental

action to bring them into force. There is simply no good reason—and the government offers none—why such action need not respect our basic constitutional structure.

Indeed, this Court has already established that federal legislation enacted to implement a valid non-self-executing treaty is, like all other federal legislation, subject to basic constitutional constraints. *See, e.g.*, *Reid*, 354 U.S. at 16-18; *Mayor of New Orleans v. United States*, 35 U.S. 662, 736 (1836). The government attempts to minimize these decisions by insisting that they refer only to "the Constitution's express prohibitions." U.S.Br.46. But one need look no further than this Court's earlier opinion in this case for an emphatic rejection of the view that only the Constitution's express prohibitions limit Congress or protect individual rights. The government offers no compelling reason why the Constitution's liberty-protecting structural limitations would not apply equally to legislation enacted to implement a non-self-executing treaty.

The government seems to believe that structural constraints must give way lest the United States negotiate a treaty it could not enforce. But that remains a possibility if the United States negotiates a treaty that cannot be implemented consistently with the First Amendment or the Due Process Clause. And the government's argument ignores the possibility that validly enacted state and local laws will permit the United States to implement a treaty consistently with our basic constitutional structure. For example, a treaty obligation to provide consular notification for arrested foreign nationals does not

imply a congressional power to federalize all crimes or nationalize all police departments. Similarly, if the Convention really required the United States to prohibit all malicious use of chemicals, state criminal prohibitions surely could discharge that obligation. That may make the treaty-implementing function more cumbersome, but the Framers did not elevate federal legislative efficiency above all other values. If they did, they would have created a federal government with plenary powers, rather than a Congress with limited and enumerated powers. To the extent treaties increasingly concern matters traditionally the province of state governments, the need to stop and consider state law before deciding whether federal legislation is wise, necessary, or even constitutional is a welcome check, not a regrettable inconvenience.

More fundamentally, this Court has already rejected the argument that the Constitution's structural protections must yield to ensure compliance with our treaty obligations. In *Medellin v. Texas*, 552 U.S. 491 (2008), the Court expressly recognized that failing to give preemptive effect to a presidential order would put the United States in breach of its obligations under the Vienna Convention on Consular Notification. Even so, the Court did not shy away from enforcing the Constitution's structural protections, which did not force Texas to yield to a presidential directive. *Id.* at 504. Although petitioner has repeatedly emphasized *Medellin*'s incompatibility with the government's unlimited conception of its treaty power, *e.g.*, Petr.Br.32, the government offers no response, citing

Medellin only once to support a principle not in dispute.

In short, it is well established that federal action to implement a non-self-executing treaty must comply with the Constitution. The validity of the treaty does not somehow guarantee the validity of compliance efforts. The government's contrary contention would leave courts with no choice but to take on the unenviable task of determining the validity of non-self-executing treaties, rather than deferring to the political branches on that issue while reviewing treaty-implementing legislation for consistency with our basic constitutional structure. Between those two options, the function better suited to judicial discharge is crystal clear. The constitutionality of treaty-implementing legislation can and should be tested the same way as all other government action. And tested that way, the government's construction of section 229 as reaching every malicious use of chemicals is plainly unconstitutional.

Significantly, not even the government contends that its broad conception of section 229 is necessary to bring the United States into compliance with its treaty obligations. The possibility that petitioner might escape criminal prosecution is not a matter of international concern, let alone one addressed by the Convention. And even if prohibiting malicious use of chemicals in domestic disputes were necessary for compliance, the Convention is explicitly indifferent to whether federal or state laws (such as those prohibiting murder and assault) do the work. Conv. Art. VII(1) (each signatory "shall, in accordance with

its constitutional processes, adopt the necessary measures to implement its obligations"). Any notion that only section 229 prosecutions can discharge our treaty obligations is difficult to square with the reality that the federal government has brought only a handful of such prosecutions, despite countless incidents involving malicious use of chemicals since its enactment. U.S.Br.Opp.27 n.5.

