No. 12-158

IN THE

Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.[1]

SUMMARY OF THE ARGUMENT

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Yet the government claims that "federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in treaty-implementing legislation." U.S. Br. in Opp. ("BIO") 23. That argument does not square with the Constitution's text, structure, or history. Treaty making is a quintessentially executive function that falls within the President's Article II

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The Petitioner has filed a blanket consent and the consent of the Respondent is submitted herewith.

authority. But treaty making is *not* a substantive power. It is a vessel through which the Executive may implement his foreign affairs, commander-in-chief, and other powers. By equating "laws of the United States" and "treaties," the Supremacy Clause and Article III confirm the treaty power's implemental function. Laws of the United States implement congressional power in the same way treaties implement executive power.

Treaties are thus subject to discernible limits. They implement executive power, which, to be sure, is broad and on occasion can escape precise definition. But the power is not limitless. Broad presidential power is not immunity from judicial review. Indeed, the Court often must decide whether the President is exceeding his Article II authority, and has done so under circumstances similar to here. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491 (2008).

This is not meant to suggest that the treaty power's substantive scope is narrow. The President has vast power over matters of war and peace and the lion's share of authority over foreign affairs more generally. In the main, treaties implementing those powers by making binding international commitments on behalf of the Nation will be facially valid and unchallengeable in federal court. But once a treaty has domestic force, dual sovereignty requires that, like any other federal law, it have a firm basis in delegated power and comply with the Constitution's structure.

Of course, Congress has a constitutional role too. Treaty ratification requires approval by a supermajority of the Senate. U.S. Const. art. II, § 2. Yet the Senate's role does not alter the treaty power's executive character. The

treaty power is part of "the executive power" vested in the President. The Treaty Clause did not create that power; it constrained it by granting the Senate a procedural check against presidential excess. If Congress has a greater role in the treaty realm, it must derive from the "Power … To make all Laws which shall be necessary and proper for carrying into Execution … all other Powers vested by this Constitution in the Government of the United States … ." U.S. Const. art. I, § 8, cl. 18. But Congress's reliance on the Necessary and Proper Clause is controversial, *see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005), as it could vastly expand the substantive reach of the treaty power to include Article I subjects or provide Congress an avenue for implementing non-self-executing treaties, or both, or neither. The Court should avoid deciding these difficult constitutional issues if it is appropriate to do so.

It is appropriate here. The government does not rely on any nuanced treaty-power argument to sustain Bond's conviction. It instead argues that a treaty can cover *any* subject and Congress can *always* rely on the Necessary and Proper Clause to implement it. Whatever else they may have disagreed about, the Framers broadly rejected that assertion. The Constitution's drafting history and ratification debates make clear that a treaty is not a tool for expanding the delegated powers of the United States or subverting the system of dual sovereignty the Constitution carefully establishes. The treaty power "must have meant to except … the rights reserved to the states; for surely the president and Senate cannot do by treaty what the whole government is interdicted from doing in any way." Thomas Jefferson, Manual of Parliamentary Practice 166 (1820) ("Jefferson's Manual").

Once the question presented is properly evaluated, it becomes clear that neither the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Convention") nor Section 229 of the Chemical Weapons Convention Implementation Act ("Act") provides a basis for turning Bond's local offense into a federal case. Although the Convention is facially valid, the issue here is whether it covers a subject beyond the treaty power as applied to Bond's conduct. It does. As broad as the President's foreign affairs powers are, they rarely—if ever—provide him constitutional authority to regulate domestic matters. And criminalizing a local assault like the one at issue here exceeds whatever authority resides in the President to supersede the States' police powers in any event.

Congress has no greater claim to authority than does the President. Whether the government relies on the Commerce Clause as a substantive source of authority for the Convention itself or a substantive source of authority for the Act, or both, the answer is the same: criminalizing Bond's crime is not the regulation of interstate commerce. Her crime involves intrastate, non-economic activity with no tangible link to an interstate market that Congress cannot regulate without reaching Bond's conduct. The Court has rejected this argument many times and it should do so again in this case. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez,* 514 U.S. 549 (1995).

The Necessary and Proper Clause also is no barrier to overturning the conviction. If the government is relying on the Clause as implementing a valid treaty, the claim

fails at the outset because the Convention is not valid as applied to Bond. If the government instead is relying on the Clause to augment the valid aspects of the Convention or Act, it misses the mark because criminalizing Bond's actions is not "necessary" or "proper" under governing precedent. It is not "necessary" to punish Bond to execute the valid aspects of the Convention and Act. There is no serious argument—and indeed none has been offered—that leaving Bond's prosecution to Pennsylvania hampers the Convention's mission of controlling the international dissemination and stockpiling of weapons of mass destruction. Nor is it proper to seize on the Convention's valid aspects to usurp the police powers of the State. As the Court has explained, it is *never* proper to alter the federal system's basic structure. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585-93 (2012) (Roberts, C.J.); *id.* at 2644-50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("joint dissent"); *United States v. Comstock*, 130 S. Ct. 1949, 1965-68 (2010) (Kennedy, J., concurring in the judgment).

