No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LISA O. MONACO
Assistant Attorney General
VIRGINIA M. VANDER JAGT
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The Chemical Weapons Convention Implementation Act of 1998 (the Act), Pub. L. No. 105-277, 112 Stat. 2681-856, makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). It defines "chemical weapon" as a "toxic chemical" that can "cause death, temporary incapacitation or permanent harm," "except where intended" for, among other things, a "peaceful purpose," 18 U.S.C. 229F(1)(A), (7)(A), and (8)(A). The questions presented are:

1. Whether the use of a toxic chemical to harm another individual is use for a "peaceful purpose" and thus exempt from the Act's prohibition.

2. Whether Congress had the power under the Constitution to enact the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties and statutes:

Treaty and statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-158

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 681 F.3d 149. The order of the district court (Pet. App. 84-85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2012. The petition for a writ of certiorari was filed on August 1, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised re-

lease. Pet. App. 51-52. The court of appeals affirmed. *Id.* at 48-72. This Court reversed and remanded. 131 S. Ct. 2355 (2011). On remand, the court of appeals again affirmed. Pet. App. 1-47.

1. In 1993, the Senate approved and the United States ratified an international treaty that prohibits the development, possession, and use of chemical weapons by nations, and requires nations to adopt measures prohibiting such activities domestically by private companies and individuals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45; 143 Cong. Rec. 5812 (1997). State Parties to the Convention, including the United States, are legally obligated never to "use chemical weapons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 148.

Each State Party is required to "adopt the necessary measures to implement its obligations under this Convention." Pet. App. 160. In particular, each State Party is required to enact domestic legislation, "including * * * penal legislation," that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Ibid.* The Convention also requires parties to "adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention." Convention Art. VI, ¶ 2.

To implement the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (the Act), Pub. L. No. 105-277, 112 Stat. 2681-856 (enacting 22 U.S.C. 6701 *et seq.*); see *id.* § 201(a), 112 Stat. 2681-866 (enacting 18 U.S.C. 229 *et seq.*). The criminal provisions of the Act, which mirror the prohibitions in the Convention, make it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1); see Pet. App. 138.

A "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." 18 U.S.C. 229F(1)(A). "Purposes not prohibited by this chapter" is a defined term that means "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," or other purposes such as law enforcement or military purposes not relevant here, "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A) and (7). A "toxic chemical" is a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A). See Pet. App. 149, 152-153 (same definitions for Convention).

2. In 2006, petitioner discovered that a close friend, Myrlinda Haynes, had become pregnant as the result of an affair with petitioner's husband. Pet. App. 3; C.A. App. 7. Petitioner vowed revenge and promised that she would make Haynes's life "a living hell." Pet. App. 91.

On Thanksgiving Day 2006, Haynes discovered that a white powder had been caked on the door handles of her

car. C.A. App. 277-278. That powder was the arsenic-based specialty chemical 10-chlorophenoxarsine. Pet. App. 95-96. Between that day and February 2007, Haynes suffered 24 more chemical attacks, most of which were made with 10-chlorophenoxarsine and some with an orange-reddish powder that turned out to be potassium dichromate. *Id.* at 49-50, 94-95. Haynes suffered from these attacks as many as three or four times a week over a period of three months. C.A. App. 281.

Haynes, a single mother, was forced to carry her toddler out to the car, to hold the child in one hand, and to use the other to check for and remove the chemicals that were repeatedly placed on her front and rear door handles. C.A. App. 280-284. Before finding out what the substances were, she would use the same free hand to give her child a toy, which the child would put in her mouth. *Id.* at 281-282. Many of the incidents involved her car, but Haynes also discovered chemicals deposited on the doorknob of her home and in her mailbox. Pet. App. 50. On one occasion, when she forgot to first clean her door knob, she sustained a chemical burn on her thumb. *Ibid.*

During the course of these attacks, Haynes repeatedly called local police. C.A. App. 279. They suggested that the substance might be cocaine and told Haynes to clean her car and door handles. *Id.* at 279-280, 284-285; Pet. App. 50. Haynes then turned to her postal carrier for help, and federal postal inspectors placed surveillance cameras in and around Haynes's home. *Ibid.* They identified petitioner as the perpetrator of the attacks and also saw petitioner stealing Haynes's mail. *Ibid.* After petitioner was arrested, she waived her rights and acknowledged that she had stolen one of the chemicals, 10-chlorophenoxarsine, from her employer.

Id. at 51. She obtained the other chemical over the Internet. *Id.* at 3.

Up until shortly before she began the chemical attacks aimed at Haynes, petitioner was employed by a multinational chemical manufacturer, Rohm & Haas, as a technical assistant in the Biocides Organization, which researched preservatives used to kill microorganisms in plastics and shampoos. C.A. App. 197-198. While she was at the company, she earned a master's degree in microbiology. *Id.* at 201.