It is equally clear that a federal prohibition on all malicious uses of chemicals would not be "proper" legislation.[4] Rather, it would be antithetical to our basic constitutional structure. Even as the federal government's powers have expanded over the past two centuries, they have never been thought to include the power to impose a general criminal code on the Nation. When the Solicitor General suggested such a power in *Lopez*, Oral Argument Tr. 8-9, *United States v. Lopez*, No. 93-1260 (1994), the fate of that statute was effectively sealed. Congress may prohibit murder on federal enclaves, among the uniformed military, and in other areas of federal concern, but a federal power to criminalize every

[4] The government attempts to avoid the "proper" analysis by resurrecting its distinction between statutes that exceed Congress' enumerated powers and statutes that "transgress … structural state-sovereignty limitations." U.S.Br.42 n.7. This Court already rejected that argument. *See Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). As five members of the Court have since reiterated, "the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2646 (2012) (joint dissent); *accord id.* at 2592 (Roberts, C.J.).

murder and assault involving chemicals has never been contemplated. Such legislation is not proper because it fails to respect the most fundamental tenets of our constitutional structure. The ratification of a valid non-self-executing treaty does not change that basic truth.[5]

The consequences of recognizing as much are hardly dire. Very few treaties require legislation Congress cannot enact, for Congress possesses many

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[5] This result follows whether this Court conceives of petitioner's challenge as as-applied or facial. In keeping with the Court's frequent reminders that facial challenges are disfavored, petitioner has offered a path to holding section 229 unconstitutional as applied. Contrary to the government's contention, *Raich* does not preclude as-applied challenges to federal statutes. *Raich* merely rejected an as-applied challenge when accepting it and excising home-grow marijuana "'could … undercut' [Congress'] regulation of interstate commerce." *Raich*, 545 U.S. at 38 (Scalia, J., concurring). The government does not seriously contend that excising garden-variety assaults and poisonings would undercut implementation of the Convention. In any event, if this Court is concerned about an as-applied holding, the answer is not to adopt the government's heads-we-win-tails-you-lose approach in which facial challenges are disfavored but as-applied challenges are doomed. It is to hold section 229 unconstitutional, and let Congress devise implementing legislation that ensures the requisite nexus to the Convention or another matter of federal concern. Petitioner has not "concede[d]" that section 229 "is constitutional on its face." U.S.Br.10. She has maintained that if the statute applies here, then "[i]t is not justified by the Necessary and Proper Clause or any other grant of congressional authority." Petr.Br.57-58. As this Court implicitly recognized in confirming petitioner's standing, the application of a statute not justified by any grant of congressional authority is unconstitutional, whether viewed through an as-applied or facial lens. *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring).

powers to legislate on matters of true international concern. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3, 10, 14. Indeed, the Framers gave Congress ample authority to legislate on the full range of matters within the founding-era conception of what treaties could legitimately address. It is precisely because modern treaties reach virtually every matter addressable by every level of government that the consequences of the government's position are so untenable. The government does not dispute—nor could it—that, under its theory, Congress could enact a general assault statute as a rational means of implementing a human rights convention. It merely observes that Congress has not done so yet, and assures that the ratification process will secure the States' consent should it choose to do so in the future. U.S.Br.10, 32.

The argument that constitutional checks and balances on the political branches suffice to preserve the federal-state balance has never met with much success in this Court. That "balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for" the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Moreover, by focusing narrowly on the rights of States qua States, the government forgets that "the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). When the federal government "exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials," *id.* at 182—let alone by

federal officials who indirectly represent the States. The agreement of two-thirds of the Senate, the President, and a foreign nation does not and cannot empower Congress to enact implementing legislation inconsistent with "the federal structure of our Government." *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011).

The government contends that recognizing as much would upset its settled expectations stemming from *Missouri v. Holland*, 252 U.S. 416 (1920). But even putting to one side that the government cannot acquire a vested interest in exercising extra-constitutional powers, *INS v. Chadha*, 462 U.S. 919, 944 (1983), *Holland* did not reject all limits where treaties are concerned. It simply focused, as did the parties, on applying limits to the treaty itself, deeming it valid because it concerned "national interest of very nearly the first magnitude." *Holland*, 252 U.S. at 435. The government would dismiss this entire discussion as dicta, but it does not—and cannot—explain why the Court found it necessary "to consider the application of established rules to the present case," *id.*, if those rules established the validity of treaties "as a categorical matter." U.S.Br.40.

If anything in *Holland* is dictum, it is its lone sentence suggesting without analysis or explanation that any legislation implementing a valid treaty is *ipso facto* valid. *Holland*, 252 U.S. at 432. That suggestion contradicted prior decisions, *see, e.g.*, *Mayor of New Orleans*, 35 U.S. at 736, has not survived subsequent decisions, *see, e.g.*, *Reid*, 354 U.S. at 16-18, has never been relied upon by this