Not only will reversing the judgment below along these lines keep faith with first principles, it also ensures that the case is resolved in a manner consistent with the full weight of precedent. This Court has *never* held that the treaty power is immune from a federalism challenge or that Congress has plenary authority to implement a non-self-executing treaty. Reliance on *Missouri v. Holland*, 252 U.S. 416 (1920), to argue otherwise is misplaced. *Holland* rejected a facial challenge to a migratory-bird treaty and assumed that Congress had authority under the Necessary and Proper Clause to implement it because Missouri declined to argue the point. And no decision before or since has suggested that a treaty or its

implementing legislation is immune from a federalism challenge. There is no reason to depart from that settled understanding now, especially as the government concedes that the Convention and Act are subject to challenge under the Bill of Rights. The whole point of the Court's previous decision in this case was to make clear that federalism principles are no less vital to individual liberty.

Addressing the scope of the treaty power also avoids creating a substantive gap between non-self-executing treaties and self-executing treaties. Although there are important differences between the two types of treaties, the path to implementation does not dictate the treaty power's substantive scope. It cannot be that a treaty abolishing the death penalty, requiring state officials to enforce federal laws, or allowing the federal government to seize control over state and local elections, for example, would be valid because the President and Senate made the treaty self-executing instead of involving the House of Representatives in the process. By confirming that treaties have substantive limitations, the Court can ensure that a decision striking down the Act as applied to Bond is not viewed as acquiescence to the President and Senate achieving the same illegitimate end by making the next chemical weapons treaty self-executing.

Finally, deciding this appeal as a matter of treaty power avoids resolving troublesome issues of congressional power under the Necessary and Proper Clause that can await an appeal where a non-self-executing treaty is valid under the facts presented. If the Court assumes that the treaty is valid in all applications, it will need to decide, for example, whether Congress can rely on the President's Article II treaty power to implement the Convention, whether it must have an independent anchor under the

Commerce Clause to do so, or whether the Necessary and Proper Clause grants Congress substantive authority in the treaty setting. In contrast, if the Court holds, as it should, that the United States lacks power to criminalize Bond's conduct even if a treaty or its implementing legislation can invoke the full measure of delegated power vested in the President and Congress, it need not answer *any* of these hard questions. Accordingly, reaffirming that the Constitution reserves the police powers to the States and that the treaty power does not alter that framework is not only correct as a matter of original understanding, it is the prudent course of action.

ARGUMENT

I. The Treaty Clause Cannot Expand The Powers The Constitution Vests In The Government Of The United States.

A. The treaty power affords the President a vehicle for implementing the executive power.

"The Executive power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. "The general doctrine then of our Constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qu[a]lifications which are expressed in the instrument." 15 The Papers of Alexander Hamilton 39 (Harold C. Syrett ed., 1969); *Myers v. United States*, 272 U.S. 52, 115-39 (1926). Treaty making falls within the "executive power" given its foreign-affairs role. 1 William Blackstone, Commentaries 257; 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 27-28,

120, 269 (Jonathan Elliot ed., 1891) ("4 Debates"); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause,* 2006 U. Ill. L. Rev. 1, 44 n.158 (2006) ("[V]irtually every important thinker who influenced the founding generation thought of treaty making as an executive function.").

But the treaty power is not substantive. Rather, it "is a vehicle for implementing otherwise-granted national powers in the international arena." Lawson & Seidman, *supra*, at 15. The treaty power provides the President with a means of converting "[t]he executive Power" into domestic law in precisely the same way Congress's lawmaking authority enables it to convert "legislative Powers" into law. U.S. Const. art. I, § 1. This understanding follows from the Constitution's text, structure, and history.

Under the Supremacy Clause, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land … ." U.S. Const. art. VI, cl. 2. Just as Congress's ability to enact "Laws of the United States" is a mechanism for implementing its Article I powers, the President's ability to make "treaties" is a mechanism for implementing his Article II powers.[2] The Constitution "specifies and delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a

2. The Supremacy Clause uses the phrase "made, or which shall be made, under the authority of the United States" with regard to treaties to ensure that treaties entered into under the Articles of Confederation remained in force and effect upon the Constitution's ratification. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President and Senate may enter into the treaty … ." 4 Memoir, Correspondence, and Miscellanies, from the Papers of Thomas Jefferson 3 (Thomas Jefferson Randolph ed., 1829).

Treaties and laws of the United States are likewise parallel under Article III's vesting clause. It extends "[t]he judicial Power … to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. If the power to make a treaty were itself a substantive grant of authority, treaties would not have been included as a jurisdictional predicate for judicial review. Article III does not extend federal jurisdiction to cases arising under the "Power … to regulate Commerce." U.S. Const. art. I, § 8, cl. 3. Congress implements the "commerce" power by statute; and the President implements "executive power" by treaty. But neither lawmaking nor treaty making is an independent, delegated power.

