

No. 09-1227

IN THE
Supreme Court of the United States

CAROL ANNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA.

*On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**BRIEF OF *AMICUS CURIAE* EAGLE FORUM
EDUCATION & LEGAL DEFENSE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute and her resulting conviction as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

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INTEREST OF *AMICUS CURIAE*¹

Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”), a nonprofit organization founded in 1981, is a pro-family group that has consistently advocated a limited federal government in adherence to the text of the U.S. Constitution. Eagle Forum ELDF has long defended the domain of state and local government against encroachment by the federal government, particularly in domestic family issues. Eagle Forum successfully filed an *amicus curiae* brief in a leading precedent germane to this action. *United States v. Morrison*, 529 U.S. 598 (2000).

¹ This brief is filed with the written consent of all parties. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Under the Constitution, “the people” are the sovereign, and implicit in sovereignty is legal standing to defend it. Sovereign powers are not dependent and subservient to assertion of those powers by someone else. Accordingly, the people are not dependent on state governments for legal standing to object to overreaching by the federal government. An individual defendant such as Mrs. Bond may directly invoke the Tenth Amendment regardless of whether her State agrees. She has standing to object to any application of a federal statute that is beyond the authority of the federal government.

Once the legal standing of the people to invoke the Tenth Amendment is recognized, the outcome in this case is clear: a federal statute was applied unconstitutionally here. Specifically, a federal statute was applied here beyond the limits of the Commerce Clause, as clarified by this Court in *United States v. Morrison*. The crime at issue here – a wife attempting to injure a rival for her husband’s affection – has no reasonable connection with interstate commerce. The federal conviction of Mrs. Bond should be overturned, with the federal charges against her dismissed.

A treaty cannot bootstrap a traditionally state offense into a federal one. The federal statute at bar implements a treaty designed for an international purpose, and yet was applied by a federal prosecutor to an intrinsically state offense. Implementation of a treaty cannot operate as an end run around the Constitution, and enable Congress to federalize state crimes.

ARGUMENT

The Tenth Amendment of the U.S. Constitution expressly reserves to “the people” powers neither delegated to the federal government nor prohibited to the States:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST., AMEND. X. These powers of “the people” are in no way subservient to or contingent on the cooperation of the States in asserting those powers.

Mrs. Bond plainly has standing to assert the powers reserved to the people by the Tenth Amendment, in defense against a federal prosecution of her that went beyond federal authority under the Constitution. There was no federal jurisdiction for the lower courts to entertain this prosecution against her for her quintessentially local crime of attempting to harm her husband’s paramour, and this Court should order the dismissal of this case below for lack of jurisdiction.

This Court should overturn the conviction of Mrs. Bond under 18 U.S.C. § 229(a)(1), which implements the treaty known as the 1993 Chemical Weapons Convention. *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009), *cert. granted*, 178 L. Ed. 2d 285 (2010).

I. “THE PEOPLE” AS SOVEREIGN HAVE STANDING TO ASSERT THEIR POWERS UNDER THE TENTH AMENDMENT.

The standing of the people to invoke the Tenth Amendment flows from their sovereign power. “In [our] republic ... the people are sovereign.” *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

This sovereignty of the people is neither novel nor controversial. Over a half-century ago, Justice Douglas, joined by Chief Justice Warren and Justice Black, also emphasized that the people are sovereign. “Under our Constitution it is We The People who are sovereign. The people have the final say.” *United States v. International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). While both this statement and the decision of *Citizens United* arose in the context of campaign finance, their basic point is broader: the people are the true sovereign, not their state and federal governments.

A sovereign – the people – is never dependent on its servant – the government – in asserting powers. The people may directly assert their powers under the Tenth Amendment regardless of whether state or federal governments agree. Mrs. Bond has just as much right to invoke the Tenth Amendment as any governmental official does on her behalf. To hold otherwise would be to deny that the people are sovereign and that their elected officials are public servants.

In addition, it is well established that constitutional rights belonging to the people are individual rights. From the first three words of the Constitution

through many references in its Amendments, the term “the people” includes individuals. This Court has held that:

“the people” seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by “the People of the United States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.”