The two chemicals that petitioner used to attack Haynes were toxic, and could be lethal, in small quantities, either orally or through skin exposure. Pet. App. 49 & n.1. One-half of a teaspoon of 10-chlorophenoxarsine could be lethal orally to an adult, while a toxic dose for a child would be a mere few crystals of the substance. C.A. App. 239-240, 245-246. One to one-and-one-half teaspoons could be lethal to the touch. *Id.* at 240. The other chemical used by petitioner, potassium dichromate, is lethal in even smaller quantities; less than one-quarter of a teaspoon ingested orally could be lethal for an adult, while a few crystals could be lethal for a child. *Id.* at 252-253. The amounts of the chemicals left by petitioner on even a single occasion were many times the amounts required for toxic or potentially lethal doses. *Id.* at 248-249, 253-254.

3. A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 51; Indictment Count 1, ¶ 4, Count 2, ¶ 2. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authori-

ty in enacting Section 229. Pet. App. 51. In particular, she argued that "neither the Commerce Clause, nor the Necessary and Proper Clause in connection with the Treaty Power, could support" 18 U.S.C. 229. Pet. App. 4. In response, the government stated that Congress had not cited its commerce power in enacting Section 229 but had instead invoked its "authority to implement treaties." Gov't Resp. to Mot. to Dismiss Counts 1 and 2 of the Indictment 7, 2:07-cr-528 Docket entry No. 30 (Nov. 13, 2007). The government defended the statute as an exercise of Congress's power under the Necessary and Proper Clause to implement a valid treaty. See *id.* at 7-8.

The district court denied the motion to dismiss, holding that the statute was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 75. The district court noted that "[o]ne could make an argument, of course, that there is a federal interest" under the Commerce Clause "beyond the [treaty-based] interest enumerated by Congress" in enacting the statute. *Ibid.* The Court, however, thought it was "bound to look only at the reasons for the enactment of the statute [given] by Congress," so it did not address the question whether Section 229 was authorized by the commerce power. *Ibid.*

The district court also found that the statute plainly applied to petitioner's conduct. "[I]t is clear that if anybody uses a toxic chemical for other than peaceful purposes, the person can be prosecuted." Pet. App. 75. Under the statute, "one need only have to know that [the chemical] is a chemical that could do harm to another person's body and use it for purposes of harming or

attempting to harm another person in the way in which that harm is described in the statute." *Id.* at 75-76.

Petitioner entered a conditional guilty plea to all four counts of the indictment, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 52; see also *id.* at 80 (petitioner's counsel informing district court that "it's never been the contention of [petitioner] to fight this case on the facts").

4. On appeal, petitioner renewed her argument that Congress could not "utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." 2008 Pet. C.A. Br. 17. In response, the government argued that "[b]ecause the statute * * * was enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause." 2008 Gov't C.A. Br. 18. "As a consequence," the government explained, "that statute does not violate the Tenth Amendment by infringing on the states' reserved powers." *Ibid.*; see *id.* at 27.

Following oral argument, the court of appeals requested supplemental briefing on the question whether petitioner "ha[s] standing to assert that 18 U.S.C. [Section] 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities." Pet. App. 5 n.2. The government then argued that petitioner did not have standing to assert her Tenth Amendment claim, see *ibid.*, and the court of appeals agreed, *id.* at 58-63.

The court of appeals also rejected petitioner's vagueness challenge to Section 229. Pet. App. 63-66. The court stated that the terms of Section 229 "are certainly broad" but found "no doubt that 'a person of reasonable

intelligence' would know that [petitioner's] conduct violated [Section] 229." *Id.* at 65. "Over a period of eight months, [petitioner] researched, stole, and deployed highly toxic chemicals with the intent of harming Haynes. Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child." *Id.* at 65-66. Accordingly, "[petitioner's] actions * * * clearly constituted unlawful possession and use of a chemical weapon under [Section] 229." *Id.* at 66.

5. This Court granted certiorari to address the limited question "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *Bond* v. *United States*, 131 S. Ct. 2355, 2360 (2011). Having changed its position on standing, the government filed a brief in support of petitioner's argument that she had standing to challenge her conviction.

This Court reversed and remanded, see *Bond*, 131 S. Ct. at 2367, holding that, in an appropriate case, an individual litigant may challenge a law on the ground that it contravenes principles of federalism. *Id.* at 2365-2366. The Court indicated that "[t]he ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power," but it "expresse[d] no view on the merits of that argument." *Id.* at 2367.