This is why the Constitution does not express the treaty power in substantive terms. Treaties implement a power that itself escapes easy definition; executive power is by necessity contextual as it is "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); 15 The Papers of Alexander Hamilton 39 ("[T]he difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms."). Because they implement executive power, "[t]he various contingencies

which may form the object of treaties, are, in the nature of things, incapable of definition." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 363 (Jonathan Elliot ed., 1891) (E. Randolph) ("3 Debates"); *see also id.* at 514 (J. Madison) ("I do not think it possible to enumerate all the cases in which such external regulations would be necessary."); The Federalist No. 23, 147 (A. Hamilton) (Jacob E. Cooke ed., 1961) ("[I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.").

Accordingly, treaties are quite clearly subject to substantive limits. Although there is debate over the scope of executive power, the power is not limitless. *See, e.g.*, *Medellín*, 552 U.S. at 523-32. "[U]nenumerated powers do not mean undefined powers." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). To be sure, acknowledging the treaty power's limits does not negate its sweep. Treaties addressing matters of war and peace implement the President's power as Commander in Chief, *see* Christopher J. Pace, *The Art of War Under the Constitution*, 95 Dick. L. Rev. 557, 562-66 (1991), and most others have a basis in Article II given the President's "vast share of responsibility for the conduct of our foreign relations," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003).[3] Nonetheless, for a treaty to be

3. Not every question involving a treaty is justiciable. The availability of judicial review will depend on the nature and context of the challenge. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). But justiciability is not a concern here. *See, e.g.*, *Medellín*, 552 U.S. at 523-32.

valid it must be rooted in a power that Article II vests in the Executive.[4]

B. Congress's role in the treaty process is subject to substantial disagreement and raises difficult constitutional questions.

Recognizing a treaty as a device for implementing executive power does not deny Congress's constitutional role. Article II provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]" U.S. Const. art. II, § 2. The Constitution thus arms the Senate with an important procedural check against presidential excess. 4 Debates 265 (C. Pinckney) ("[P]olitical caution and republican jealousy rendered it improper … to vest [the treaty power] in the President alone."). "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 507 (J. Wilson) (Jonathan Elliot ed., 1891) ("2 Debates"); The Federalist No. 75 (A. Hamilton).

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4. The treaty power might instead be seen as a defined concept that covers "matters usually the subject of treaties at the time the Constitution was adopted" or "matters that are truly 'international' in nature." Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 451 (1998). These conceptions of the treaty power likewise impose substantive limits and lead to the same outcome as the implementing approach in most cases, including this one. *See infra* at 16-26.

But granting the Senate this political check does not alter the treaty power's executive focus. Article II's vesting clause confers the treaty power on the President alone. *See* Lawson & Seidman, *supra* at 8, at 43 ("Without the Treaty Clause, the President would have the sole power of making treaties as an aspect of the 'executive Power.'"). The Treaty Clause limits that authority by granting the Senate a procedural role—nothing more. 15 The Papers of Alexander Hamilton 42 ("[T]he participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President."); *Myers*, 272 U.S. at 115-39. "[T]here can be but one answer. For the treaty power is placed in Article II, under the Executive, with a check in the Senate. It was not placed in Article I, under the Legislative branch, with a check in the Executive. The starting point for analysis … is that the treaty power is primarily executive in its nature." John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 Va. J. Int'l L. 163, 192-93 (2001).

If Congress has a substantive role in the treaty arena, it must derive from the authority to "make all Laws which shall be necessary and proper for carrying into Execution … all other Powers vested by this Constitution in the Government of the United States … ." U.S. Const. art. I, § 8, cl. 18. "The 'other Powers' to which the Clause refers" includes "those 'vested' in … the other branches by other specific provisions of the Constitution." *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting). But there is serious disagreement over the extent of authority that the Necessary and Proper Clause affords Congress with regard to treaties.

To begin, the Constitution's vesting of the check in the Senate would seem to exclude from a treaty's purview "those subjects of legislation in which [the Constitution] gave a participation to the house of Representatives." Jefferson's Manual 166; 1 Blackstone's Commentaries With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia, App. 287-88 (St. George Tucker ed., 1803). Yet there is some support for the view that the Necessary and Proper Clause, in conjunction with the Treaty Clause, "permits the treaty power to effectuate all powers of all federal institutions." Lawson & Seidman, *supra* at 8, at 15 n.42; *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("Congress may of course delegate very large grants of its power over foreign commerce to the President.").[5]

There is also disagreement as to what implementing authority, if any, the Necessary and Proper Clause grants Congress. For example, it might grant Congress authority to implement a non-self-executing treaty as the treaty's executive nature would deprive Congress of an Article I power on which to rely. The Clause might grant Congress authority to make a treaty effective for other reasons as well. As James Wilson explained, "if the king and his ministers [found] themselves, during their negotiation, to be embarrassed because an existing law is not repealed, or a new law is not enacted, they [gave] notice to the

5. This dispute would appear to matter for purposes of judicial review only if the treaty is self-executing. Once Congress enacts a law to domestically implement a non-self-executing treaty, as here, the statute would be evaluated on its own merit, as presumably it would be anchored to the same Article I, Section 8 power upon which the treaty may have inappropriately intruded.

legislature of their situation, and inform[ed] them that it will be necessary, before the treaty can operate, that some law be repealed, or some be made." 2 Debates 506-07. Yet the suggestion that the Necessary and Proper Clause grants Congress *any* authority to implement treaties already made also is subject to sober criticism. *See* Rosenkranz, *supra* at 3, at 1880-92.