Court as a holding, and has generated substantial criticism, *see* Pet.17-23. Although the government notes a handful of cases that have cited *Holland*, only one did so for the proposition that a treaty can expand Congress' power, and that was in the unique context of Indian treaties, where a treaty recognizing tribal interests necessarily expands federal authority *vis-à-vis* the States. *See United States v. Lara*, 541 U.S. 193, 201 (2004). *Lara* did not even involve treaty-implementing legislation, and it certainly did not embrace the dubious notion that Congress' power to implement treaties knows no limits. *Neely v. Henkel* likewise does not endorse that extraordinary theory. *Neely* merely held that an extradition statute was an "appropriate" means of implementing an extradition treaty; it never suggested the statute escaped constitutional scrutiny altogether because it implemented a treaty. 180 U.S. 109, 121 (1901).[6]

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[6] The debate surrounding the Bricker amendment does not support the government's theory. That amendment responded in large part to *Holland*'s suggestion that treaties might not be subject to any constitutional limits because the Supremacy Clause describes treaties as made "under the authority of the United States" rather than "in pursuance" of the Constitution. *Holland*, 252 U.S. at 433. Fearing this dictum suggested treaties could override the Constitution, Senator Bricker proposed a constitutional amendment to eliminate self-executing treaties and render treaties enforceable only if Congress exercised its Article I powers to implement them. Most of the opposition to that proposal centered on eliminating the power to make self-executing treaties, not the suggestion that Congress' power to implement treaties is cabined by Article I. Although his amendment failed, Senator Bricker's concerns carried the day in *Reid v. Covert*, when this Court emphatically rejected any suggestion that a treaty may override the Constitution. *Reid*, 354 U.S. at 16-18.

At bottom, there is no treaty-implementing exception to this Court's "responsibility to declare unconstitutional laws that undermine the structure of government established by the Constitution." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (Roberts, C.J.). If section 229 reaches petitioner's conduct, it is just such a law, as it is neither a necessary nor a proper means of implementing the Convention.

III. Section 229 Need Not And Should Not Be Construed To Reach Petitioner's Conduct.

All these grave constitutional questions—and the even graver implications of the government's theory—can be avoided by construing section 229 not to reach petitioner's conduct. The government's interpretation would give the statute breathtaking scope. As the court of appeals recognized, under the government's reading, section 229 would turn every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Pet.App.10 n.7. It likewise would convert every malicious use of chemicals, long the subject of state prosecutions for everything from assault to murder, into a federal offense with the kind of severe penalties associated with acts of terrorism. Equally troublingly, it would treat conduct like petitioner's as an international incident that would give other signatories (such as China, Russia, and Venezuela) rights under the Convention to force the United States to comply with burdensome inspection and verification procedures "required in cases of alleged use of chemical weapons." Conv., Verification Annex, Part XI(A)(2).

The government does not deny the breadth of its position or disclaim these absurd results. Rather, it simply invites the Court to ignore them. U.S.Br.13 n.3. But the very breadth of the government's interpretation demands a narrowing construction if one is available. Not only does its construction of section 229 implicate grave constitutional doubt, but it would profoundly upset the federal-state balance in the absence of the requisite "clear and manifest" indication of congressional intent to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Jones v. United States*, 529 U.S. 848, 858 (2000). Under the government's theory, the only thing preventing federal prosecution of every malicious use of chemicals is prosecutorial discretion. And as this case dramatically demonstrates, that is a woefully insufficient check. Using chemicals to seek revenge against a romantic rival no more implicates federal interests (let alone the concerns of the Convention) than the burning of a cousin's residence did in *Jones*.

Fortunately, section 229 "is not soundly read to make virtually every [malicious use of chemicals] in the country a federal offense." *Id.* at 859. Rather, sensibly construed, the statute's exclusion of toxic chemicals intended for "peaceful purposes," 18 U.S.C. § 229F(7)(A), provides the jurisdictional nexus the government insists is lacking. "Peaceful purposes" is a term of art used to distinguish between warlike and non-warlike conduct of nation-states. The handful of federal laws in which it is found all deal with international concerns and make sense only if the phrase is so understood. Petr.Br.52 (collecting statutes). Rather than dispute that "peaceful purposes" has this recognized meaning, the

government counters that garden-variety assaults and murders involving chemicals would not be described colloquially as peaceful. But statutory text must be interpreted "by reference" to "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Greenbag 2d 419, 423 (2013) ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense."). There is certainly no reason to deprive this term of its ordinary international-law meaning in a statute avowedly designed to implement an international convention.

The government's attempts to suggest otherwise mischaracterize petitioner's argument. The government insists "peaceful purposes" cannot be interpreted to exclude conduct occurring "outside of war." U.S.Br.14. But petitioner concedes that warlike conduct includes use of chemical weapons "to intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). The activities the government identifies—targeted assassination of a foreign leader and retaliation against "an expatriate critic," U.S.Br.14—fit comfortably within that understanding.