6. On remand, the Third Circuit affirmed petitioner's conviction. Pet. App. 1-47.

a. The court of appeals first addressed petitioner's argument that the statute should be construed not to apply to her conduct. Pet. App. 8-12. Petitioner assert-

ed that her conduct fell within the statute's exception for use of a toxic substance for a "peaceful purpose," which she said should comprise any activity that was not "war-like." *Id.* at 9. According to petitioner, her proposed construction of the statute would place outside the scope of the statute's prohibition "conduct that no signatory state could possibly engage in." *Ibid.*

The court of appeals rejected that interpretation, concluding as it had in its prior decision that petitioner's "behavior 'clearly constituted unlawful possession and use of a chemical weapon under [Section] 229.'" Pet. App. 10 (quoting Pet. App. 66)). The court explained that petitioner's use of "highly toxic chemicals with the intent of harming Haynes, can hardly be characterized as 'peaceful' under that word's commonly understood meaning." *Id.* at 10-11 (citation omitted). The court concluded that because "the language [of Section 229] itself does cover [petitioner's] criminal conduct," it was not the court's "prerogative to rewrite a statute, and [it saw] no sound basis on which [it could] accept [petitioner's] construction of the Act without usurping Congress's legislative role." *Id.* at 11-12.

b. The court of appeals also rejected petitioner's constitutional objection to her conviction. See Pet. App. 12-36.

The court emphasized that this case did not present the question "whether an arguably invalid treaty has led to legislation encroaching on matters traditionally left to the police powers of the states." Pet. App. 20. Indeed, petitioner conceded that the Convention was a valid exercise of the treaty power. *Ibid.*; see *id.* at 38 (Rendell, J., concurring) (noting that petitioner "unequivocally concedes" that "the Convention itself is valid"). The court concluded that petitioner's concession was appro-

priate. It explained that, "[w]hatever the Treaty Power's proper bounds may be, * * * we are confident that the Convention we are dealing with here falls comfortably within them" because it regulates the proliferation and use of chemical weapons. *Id.* at 26. The Convention "is valid under any reasonable conception of the Treaty Power's scope." *Ibid.*

The court of appeals also concluded that Section 229 was "necessary and proper to carry the Convention into effect." Pet. App. 27. The court of appeals noted that this Court in *Missouri* v. *Holland*, 252 U.S. 416 (1920), had stated that "[i]f the treaty is valid there can be no dispute about the validity of the statute" implementing it "as a necessary and proper means to execute the powers of the Government." Pet. App. 27 (quoting 252 U.S. at 432); see *id.* at 31. Accordingly, the court of appeals concluded that the Act is constitutional "unless it somehow goes beyond the Convention." *Id.* at 33-34. The court held that the Act did not go beyond the Convention in any relevant sense; instead, the treaty and the statute "are coextensive at least on the question of 'use,' which is the only point relevant to [petitioner's] as-applied challenge." *Id.* at 29 n.15; see also *id.* at 34 (rejecting petitioner's argument that Section 229 "covers a range of activity not actually banned by the Convention" and that the statute "cannot be sustained by the Necessary and Proper Clause" for that reason).

Given its conclusion that the Act is constitutional, the court held that its application to petitioner did not "disrupt[] the balance of power between the federal government and the states." Pet. App. 36. It based that conclusion on this Court's holding in the context of Congress's commerce power that "where the class of activities is regulated and that class is within the reach of

federal power, the courts have no power to excise, as trivial, individual instances of the class." *Ibid.* (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005)).

In the alternative, the court of appeals also considered how federalism claims like petitioner's might be approached here if *Holland* had not resolved the constitutional question. Pet. App. 31 n.18. It concluded that, even under such an approach, petitioner's claim would still fail. The court noted that the framers of the Constitution did not "defin[e] the limits of the Treaty Power because they decided its scope required flexibility in the face of unknowable future events." *Ibid.* Moreover, the court said, "any attempt to precisely define a subject matter limitation on the Treaty Power would involve political judgments beyond [courts'] ken." *Ibid.* Nonetheless, imagining a world without *Holland*, the court posited that it might still be possible to identify "certain kinds of treaties" that would "fall within the core of [the treaty] power, namely those dealing with war, peace, foreign commerce, and diplomacy directed to those ends." *Ibid.*

Under this alternative approach, the court explained that the Tenth Amendment would still have "nothing meaningful to say" with respect to statutes implementing treaties lying at the core of the treaty power. Pet. App. 32 n.18. But federalism principles might lead to a different outcome where a treaty "plainly f[e]ll outside" "the traditionally understood bounds of the Treaty Power," or even "[b]efore the outer limits of the treaty power are reached." *Id.* at 32-33 n.18. The court emphasized, however, that no such inquiry was called for here. *Ibid.* As the court had previously explained, "[g]iven its quintessentially international character, * * * the

Convention is valid under any reasonable conception of the Treaty Power's scope." *Id.* at 26; see *id.* at 27.