C. The treaty power cannot subvert the constitutional plan irrespective of any powers Congress holds.

Discerning Congress's precise authority to shape a treaty's substance and act as an agent for its domestic implementation raises difficult constitutional questions. And although the Court would need to answer those hard questions before upholding Bond's conviction, it does not need to resolve them to overturn it. *See infra* at 32-33. The Third Circuit did not rule that the Convention or Act implement an Article I or Article II power in criminalizing Bond's conduct. Nor did it hold that the Act executes the treaty based on a defensible conception of the Necessary and Proper Clause. Rather, it held that the treaty power has *no* subject limitation and implementing legislation is always valid for tautological reasons. There is *no* support for that proposition. Pet. Br. 24-25.

A treaty power without any boundaries is an avenue for amending the Constitution "in a manner not sanctioned by Article V." *Reid v. Covert*, 354 U.S. 1, 17 (1957); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1309 (9th Cir. 1982) (same). There is no evidence that those charged with drafting and ratifying the Constitution understood the treaty power to license the President and Senate to amend the Constitution without

observing the requisite procedures. The powers held by "the Government of the United States," U.S. Const. art. I, § 8, cl. 18, are not expandable by treaty. [6]

Rather, they believed that the treaty power "must have meant to except … the rights reserved to the states; for surely the president and Senate cannot do by treaty what the whole government is interdicted from doing in any way." Jefferson's Manual 166. A treaty "repugnant to the spirit of the Constitution, or inconsistent with the delegated powers" is invalid. 3 Debates 507 (G. Nicholas); *id.* at 504 (E. Randolph) ("[N]either the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty."). "[T]hough the [treaty] power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state" and "cannot supersede, or interfere with any other of [the Constitution's] fundamental provisions." 3 Joseph Story, Commentaries on the Constitution of the United States § 1502 (1833); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 417 n.154 (1998) (collecting sources).

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6. The government incorrectly suggests that the Constitution's displacement of the States from entering into treaties, U.S. Const. art. I, § 10, indicates that federalism is not a relevant limitation, BIO 21. This Clause makes express what is already implicit in Article II, *i.e.*, the power to make a treaty is exclusively federal. That the treaty power is exclusively federal, however, no more dictates its substantive scope than the federal exclusivity of the war powers dictates their substantive scope. In other words, the fact that States have no power to declare or conduct a war does not mean that the federal government can trample rights reserved to the States simply because it claims authority under that head of federal power. *See, e.g.*, *Youngstown,* 343 U.S. at 587-89.

II. Criminalizing Bond's Conduct Exceeds The Powers Vested In The United States.

A. Bond appropriately brings an as-applied challenge to the constitutionality of her conviction under the Act.

Because this Court's judicial power reaches treaties and federal statutes alike, they are subject to the same forms of challenge. As-applied challenges are, of course, the preferred course with regard to statutes. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The rule for treaties should be the same. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 211 (1999) (Rehnquist, C.J., dissenting) ("[T]reaties, every bit as much as statutes, are sources of law[.]"). In any case, an as-applied challenge is certainly appropriate, as here, where the treaty is given domestic force by statute. *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring) ("If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free.").

Bond's decision to bring an as-applied challenge is key to this case's disposition. Pet. Br. 57-62. She does not claim that the Convention or Act "is unconstitutional in all of its applications." *Wash. State Grange*, 552 U.S at 449. Chemical weapons are indisputably a proper treaty subject given the President's foreign affairs power and role as Commander in Chief. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-20 (1936); *United States v. Caltex*, 344 U.S. 149, 202-03 (1952). In turn, Congress's implementation of the Convention would be facially valid

given its "plainly legitimate sweep," *Wash. State Grange*, 552 U.S. at 449, assuming that the Necessary and Proper Clause affords Congress *any* authority to implement a treaty, *see supra* at 11-14.

Instead, Bond's as-applied challenge presents a question that "can be met … without attempting to define" the federal government's "powers comprehensively." *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring). Like any domestic law, the Act "may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte*, 546 U.S. at 329. The pertinent question is whether, "*at least in the present instance*, the treaty cannot be the source of congressional power to regulate or prohibit [Bond's] conduct." *Bond*, 131 S. Ct. at 2360 (emphasis added).