Petitioner's interpretation is also consistent with the Convention's goal of sweeping more broadly than

the 1925 Geneva Protocol on chemical weapons. As the very analysis the government invokes underscores, the goal was to reach all warlike activities of nation-states, even those occurring outside the strict confines of "international armed conflict." U.S. Dep't of Def., Defense Treaty Inspection Readiness Program, Article-by-Article Analysis of Chemical Weapons Convention, http://bit.ly/1bjaP7X (Convention was designed to reach "purely domestic conflicts, civil wars, or state-sponsored terrorism"). Likewise, section 229 was designed to reach warlike activities of individuals, not to make an international incident out of every malicious use of chemicals. Congress confirmed that when it made section 229 a predicate offense for the federal prohibitions on harboring or providing material support to terrorists. 18 U.S.C. §§ 2339, 2339A.

Remarkably, the government insists Congress *did* intend to render conduct like petitioner's an act of terrorism. U.S.Br.17. That is implausible. While not every statute listed in sections 2339 and 2339A contains an express "terrorist intent element," U.S.Br.17, most contain jurisdictional hooks targeting the similar concerns. For instance, many prohibit crimes against government actors or property. *E.g.*, 18 U.S.C. §§ 351, 844(f), 930(c), 956, 1114, 1116, 1361, 1362, 2156. Others prohibit crimes that, by their nature, target a broad civilian population. *E.g.*, *id.* §§ 32, 831, 1091, 1992, 2332a, 2442, 2284. Some contain physical jurisdictional elements limiting their prohibitions to crimes implicating international interests—for instance, the arson provision the government cites applies only

"within the special maritime and territorial jurisdiction of the United States." *Id.* § 81; *see also, e.g.*, *id.* §§ 2280, 2281, 2340A. But none of these provisions treats conduct anything like petitioner's as a terrorism predicate. In short, under the government's broad construction, section 229 sticks out like the proverbial sore thumb, but if "peaceful purposes" excludes non-warlike activities, then section 229 looks like the company it keeps.

In all events, the government's blithe assertion that these anti-terrorism measures and their serious consequences may be triggered by crimes "that have no necessary connection to terrorism," U.S.Br.17, is all the more reason to read the "terrorism predicates" narrowly. *Cf. Cleveland v. United States*, 531 U.S. 12, 25 (2000) (rule of lenity is "especially appropriate in construing … a predicate offense under RICO"). For instance, the biological weapons statute is another such predicate. Construed as broadly as the government construes the chemical weapons statute, its prohibition on transferring a biological toxin "for other than prophylactic, protection, bona fide research, or other peaceful purposes," 18 U.S.C. § 175(c), would make it not only a crime, but an act of terrorism, for someone with a head cold to maliciously spit on another.

Nothing in the chemical weapons statute's examples of "peaceful purposes" prevents this Court from adopting petitioner's reasonable reading of that phrase. The government suggests the "common thread running through" these examples is "non-malicious and socially beneficial" activities. U.S.Br.14-15. But the common thread is just as

easily described as non-warlike activities in which nation-states engage. Indeed, these examples are identical to those included in the Convention's definition of what activities *undertaken by a nation-state* constitute "peaceful purposes." Conv. Art. II.9(a).

The government makes much of a provision exempting "individual self-defense device[s]" from the statute's prohibitions. 18 U.S.C. § 229C. But it ignores a critical aspect of the statute: Unlike the subsection defining "chemical weapon" to include "[a] toxic chemical and its precursor," the subsection defining "chemical weapon" to include "[a] munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals," does not exempt munitions or devices "intended for a purpose not prohibited." *Id.* § 229F(1)(A)-(B). Thus, without a specific exemption, pepper spray and mace devices would *always* be chemical weapons, even when possessed and used for non-warlike purposes. That Congress expressly exempted all such individual self-defense devices (regardless of whether intended for peaceful purposes) underscores that Congress intended the statute to apply only to the kinds of warlike activities with which the Convention is concerned.

In sum, as construed by petitioner, section 229 fully discharges our Nation's obligation to prohibit individuals from undertaking activities prohibited by the Convention without doing damage to the federalist structure of our Constitution. As construed by the government, section 229 radically alters the federal-state balance by federalizing ordinary

poisonings and assaults having nothing to do with the Convention's disarmament and proliferation concerns. Even without the grave constitutional questions the government's reading creates, the choice between those two paths should be clear. The Court should not lightly conclude that Congress intended to federalize a domestic dispute culminating in a thumb burn as a means of implementing an international arms-control agreement, but if that conclusion is unavoidable, Congress exceeded its constitutional authority.

CONCLUSION

The Court should reverse the decision below.

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