Having concluded that the Act was a valid exercise of Congress's necessary and proper authority to implement the Convention, the court did not express an opinion on the government's alternative argument that the Act was also a valid exercise of Congress's commerce power. Pet. App. 27 n.14.

Judge Rendell filed a concurrence. See Pet. App. 37-44. She emphasized that it was undisputed that the Convention was within the treaty power and explained that the Act was a necessary and proper way of implementing it. See *id.* at 38. "Enacting a statute that essentially mirrors the terms of an underlying treaty is plainly a means which is 'reasonably adapted to the attainment of a legitimate end.'" *Ibid.* (quoting *United States* v. *Comstock*, 130 S. Ct. 1949, 1957 (2010)). And, Judge Rendell explained, because the Act is constitutional, no further necessary and proper inquiry was appropriate with respect to its particular application to petitioner. See *id.* at 38-39. "The fact that an otherwise constitutional federal statute might criminalize conduct considered to be local does not render that particular criminalization unconstitutional." *Id.* at 40 (citing *Raich*, 545 U.S. at 23).

Judge Ambro also filed a concurrence (Pet. App. 45-47) in which he "urge[d] the Supreme Court to provide a clarifying explanation of its statement in *Missouri* v. *Holland* that '[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.'" *Id.* at 45 (quoting 252 U.S. at 432) (brackets in original).

ARGUMENT

Petitioner asks the Court to grant her petition for a writ of certiorari to reconsider *Missouri* v. *Holland*, 252 U.S. 416 (1920), and to enforce asserted federalism-based limitations on "the federal government's authority to criminalize purely local conduct when seeking to implement treaties" (Pet. 17). She also asks the Court to consider her proffered limiting construction of 18 U.S.C. 229 as a means of avoiding those constitutional questions. This petition is not an appropriate vehicle for consideration of either question. Congress had independent authority under its commerce and necessary-and-proper-clause powers to enact the Act, so the statute is valid without regard to petitioner's treaty-power claim. Additionally, the court below correctly applied *Missouri* v. *Holland* to uphold Section 229. No other court of appeals has considered that issue, and the circuits have reached no conflicting results in the interpretation of *Holland* in other contexts. And, even assuming there were federalism limits on Congress's powers under the Necessary and Proper Clause when implementing a treaty, the exercise of federal authority here would not implicate them. Finally, petitioner would not even benefit from her own limiting construction—which has no basis in the statute in any event—because her actions were anything but "peaceful." Further review is not warranted.

1. Petitioner asks the Court to grant her petition and hold that "legislation enacted to implement a treaty must be a valid exercise of either some specific enumerated power or the Necessary and Proper Clause." Pet. 27-28. That test is plainly satisfied in this case for a reason not addressed by the petition: the Act is a valid exercise of Congress's commerce and necessary-and-

proper-clause power. The portion of the Act applied to petitioner would be within Congress's constitutional authority on this basis even if no treaty underlay it. This case accordingly does not present a suitable vehicle for addressing the question petitioner presents on the meaning and viability of *Holland*, *supra*, because her conviction is valid without regard to that claim.

a. Section 229 makes it unlawful for any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). As this Court explained in *Gonzales* v. *Raich*, 545 U.S. 1, 26 (2005), "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."

To illustrate this point, the Court in *Raich* cited a series of criminal statutes that are materially indistinguishable from Section 229. 545 U.S. at 26 n.36. Those statutes include: 18 U.S.C. 175(a), which implements the Biological Weapons Convention by making it unlawful to "knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831, which implements the Convention on the Physical Protection of Nuclear Material by making it unlawful under certain circumstances to "receive[], possess[], use[], transfer[], alter[], dispose[] of, or disperse[] any nuclear material"; and 18 U.S.C. 842(n)(1), the statute implementing the Plastic Explosives Convention by making it unlawful "to ship, transport, transfer, receive,

or possess any plastic explosive that does not contain a detection agent."[1]

Raich's citation of these statutes makes clear that Congress may regulate the intrastate possession, manufacture, and distribution of these weapons as part of its regulation of the interstate market, just as Congress validly placed similar restrictions on homegrown marijuana. See 545 U.S. at 16-22. The same is true for the chemical weapons regulated by Section 229. Section 229, like the statute in *Raich*, is part of a "comprehensive framework" for prohibiting "the production, distribution, and possession" of chemical weapons. *Id.* at 24; see Pet. App. 147 (Convention preamble explains that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of" the objective of eliminating weapons of mass destruction). Congress could rationally have concluded that the intrastate possession, manufacture, and distribution of these weapons substantially affects interstate commerce and must be restricted to control the interstate market. See *Raich*, 545 U.S. at 16-19; *id.* at 33-34, 39-41 (Scalia, J., concurring) (invoking Necessary and Proper Clause in combination with the Commerce

---

[1] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 I.L.M. 721, ICAO Doc. 9571 (Mar. 1, 1991).