The Court can resolve this question through a straightforward application of settled principles. The Court should first ask whether the President has independent authority under Article II to regulate Bond's conduct. If he does, and assuming the legislation merely implements the treaty according to its terms, *but see* Pet. Br. 45, the Court should uphold Bond's conviction so long as, again, Congress has authority under the Necessary and Proper Clause to implement a non-self-executing treaty, *see supra* at 11-14. If the legislation is unsustainable on Article II grounds, the Court should ask whether the Convention or Act is sustainable on these facts under Congress's commerce power, either independently of or in conjunction with the Necessary and Proper Clause.

Here, as explained below, the Convention and Act are unconstitutional as applied to Bond no matter whether

they sought to implement the President's executive power or an enumerated power Congress holds under Article I. Put simply, the United States lacks delegated authority to criminalize Bond's conduct under the treaty power and independent of it. Accordingly, Bond's conviction should be overturned.

B. The Convention exceeds the President's Article II authority as applied to Bond's conduct.

The United States has not defended the application of the Convention to Bond's conduct under any power that Article II vests in the President. And for good reason. The President's foreign affairs powers are broad; they comprise "all the powers of government necessary to maintain an effective control of international relations." *Curtiss-Wright*, 299 U.S. at 318. But "like every other governmental power," the President's Article II authority "must be exercised in subordination to the applicable provisions of the Constitution." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). Here, any assertion of Article II power to regulate Bond's conduct would fail.

As an initial matter, it is far from certain that the President can *ever* rely on his foreign affairs powers to regulate domestic behavior through a treaty. There are "fundamental" differences "between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs." *Curtiss-Wright*, 299 U.S. at 315. When taking action in the international arena, the President's authority surely includes the power to negotiate multilateral agreements regarding chemical weapons. *See supra* at 10. But "[t]he exercise of the power must be consistent with the

object of the delegation … . The object of treaties is the regulation of intercourse with foreign nations, and is external." 3 Debates 514 (J. Madison). Consequently, there is ample support for the notion that treaties—as vessels for implementing the President's foreign affairs powers—are "not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." The Federalist No. 75, 504-05 (A. Hamilton).[7]

But even if the President's foreign-affairs authority allows him to intrude on powers reserved to the States under some circumstances, it would not alter the outcome here. Bond's crime does not impact the President's foreign affairs responsibilities. Federalizing Bond's assault on a disloyal friend is hardly "necessary to maintain an effective control of international relations." *Curtiss-Wright*, 299 U.S. at 318. In other words, the President does not have independent authority to seize and detain Bond for poisoning her neighbor. Thus, he has no Article II power to "implement" through the Convention.

C. Both the Convention and the Act exceed Congress's Commerce Clause authority as applied to Bond's conduct.

Whether as a source of authority for the Convention or the Act, the government's reliance on the Commerce power fares no better. BIO 13-17. Even if the government

7. Whether the President's commander-in-chief authority allows him to regulate internal affairs under specific circumstances is a far different question and one the Court need not address in this case. There is no plausible claim—or a claim at all—that the President has regulated Bond's conduct to "harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. 603, 615 (1850).

can belatedly press that argument, *but see* Reply Br. in Supp. of Cert. 9-11, the Commerce Clause is not a basis for upholding Bond's conviction. Although the Court has concluded that "Congress has broad authority under the Clause," *NFIB*, 132 S. Ct. at 2585 (Roberts, C.J.), this power has limits too. The Commerce Clause reaches "the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 609. The first two categories do not apply here. So if Bond's conviction is to be upheld, it must be as intrastate activity substantially affecting interstate commerce. BIO 14-17.

But including Bond's conduct within this category is a bridge too far. Pet. Br. 20-23. Laws like this one, which "do not act directly on an interstate market or its participants," call for "careful scrutiny." *NFIB*, 132 S. Ct. at 2646 (joint dissent); *see also id.* at 2578 (Roberts, C.J.). Indeed, because the Act trenches on "a traditional concern of the States," the Court owes a "particular duty to ensure that the federal-state balance is not destroyed." *Lopez*, 514 U.S. at 580-81 (Kennedy, J., concurring); *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J.).

Federalizing Bond's crime raises the same concerns as in *Lopez* and *Morrison*. Like Lopez's conviction, Bond's stems from "a criminal statute 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. As applied to Bond, the Act "d[oes] not regulate any economic activity," nor does it "contain any requirement that [Bond's offense] have any connection to past interstate activity or a predictable

impact on future commercial activity." *Gonzalez v. Raich*, 545 U.S. 1, 23 (2005). It should come as no surprise, therefore, that the government won Bond's conviction—as it did Lopez's—without showing any tie to interstate or foreign commerce. *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 613; Pet. Br. 38-42.

Nor can Bond's conviction be upheld as an "essential part[] of a larger regulation of economic activity." *Raich*, 545 U.S. at 24. The government has at times justified charging Bond as incident to Congress's power to regulate the interstate market in toxic chemicals. BIO 13-17. The government's theory rests, as it must, on the Court's decision in *Raich* to uphold the Controlled Substances Act (CSA) as applied to the intrastate cultivation of marijuana for personal use. 545 U.S. at 14-16. Yet the reasoning in that decision only highlights the unprecedented step the government invites here.