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

When the people are recognized as a sovereign fully empowered to assert individual rights, the issue at bar is no longer a matter of the scope of standing. Decisions tending to hold against an individual right to invoke the Tenth Amendment should thus be overturned or interpreted because of the sovereignty of the people, rather than through an expansion of standing. Mrs. Bond should prevail here not because “standing barriers have been substantially lowered” in the many decades since *Tennessee Elec. Power Co. v. TVA*. *United States v. Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring) (citing *Tennessee Elec. Power*, 306 U.S. 118 (1939)). Rather, Mrs. Bond enjoys an individual right to invoke the Tenth Amendment because the people are sovereign and not subjected to the approval of government in objecting to a violation of the Constitution.

In its brief here, the government bifurcates Tenth Amendment arguments into those that concern “state sovereignty” and those that concern a lack of congres-

sional authority to legislate. Gov't Br. 14-15. But that approach implicitly and erroneously denies that the people are the sovereign. The Tenth Amendment in no way subjugates the people to be servants rather than the sovereign. The text of the Tenth Amendment clearly treats the people as at least equal in power to government, and rights of the people to invoke the Tenth Amendment derive from the people as sovereign, not as a subjugated class.

The rights of the people – and their ability to assert such rights – are at least as strong under the Tenth Amendment as under other Amendments. Accordingly, the people have legal standing to assert the Tenth Amendment in defense against federal overreaching. The people retain these rights regardless of whether their state governments agree or disagree at any particular moment. Powers reserved to the people under the Tenth Amendment are not conditioned on approval by state government.

II. THERE IS NO FEDERAL JURISDICTION OVER THIS CASE DUE TO THIS COURT'S RULINGS IN *UNITED STATES V. MORRISON* AND *UNITED STATES V. LOPEZ*.

This Court's rulings in *United States v. Morrison* and *United States v. Lopez* preclude federal jurisdiction in this matter. In *Morrison*, this Court made clear that crimes of domestic violence were typically not subject to federal control. This crime is squarely within the exclusive jurisdiction of state and local governments. While the instrumentalities of nearly any crime may be sold in interstate commerce, domestic crimes themselves are simply outside the reach of the Commerce Clause.

"Every federal appellate court has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). Jurisdiction was lacking below for this prosecution; the conviction should be overturned and the charges dismissed.

A. BOTH *UNITED STATES V. MORRISON* AND *UNITED STATES V. LOPEZ* ESTABLISH A LACK OF JURISDICTION HERE.

This Court has considered and rejected analogous encroachments by Congress into traditionally exclusive state domain. In *United States v. Morrison*, this Court invalidated a federally created cause of action over domestic crimes similar to the one at bar. 529 U.S. at 607-19. In *United States v. Lopez*, this Court struck down a federal law banning gun possession within 1,000 feet of a school. 514 U.S. 549, 551 (1995). Holding that these activities were beyond the

reach of the Commerce Clause, this Court declined to allow federal courts and prosecutors to exercise authority over them. A prosecutor likewise lacks constitutional authority to proceed in federal court with respect to a wife's local retaliation against a rival for her husband's affection.

In *Morrison*, this Court emphasized that:

The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

529 U.S. at 617-618 (citations omitted). This Court even went further in *Morrison*, holding that “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than *the suppression of violent crime and vindication of its victims.*” *Id.* at 618 (emphasis added).

Congress could not, consistent with *Morrison*, create a private cause of action by the victim of Mrs. Bond's activities. By the same logic a federal prosecutor cannot, consistent with the Constitution, press charges and convict Mrs. Bond in federal court for her local crime.

This Court's holding in *Lopez* likewise requires reversal of the conviction of Mrs. Bond. As this Court held in rejecting an expansive view of the Commerce Clause to include gun possession with 1,000 feet of a school, this Court noted that “if we were to accept the

Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

In concurrence, Justice Kennedy found an additional reason to reject such intrusion by the federal government into the state domain:

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.

Lopez, 514 U.S. at 577 (Kennedy, J., concurring).

As with the constitutional defect in *Lopez*, federalizing the crime by Mrs. Bond "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." 514 U.S. at 583 (Kennedy, J., concurring).

The prosecution below represents an end run around the precedent established by this Court in *Morrison* and *Lopez*. The facts here offer nothing more to substantiate federal jurisdiction than what was found to be insufficient in those precedents. Given that federal jurisdiction was lacking in *Morrison* and *Lopez*, it is likewise lacking here. Mrs. Bond's conviction should be reversed and the action against her dismissed.