Clause); see also 18 U.S.C. 229F(7) (statutory carve-out for trade in chemicals with legitimate uses).

Congress likewise could have rationally concluded, as the Convention's preamble expressly stated, that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons" was a "necessary step" toward "promot[ing] free trade in chemicals," Pet. App. 147, placing the Act within Congress's power over foreign commerce as well. Indeed, the Chemical Manufacturers Association (CMA), which was deeply involved in the development of the Convention, supported ratification of the Convention in part because the American chemical industry "produce[s] commercial chemicals which can be illegally converted into weapons." *Chemical Weapons Convention: Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. 90 (1994) (*Hearings*) (statement of Dr. Will Carpenter, CMA). The CMA explained that it supported the Convention's protections against diversion of such chemicals because those protections "could have the positive effect of liberalizing the existing system of export controls applicable to [the chemical] industry's products, technologies and processes." *Ibid.* And the Convention itself regulates international trade in chemicals by, among other things, prohibiting signatories from exporting certain scheduled toxic chemicals to non-signatory countries. See Convention, Verification Annex, Part VII, ¶ 31; see also *Hearings* 12 (statement of John D. Holum, director, United States Arms Control and Disarmament Agency) ("States remaining outside the Convention will be denied access to State Party trade in specified chemicals that are important not only to

[chemical weapon] production but also to industrial development and growth.").

Because Section 229 is valid under Congress's commerce and necessary-and-proper power, this case is not an appropriate vehicle for considering the question petitioner presents about the limits on Congress's power when implementing a treaty in the absence of some other enumerated basis for the legislation. Nor does the commerce-power basis for Section 229 merit review in its own right. No division in the courts of appeals exists on that question. Indeed, no court of appeals has even addressed it. "This Court * * * is one of final review, 'not first view.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (declining to address a constitutional question not decided below) (citation omitted).

b. In the court of appeals, petitioner contended that the government's commerce-power defense of Section 229 is waived because the government did not advance it in the district court or in the court of appeals the first time the case was there. 2011 Pet. C.A. Reply Br. 22. The court of appeals, however, did not find the claim waived, see Pet. App. 27 n.14 (court "express[ing] no opinion" on commerce authority for Section 229), and it is not.

"A statute is presumed constitutional * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (brackets in original). "[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett* v.

Holden, 275 U.S. 142, 147-148 (1927)). The respect due a coordinate branch counsels against invalidating an Act of Congress as in excess of its Article I authority without considering available grounds for upholding the law.

In the district court, the government stated that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties." Gov't Resp. to Mot. to Dismiss Counts 1 and 2 of the Indictment 7. That description of what power Congress expressly invoked at the time of the statute's enactment does not mean that other bases of authority are unavailable to defend the statute. To the contrary, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see *United States* v. *Shi*, 525 F.3d 709, 721 (9th Cir.) (treaty-implementing legislation may draw on multiple sources of constitutional authority), cert. denied, 555 U.S. 934 (2008). Accordingly, the Court in *Raich* cited a number of statutes enacted to implement treaties as examples of legislation within Congress's commerce power. See p. 14, *supra*.

2. Even putting aside the alternative basis for affirmance of the judgment below, the petition would not warrant this Court's review. Petitioner was prosecuted under a statute that closely tracks an international treaty she "unequivocally concedes" is "valid." Pet. App. 38 (Rendell, J., concurring). Her conduct fell squarely within the terms of that statute. The court of appeals accordingly recognized that, even assuming *arguendo* that federalism principles placed limits on Congress's power under the Necessary and Proper Clause to implement a treaty, no such limits would have been

breached here. Moreover, the court of appeals correctly applied *Holland*—a longstanding precedent about which there is no disagreement or confusion in the circuits—to this case.

a. The court of appeals explained that petitioner's claim fails under the rule of *Holland* that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432; see Pet. App. 31 & n.18. But even setting aside *Holland*, the court said it would be untroubled by the exercise of federal authority in this case because, "[w]hatever the Treaty Power's proper bounds may be," it was "confident that the Convention [it was] dealing with here falls comfortably within them." *Id.* at 26.