First, regulating the conduct at issue in *Raich* was deemed reasonably related to the CSA's "comprehensive framework" governing a defined interstate market. *Id.* at 24. Congress "found that [marijuana] has no acceptable medical uses" and sought to extinguish the drug's interstate market "in [its] entirety." *Id.* at 19, 27. Even if the government can identify an interstate market in chemical weapons, applying the Act to Bond is proof that this market is susceptible to no definition, encompassing virtually any substance on earth so long as its owner harbors ill intent. "[I]t is difficult to perceive any limitation on federal power" under this understanding of the Commerce Clause, *Lopez*, 514 U.S. at 564, which treads perilously close to "a theory that everything is within federal control simply because it exists," *NFIB*, 132

S. Ct. at 2649 (joint dissent); *Lopez*, 514 U.S. at 564 ("[I]f 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.").

Second, an act of malevolence like Bond's "is in no sense an … activity that might, through repetition elsewhere, substantially affect any sort of … commerce." *Lopez*, 514 U.S. at 567. Unlike the growing of marijuana in *Raich*—which, in the aggregate, the Court concluded "has a substantial effect on supply and demand in the national market for that commodity," 545 U.S. at 19—there is no reasonable basis for believing that the commerce power would be "undercut unless [Bond's] intrastate activity were regulated," *id.* at 24-25. Tellingly, "in every case where [the Court] ha[s] sustained federal regulation under the aggregation principle … the regulated activity was of an apparent commercial character" that is strikingly absent here. *See Morrison*, 529 U.S. at 611 n.4. And while the Court has stopped short of declaring "a categorical rule against aggregating the effects of any noneconomic activity," *id.* at 613, a thousand Bonds could torment a thousand erstwhile friends without their crimes touching interstate or foreign commerce. Bond's assault on her victim no more affected the phenoxarsine market than cutting her would have affected the market in knives or clubbing her the market in cricket bats. Without more, "the noneconomic, criminal nature of [Bond's] conduct" alone cannot anchor her prosecution to the commerce power. *Id.* at 610; *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

The Court has held that "[w]here [a] 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. And it is true that Bond's as-applied challenge draws focus to the facts of her own case. Yet this is hardly an instance where federal law has incidentally ensnared "trivial, individual instances" of intrastate activity as part of an otherwise-proper regulatory scheme. On the government's reading, the Act is cabined by little more than a federal prosecutor's imagination. "[P]rosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes" under usual circumstances, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012), let alone when the federal-state balance is at stake.

D. The Act exceeds Congress's Necessary and Proper Clause authority as applied to Bond's conduct.

Finally, the government's reliance on the Necessary and Proper Clause, "the last, best hope of those who defend ultra vires congressional action," *Printz*, 521 U.S. at 923, falls short. The Clause is a grant of derivative power. It "gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,'" but it "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 132 S. Ct. at 2591 (Roberts, C.J.) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 418, 481 (1819)). Upholding the application of the Act to Bond's conduct would violate this command for at least three reasons.

First, Congress cannot point to the Clause as merely implementing a valid non-self-executing treaty. The

Convention is not valid as applied to Bond. The President lacks authority under Article II to regulate Bond's conduct and, even assuming a treaty can effectuate a congressional power, *but see supra* at 13-14, Congress lacks authority under the Commerce Clause to criminalize this behavior. Because Bond's conduct is not the proper subject of a treaty, Congress cannot rely on the Necessary and Proper Clause for its implementing authority. If the Convention is unconstitutional as applied to Bond, the statute claiming to give it domestic effect is, too.

Second, applying the Act to Bond is not "necessary" to carry the treaty's legitimate aspects into execution. Her conviction is not even tenuously incidental to the President's foreign affairs powers. It is nearly impossible to imagine a scenario in which Bond's spiteful actions might threaten global harmony or be seen as a violation of the Convention by the treaty's signatories. The links between Article II and Bond's crime are "too attenuated"—if they exist at all—to render this prosecution necessary to effectuate the treaty within its legitimate sphere of operation. *See Comstock*, 130 S. Ct. at 1963; *id.* at 1967 (Kennedy, J., concurring in the judgment) (requiring a "tangible link" to an enumerated Article I power "based on empirical demonstration").

Nor is Bond's conviction incidental to any commercial interest that the legislation might be vindicating. Whether analyzed under the Commerce Clause or the Necessary and Proper Clause the answer is the same: Congress may not "'pile inference upon inference' in order to establish that noneconomic activity has a substantial effect on … commerce." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514

U.S. at 567); *NFIB*, 132 S. Ct. at 2648 (joint dissent). Under the government's reasoning, a crime that involves *any* substance is ripe for federal prosecution because substances can be articles of commerce. This vision of federal power is in no way "narrow in scope," *Comstock*, 130 S. Ct. at 1964, and to embrace it "would open a new and potentially vast domain to congressional authority," *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.).