**B. LACKING FEDERAL JURISDICTION OVER THIS
PURELY INTRASTATE CRIME, THE UNDERLYING
CHARGES SHOULD BE DISMISSED.**

It is the duty of federal appellate courts to dismiss actions that lack jurisdiction, regardless of whether the parties raise the issue:

[I]f the record discloses that the lower court was without jurisdiction *this court will notice the defect, although the parties make no contention concerning it*. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (citations and quotations omitted).

While the question presented here concerns whether Mrs. Bond had standing to invoke the Tenth Amendment, it is abundantly clear that federal jurisdiction was not proper below, and thus this Court should direct the lower court to dismiss the federal charges entirely. Mrs. Bond was accused of attempting to poison a woman who was interfering with her marriage, a crime fully punishable under state law. This crime of domestic violence is not within the powers established by the Constitution for the federal government; this is intrastate violence and nothing more.

III. A TREATY CANNOT BOOTSTRAP JURISDICTION FOR FEDERAL COURTS BEYOND CONSTITUTIONAL LIMITS.

A treaty cannot circumvent constitutional limitations on federal power:

The Constitution gives [a treaty] no superiority over an act of Congress ..., which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

Edye v. Robertson [*Head Money Cases*], 112 U.S. 580, 599 (1884). The existence of a treaty underlying a federal statute does not somehow render it constitutional. This Court should resolve the uncertainty expressed by the court below on this issue, in favor of constitutional limits on federal power. *See United States v. Bond*, 581 F.3d at 135 (suggesting that “the ability of the treaty power to override ‘state prerogatives’ is uncertain”). *See also* Gov’t Brief 8 (quoting Gov’t C.A. Br. 18).

The argument that a treaty could be the basis for federal jurisdiction over activity traditionally within the exclusive authority of state law was attempted unsuccessfully in *Morrison*. *See* Gov’t Reply Brief in *United States v. Morrison*, 1999 U.S. Briefs [LEXIS] 5, 9 n.5 (Dec. 30, 1999) (stating that treaty rights can implicate state property rights); Brief *Amici Curiae* on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners in *United States v. Morrison*, 1999 U.S. Briefs [LEXIS] 5, 3 (Nov. 12, 1999) (“It is well established that Congress

has the authority to enact legislation that is ‘necessary and proper’ to meet the United States’ obligations under ratified treaties, and that the existence of a valid treaty gives Congress authority to legislate over the subject matter thereof.”). This argument was implicitly rejected in *Morrison*, and it should be rejected here also.

Where, as here, an intrastate activity cannot be directly regulated by Congress and the President, a treaty ratified by the Senate cannot create federal jurisdiction. Over a half-century ago, this Court flatly rejected the argument that the treaty power can tread on exclusive state jurisdiction. *See Reid v. Covert*, 354 U.S. 1 (1957). *Reid* addressed the implementation of treaties with Great Britain and Japan by a statute authorizing military trials of wives who had murdered their military-officer husbands. *Id.* at 5 (citing Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. § 552(11)). *See also* 354 U.S. at 42 (Frankfurter, J., concurring) (citing international agreements). The Court ruled against the effort to bootstrap a treaty into an encroachment on state jurisdiction.

“The obvious and decisive answer ..., of course, is that *no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.*” *Reid*, 354 U.S. at 16 (emphasis added). In *Reid* this Court explained further:

“The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those

arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.”

Id. at 17-18 (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Congress cannot appropriate state police powers under the guise of the treaty power any more than it can “appropriat[e] state police powers under the guise of regulating commerce.” *Morrison*, 529 U.S. at 627 (Thomas, J., concurring). “Rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them.” *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting 1 Restatement of Foreign Relations Law of the United States 131, Comment a, p. 53 (Tent. Draft No. 6, Apr. 12, 1985)).

The treaty power cannot accomplish an end run around constitutional limits on federal authority. “It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.” *Reid*, 354 U.S. at 18.

A married woman’s criminal reaction to news that her husband is having a child with her friend does not make a federal case. These participants and their actions are not “proper subjects of negotiation between our government and the governments of other

nations.” *Geofroy*, 133 U.S. at 265. The treaty power offers no added authority to regulate such domestic matters within the exclusive domain of the state police power.

CONCLUSION

The decision below should be reversed with instructions for dismissal of this entire case for lack of jurisdiction.

Respectfully submitted,

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