The Act's terms very closely track those of the concededly-valid Convention in all material respects, see Pet. App. at 28-29 n.15; see also *id.* at 34-35, so there is no argument that the Act goes beyond the scope of the Convention. Further, even assuming that federalism principles had a role to play in evaluating the validity of treaty-based legislation, as explained below, the Act would not infringe on such hypothetical federalism limits. See *id.* at 26-27, 31 n.18.

Petitioner nowhere plainly explains what her proposed test for the constitutionality of treaty-implementing legislation should be. She appears to assert that her prosecution contravenes federalism principles because Pennsylvania could have prosecuted her for assault, but it is well-settled that the Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. See Pet. App. 41 (Rendell, J., concurring) ("Instances of overlapping federal and state criminalization of similar conduct abound.");

see also, *e.g.*, *Cleveland* v. *United States*, 329 U.S. 14, 16 (1946) (Mann Act's criminalization of interstate transportation for "purpose of prostitution or debauchery, or for any other immoral purpose" not unconstitutional invasion of traditional area of state regulation); *United States* v. *Johnson*, 114 F.3d 476, 481 (4th Cir.) ("[f]ederal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement *per se* of states' sovereignty in the administration of their criminal laws"), cert. denied, 522 U.S. 904 (1997).

Under the dual-sovereign doctrine, Pennsylvania remained free to prosecute petitioner for assault notwithstanding the federal prosecution. See *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994). This federal prosecution therefore in no way impinged on Pennsylvania's sovereign powers. Indeed, the Act, which did not preempt any Pennsylvania law, has less of an impact on state prerogatives than other historic exercises of the treaty power. See, *e.g.*, *Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796).

Petitioner is incorrect that, assuming that federalism principles apply to legislation implementing a valid treaty, Congress violated such limitations by not deferring to state law to implement "any treaty obligation the United States had to criminalize her conduct." Pet. 27. The Necessary and Proper Clause affords Congress discretion to decide how best to execute the powers set

forth in the Constitution. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (explaining that the "constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people"). In fact, because the relevant provisions of the Convention are not directly judicially enforceable, the absence of federal legislation to implement the Convention's requirements could have left the federal government without adequate means to ensure the United States' compliance with the Convention.

Petitioner's argument echoes one side of a debate that occurred leading up to the Constitutional Convention regarding the treaty power. That debate was textually resolved in the Constitution, which granted the treaty power to the Executive, with advice and consent by the Senate. U.S. Const. Art. II, § 2. The Framers made that choice because of the government's inability, under the Articles of Confederation, to induce the states to implement treaties. See, *e.g.*, *The Federalist*, No. 42, at 264 (James Madison); No. 22, at 150-151 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Samuel B. Crandall, *Treaties: Their Making and Enforcement* 34-35, 51-52 (2d ed. 1916). The Constitution also expressly withheld the treaty power from the States. U.S. Const. Art. I, § 10. Thus it cannot be said that the decision below represents a "reconfigur[ing]" of constitutional structures (Pet. 24).

Moreover, a rule that Congress cannot exercise its power to implement treaties if a state law provision arguably overlaps with a treaty requirement (Pet. 26-27) would be wholly unworkable. Congress would have to

conduct 50-state surveys of state law, and perhaps of municipal law as well, for each treaty provision to determine if the provision were implemented locally. Under petitioner's reading, such surveys would also have to ascertain whether provisions that were not directly related to the subject matter (*e.g.*, assault laws) might overlap with the treaty provisions. In this case, the government has never maintained (cf. Pet. 13) that state law would be sufficient to implement the Convention, and petitioner's premise that a generic assault statute would adequately implement the Nation's treaty obligations to restrict not only the use, but also the development, production, acquisition, retention, and transfer, of toxic chemicals is not tenable.

Petitioner claims that *Medellin* v. *Texas*, 552 U.S. 491 (2008), supports her view that the federal government should have deferred to state law rather than enacting Section 229. Pet. 27. But *Medellin*, to the extent that it is relevant to this case, demonstrates petitioner's error. The *Medellin* Court held that "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.* at 525-526. *Medellin* found ineffective a presidential memorandum that directed States to comply with a judgment of the International Court of Justice regarding the Vienna Convention on Consular Relations. Instead, it was *Congress* under the Constitution that had the power to give effect to the international decision. *Ibid.* (And, of course, in this case Congress did act.) The facts in *Medellin* also illustrate the fundamental flaw in petitioner's proposed reliance on States to execute the United States' international obligations. Because the actions of the State of Texas did not fulfill the United States' international obligations, the United

States was found in breach of the Vienna Convention. See *Medellin* v. *Texas*, 554 U.S. 759 (2008) (per curiam).