Third, and most importantly, applying the Act to Bond is not "proper." "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in the judgment). When exercises of federal power "violate[] the principle of state sovereignty" they cannot be "*proper* for carrying into Execution" the Government's enumerated powers. *Printz*, 521 U.S. at 924. "Rather, they are, 'in the words of The Federalist, "merely acts of usurpation" which "deserve to be treated as such."'" *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) (quoting *Printz*, 521 U.S. at 924).

These federalism principles dictate the outcome here. In criminalizing Bond's conduct, the United States "intrude[d] upon functions and duties traditionally committed to the State." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment). Indeed, this Court has found "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." *Morrison*, 529 U.S. at 618; *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J.); *Lopez*, 514 U.S. at 561 n.3; *Lopez*, 514 U.S. at 597 n.6 (Thomas, J.,

concurring); *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821). As applied here, the Act operates in the heartland of state sovereignty.

It is no answer to say that the government's prosecution does not stop Pennsylvania from bringing charges in its own right. BIO 20. "[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States," as in *Printz*, for example, "but also when it violates the background principle of enumerated (and hence limited) federal power." *NFIB*, 132 S. Ct. at 2646 (joint dissent). "State sovereignty is not just an end in itself." *Bond*, 131 S. Ct. at 2364 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). Above all, our federal system exists to "secure[] the freedom of the individual," *id.*, and Bond cannot be punished under a law that unconstitutionally "change[s] … the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S. at 561 n.3; *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring).

III. Only By Reversing The Judgment Below Can The Court Adhere To Precedent And Avoid Difficult Constitutional Questions Of Congressional Power.

A. The government's interpretation of the treaty power is incompatible with longstanding precedent.

The government claims that "well-settled precedent" holds that "federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in

treaty-implementing legislation." BIO 23. That is untrue. Pet. Br. 26-27. For nearly two centuries, the Court has held that the treaty power is subject to "those restraints which are found in [the Constitution] against the action of the government … and those arising from the nature of the government itself, and of that of the states." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Reid*, 354 U.S. at 16 (nothing in the Constitution "intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution"); *Mayor of City of New Orleans v. United States*, 10 Pet. 662, 736 (1836) ("Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."); *see also Downes v. Bidwell*, 182 U.S. 244, 370 (1901); *The Cherokee Tobacco*, 78 U.S. 616, 621-22 (1870); *Doe v. Braden*, 16 How. 635 (1835).

The Court has maintained that "[i]t would not be contended that [the power] 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 … ." *Geofroy*, 133 U.S. at 267. "[T]he framers of the Constitution intended that [the power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty" but only "if not inconsistent with the nature of our government and the relation between the States and the United States." *Holden v. Joy*, 84 U.S. 211, 243 (1872). Put simply, "it is well established 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." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

Holland is not to the contrary. BIO 23-25. That case held that "[i]f the treaty is valid … there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. That sentence is most sensibly read as rejecting what is now termed a facial challenge. Pet. Br. 29. Missouri sued to invalidate the Migratory Bird Treaty Act of 1918, which implemented a treaty between the United States and Great Britain. Pet. Br. 30 n.1. The Court interpreted Missouri's challenge as a "general one": if the treaty and statute were unlawful, it would be on the "general grounds" of interference with existing state law and the state's proprietary interest in wild fowl. *Holland*, 252 U.S. at 432, 434. In the Court's view, however, the treaty's object was of "national interest," and one that could "be protected only by national action in concert with that of another power." *Id.* at 435. In current vernacular, the treaty was facially valid because it had a "plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449. And because (unlike in this case) Missouri did not challenge Congress's authority to implement the treaty under the Necessary and Proper Clause, the Court assumed the law's validity. *See United States v. Bond*, 681 F.3d 149, 156-57 (3d Cir. 2012) ("[T]he Court assumed without further discussion that, because the treaty was valid, so was the implementing statute.").

Moreover, the government is unwilling to embrace the full breadth of its *Holland* argument. Instead, it draws a jagged dividing line with "federalism principles" on one side and "the Constitution's express limitations on government power, such as those found in the Bill of Rights" on the other. BIO 23, 25. That is an unsustainable paradigm. In fact, the government's view seems to be of

recent vintage. Pet. Br. 36-37; *see also* 2 Op. Atty. Gen. 437 (1831) (concluding that the federal government is "under a constitutional obligation to respect [the powers reserved to the States] in the formation of treaties"); Department of State, Circular No. 175 (1955) ("Treaties are not to be used as a device for the purpose of effecting social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.").