Finally, there is no requirement that the government establish that the prosecution of petitioner in particular "is necessary and proper to complying with the Convention." Pet. App. 39 (Rendell, J., concurring). This Court "ha[s] often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'" *Raich*, 545 U.S. at 23 (quoting *Perez* v. *United States*, 402 U.S. 146, 154 (1971)) (some internal quotation marks omitted; brackets in original).

b. In any event, the court below correctly followed this Court's well-settled precedent holding that federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in treaty-implementing legislation. No disagreement exists in the courts of appeals on that question, and further review is not warranted.

i. In *Holland*, the State of Missouri, seeking to prevent a federal game warden from enforcing the Migratory Bird Treaty Act and accompanying regulations, argued that "the treaty and statute are void as an interference with the rights reserved to the States." 252 U.S. at 432. This Court disagreed. The Court explained that the Tenth Amendment did not operate as a limitation on the treaty power because that amendment applied to powers "not delegated to the United States," while the treaty power was "delegated expressly" to the federal government. *Ibid.*; cf. *United States* v. *Comstock*, 130 S. Ct. 1949, 1962 (2010) (finding that the Tenth Amendment was not applicable to a statute enacted under the Necessary and Proper Clause "[v]irtually by definition"

because the necessary-and-proper power, as an Article I power, is "not [a] power[] that the Constitution 'reserved to the States'") (citation omitted).

Accordingly, the Court in *Holland* held that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. The Court noted that it did not "mean to imply that there are no qualifications to the treaty-making power," *id.* at 433, but determined that the Tenth Amendment did not restrict that power through "some invisible radiation." *Id.* at 434. Instead, the Court considered only whether the treaty violated other constitutional provisions; because it did "not contravene any prohibitory words to be found in the Constitution," it was valid. *Id.* at 433.

Holland does not contemplate that the courts will "balance" federal and state interests in enacting legislation to implement a treaty, as petitioner suggests. Cf. Pet. 25-26. While the *Holland* Court mentioned the "slender reed" of the State's interest and the "national interest of very nearly the first magnitude" in that case, its holding was not premised on the weight of the interests but on the explicit allocation of power to the federal government: "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power." 252 U.S. at 434-435.

Nor is the *Holland* Court's holding that Congress indisputably has necessary-and-proper power to implement the treaty "dictum," as petitioner would characterize it (Pet. 25). Indeed, adoption of petitioner's position would require this Court to reject a settled understanding of *Holland* that reflects the unique national interests furthered by treaties above and beyond the local inter-

ests of the States. See *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (reaffirming *Holland*'s interpretation of the treaty and necessary-and-proper powers). Reconsidering that settled understanding is unwarranted—especially in this case, where Section 229 is valid under the commerce power.

ii. Contrary to petitioner's suggestion (Pet. 20-22), the courts of appeals are not divided on the meaning of *Holland*, a 90-year-old precedent of this Court. She fails to cite a single court of appeals decision that invalidated legislation implementing a treaty on federalism (or any other) grounds. Several of the decisions she cites simply state the rule that legislation implementing a treaty must comply with the Constitution's express limitations on government power, such as those found in the Bill of Rights.[2] *Holland* itself invoked that principle, see 252 U.S. at 433 (noting that the treaty before the Court "does not contravene any prohibitory words to be found in the Constitution"), and a plurality of the Court again expressly stated it in *Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957). *Reid* explained that application of the Constitution's limitations to treaty-implementing legislation was entirely consistent with *Holland* because "the treaty involved" in that case "was not inconsistent with any specific provision of the Constitution," *Reid*, 354 U.S. at 18. At the same time, the *Reid* plurality

---

[2] See, *e.g.*, *Plaster* v. *United States*, 720 F.2d 340, 348 (4th Cir. 1983) (citing *Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957) (plurality opinion), and involving due process claim); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308-1309 (9th Cir. 1982) (citing *Reid*, 354 U.S. at 16-19, and involving due process and equal protection claims); *Chas T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981) (citing *Reid*, 354 U.S. at 15-19, and involving takings claim).

went on to explain that, "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid.* Accordingly, court of appeals cases relying on *Reid* do not reflect any disagreement on the meaning of *Holland*.[3]

The only court of appeals decisions petitioner cites that are relevant to the question presented here are those that *rejected* federalism or enumerated powers challenges to the statute implementing the International Convention Against the Taking of Hostages. See Pet. 21-22 (citing *United States* v. *Lue*, 134 F.3d 79, 84 (2d Cir. 1988), and *United States* v. *Ferreira*, 275 F.3d 1020, 1027-1028 (11th Cir. 2001), cert. denied, 535 U.S. 977, 535 U.S. 1028, and 537 U.S. 926 (2002)); see also *United States* v. *Belfast*, 611 F.3d 783, 803-809 (11th Cir. 2010) (rejecting enumerated powers challenge to statute implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), cert. denied, 131 S. Ct. 1511 (2011). As petitioner recognizes (Pet. 21), those decisions are entirely consistent with the one below in this case.

In the absence of disagreement or confusion in the courts of appeals about *Holland*, no warrant for further

---

[3] *Power Authority of N.Y.* v. *Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), also cited by petitioner (Pet. 21) as among cases holding that there are Tenth Amendment limitations on legislation implementing a treaty, "d[id] not decide the constitutional question," *id.* at 543, and was subsequently vacated by this Court, see *American Pub. Power Ass'n* v. *Power Auth. of State of N.Y.*, 355 U.S. 64 (1957). *Holmes* v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972), did not involve a Tenth Amendment claim, and, in any event, the court concluded that any constitutional question was "beside the point," *id.* at 1217.

review exists. Petitioner fails to point to any genuine problem with Congress's use of its power to implement treaties. Constitutional limitations on the treaty process, including the requirement for the concurrence of a two-thirds majority of the Senators voting, make such hypothetical uses unlikely. Finally, as discussed above, granting this petition to consider the viability of *Holland* would be particularly unwarranted because of the clear non-treaty-based ground for affirming the judgment below.

3. Petitioner also urges the Court to read the Act to exclude her conduct in order to avoid the constitutional question she presents. Pet. ii.[4] She does not claim any conflict in the courts of appeals on the meaning of the statute, and none exists.[5] Moreover, petitioner's pro-

---

[4] In *Ghane* v. *United States*, petition for cert. pending, No. 12-5318 (filed July 16, 2012), the petitioner advances a different limiting construction of Section 229, *i.e.*, that it "exempts from criminality an individual's use of toxic chemicals without the intent to harm another person." *Ghane* Pet. 17. Petitioner does not advance that claim. Nor does petitioner here assert the vagueness or overbreadth claims asserted by the petitioner in *Ghane*.

[5] Charges are not brought frequently under the Act. Only five cases other than this one have led to Westlaw opinions mentioning the charge. See *United States* v. *Ghane*, 673 F.3d 771 (8th Cir. 2012), petition for cert. pending, No. 12-5318 (filed July 16, 2012); *United States* v. *Crocker*, 260 Fed. Appx. 794 (6th Cir.) (conviction based on attempts to acquire VX nerve gas), cert. denied, 553 U.S. 1060 (2008); *United States* v. *Krar*, 134 Fed. Appx. 662 (5th Cir. 2005) (conviction based on possession of sodium cyanide and other chemicals); *United States* v. *Fries*, No. CR-11-1751, 2012 WL 689157 (D. Ariz. Feb. 28, 2012) (charge based on alleged plan to generate deadly chlorine gas); *United States* v. *Kassir*, No. 04cr356, 2009 WL 2913651, at *1 n.2 (S.D.N.Y. Sept. 11, 2009) (noting that the government had voluntarily dismissed Section 229 count).

posed rewriting of the statute is unwarranted and would not even benefit her.

As explained above, no serious constitutional question exists regarding the Act, so the doctrine of constitutional doubt is inapplicable here. In addition, the doctrine of constitutional avoidance is not implicated because the statutory language is clear. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227-228 (2008); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Here, the statute unambiguously encompasses petitioner's conduct, as the Third Circuit has twice decided. See Pet. App. 10, 66. The statute bars possession and use of toxic chemicals, whose definition indisputably includes the chemicals petitioner used here. 18 U.S.C. 229, 229F. Petitioner suggests that she should have benefited from an exception in the statute for toxic chemicals used for "[a]ny peaceful purpose." 18 U.S.C. 229F(7)(A). But no reasonable construction of that phrase would cover petitioner's conduct. Petitioner's "deployment of highly toxic chemicals with the intent of harming Haynes can hardly be characterized as 'peaceful' under that word's commonly understood meaning." Pet. App. 10-11 (brackets and citation omitted). "Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child." *Id.* at 66. Those attacks were hardly peaceful.

Petitioner proposes that "peaceful" should mean "non-warlike." Pet. 31. But no basis for this limiting construction appears in the Act. Relatedly, she posits that the Convention requires only the prohibition of "conduct by private parties that would violate the Convention if undertaken by signatory states" and contends that her conduct would not be a violation if committed by a State Party to the Convention. *Id.* at 30. This ar-

gument is similarly unsound. If a State Party to the Convention were to develop, produce, or stockpile 10-chlorophenoxarsine and potassium dichromate outside of the peaceful purposes outlined in the Convention, or were to use those toxic chemicals against an adversary, the state's conduct would plainly have violated the Convention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LISA O. MONACO
Assistant Attorney General
VIRGINIA M. VANDER JAGT
Attorney

OCTOBER 2012