Far from reflecting "well-settled precedent," then, the government's disquieting vision of federal power breaks faith with "the compound republic of America." The Federalist No. 51, 387 (J. Madison). The suggested distinction between provisions granting powers and those reserving rights is illusory. The government's theory would mean that treaties enacted before December 15, 1791, superseded those rights later enshrined in the first eight amendments to the Constitution, a period dating back nearly a decade to the ratification of the Articles of Confederation on March 1, 1781. *See supra* at 8 n.2. But it was not the Bill of Rights that shielded these freedoms from federal encroachment. *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.); *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). "The enumeration of powers is also a limitation of powers, because [t]he enumeration presupposes something not enumerated." *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.). "[T]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." The Federalist No. 84, 581 (A. Hamilton).

For this reason, the many powers not granted to the national government by the Constitution—and therefore reserved to the States under the Tenth Amendment—are

of equal stature to those in the Bill of Rights. Pet. Br. 34-36. The Court has made that important point clear *in this case*, *Bond*, 131 S. Ct. 2364, and in many others, *see, e.g.*, *Printz*, 521 U.S. at 935; *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 567; *New York*, 505 U.S. at 177; *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment); *NFIB*, 132 S. Ct. at 2576-78 (Roberts, C.J.); *id*. at 2676-77 (joint dissent). There is no reason to retreat because a treaty is involved. "[T]he Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment." *Id*. at 2676-77 (joint dissent).

B. Whether a treaty may intrude on powers reserved to the States cannot turn on whether it is self-executing or non-self-executing.

Although Congress's ability to implement a non-self-executing treaty is an issue warranting close attention, this case raises an important antecedent issue: "is there any initial power here at all?" *Reid*, 354 U.S. at 70 (Harlan, J., concurring in the result). By resolving the case on treaty power grounds, the Court can decide that issue and leave no doubt that Bond's conduct is beyond the authority of the United States to criminalize—period. By doing so, the Court will ensure that a decision focusing on the Act's validity is not seen as an endorsement of the mistaken idea that self-executing treaties somehow have greater substantive reach than do their non-self-executing counterparts.

There are notable procedural differences between these two instruments. Pet. Br. 31-33. Self-executing

treaties "automatically have effect as domestic law"; they are "equivalent to an act of the legislature" and each "operates of itself without the aid of any legislative provision." *Medellín*, 552 U.S. at 504-05. Non-self-executing treaties have no domestic effect until the full Congress "has … enacted implementing statutes." *Id.* at 505. That said, the substantive scope of the treaty power cannot depend on the procedural channel used to invoke it. The Constitution's text contemplates no such distinction, and the Court, in turn, has found that the Constitution applies equally to treaties and implementing laws alike. *See Reid*, 354 U.S. at 16.

Establishing different regimes would give rise to troubling consequences. Federalism limits would apply when a treaty depends on legislation for domestic effect, as they should, but the President and Senate could evade those limits by making the treaty self-executing. Holding only treaty-implementing laws to constitutional limits would, perversely, allow the President and the Senate to accomplish objects the President, Senate, and House of Representatives together could not.

The President and Senate, for example, could abolish the death penalty, *but see Gregg v. Georgia*, 428 U.S. 153 (1976), commandeer state officials, *but see Printz*, 521 U.S. 898, or establish a national voting age for state and local elections, *but see Oregon v. Mitchell*, 400 U.S. 112 (1970). A Constitution that applies to laws implementing non-self-executing treaties but which leaves self-executing treaties unchecked would be little more than a "parchment barrier[]." The Federalist No. 48, 333 (J. Madison). The Court should deny this argument life by unequivocally holding that Bond's local conduct is beyond the substantive

reach of the treaty power no matter the Convention's path to implementation.

C. Overturning Bond's conviction as beyond the treaty power avoids hard constitutional questions.

To summarize, the Court should resolve this appeal by assuming (but not deciding) that the Convention and Act can cover any substantive power the Constitution vests in the President or Congress and holding that neither one—as applied to Bond—falls within the ambit of those powers. In so holding, the Court could establish that there is at least *some* substantive limitation on the treaty power, dispose of the government's claim that "Congress had independent authority under its commerce and necessary-and-proper clause powers to enact the Act," BIO 13, and avoid having to decide the issue taken for granted in *Holland*. By holding that criminalizing Bond's conduct is beyond the powers vested in the United States, the premise—*i.e.,* that Congress has plenary power under the Necessary and Proper Clause to carry a *valid* treaty into execution—will have been negated.

Conversely, the Court would need to decide a series of thorny constitutional issues to uphold Bond's conviction. First, the Court would need to decide whether a treaty can be predicated on an Article I power, an Article II power, or both, and which one of these powers allows the Convention to turn Bond's local crime into a federal offense. Second, the Court would need to decide if Congress has authority to implement this non-self-executing treaty. That question would require the Court in turn to decide whether Congress can anchor the Act in the Commerce

Clause or if the Necessary and Proper Clause provides it with authority to implement the treaty. These are all difficult constitutional questions that the Court should avoid deciding if possible. *See supra* at 11-14.

The Court can—and should—avoid those issues by overturning Bond's conviction as *ultra vires*. That result is faithful to precedent, avoids creating a schism between self-executing and non-self-executing treaties, and leaves for another day difficult questions of congressional power that need not be resolved here.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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