No. 12-158

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign relations law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of U.S. foreign relations law in this case.

[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

SUMMARY OF ARGUMENT

The Framers crafted a Constitution to enable the United States to act as one nation on the global stage. The Constitution's multiple treaty-related clauses were shaped by the Framers' experience with a failed treaty regime under the Articles of Confederation – a failure due mostly to the resistance of individual States to national treaty commitments undertaken during the Confederation. The Framers responded by empowering the President to make treaties with the advice and consent of the Senate and by endowing Congress with authority to make all laws necessary and proper to carry out the treaty power. In addition, the Framers ordained treaties as the supreme law of the land. In light of this history, this Court has rightly affirmed Congress's authority to ensure the effectiveness of our international treaty obligations over the objections of States. See, *e.g.*, *Missouri* v. *Holland*, 252 U.S. 416 (1920).

The Framers were not inattentive to federalism concerns or unaware that the treaty power could be abused. Indeed, they crafted structural, political, and diplomatic checks precisely to address these concerns. The Constitution's requirement that two-thirds of the Senate advise and consent to a treaty gives the power to a minority of States to prevent ratification of a treaty. The President and Senate, moreover, are subject to discipline at the polls if they use the treaty power to inappropriately expand their power vis-à-vis the States. The United States must also secure the consent of a foreign government to any treaty, thus

adding a diplomatic check to the Constitution's structural and political checks. Finally, it has long been accepted that treaties may not contravene individual rights.

These checks have proven remarkably effective. Traditional Article II treaties of the type at issue in this case are a vanishing breed of lawmaking. During the 112th Congress, the United States has ratified only two Article II treaties. In the previous 13 years, the United States ratified an average of about 15 Article II treaties per year. The vast majority of these treaties required no new implementing legislation. Indeed, congressional-executive agreements have largely displaced traditional Article II treaties over the course of the last seventy years. These congressional-executive agreements do not pose the concern raised by petitioner in this case, because they are limited to the enumerated lawmaking authority of Congress under Article I.

Although the legal issue here is admittedly of considerable academic interest, it is of little continuing real-world importance. The Court should deny the petition for certiorari.

ARGUMENT

I. IT IS LONG-SETTLED THAT THE TREATY POWER PERMITS THE FEDERAL GOVERNMENT TO MAKE AND ENFORCE TREATIES ON MATTERS BEYOND THE ENUMERATED POWERS OF CONGRESS IN ARTICLE I.

Against a troubled history of treaty compliance under the Articles of Confederation, the Framers included multiple provisions in the Constitution to enable the national government to engage in a unified and effective foreign policy. The Framers removed the power to make treaties from the States and granted a unified treaty power to the federal government. They ensured that this power would be effective by granting Congress the authority to implement treaties to the full extent of the national government's treaty power.

A. The Constitution Creates a Unified and Effective Treaty Power.

The Constitution endows our national government with comprehensive authority to make and enforce international treaties. It begins in Article I by removing the power to conclude treaties from the States. It provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation," U.S. Const. Art. I, § 10, Cl. 1, and "[n]o State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign

Power," *id.* Art. I, § 10, Cl. 3. It then grants the entire power to conclude treaties to the President by and with the advice and consent of two-thirds of the Senate. *Id.* Art. II, § 2, Cl. 2. To ensure this power will be effective – and that the courts will enforce the obligations even against contrary state law – the Constitution gives the federal courts "judicial power" over "all Cases * * * arising under * * * treaties made," *id*. Art. III, § 2, Cl. 1, and declares that treaties – like the Constitution and other federal laws – "shall be the supreme Law of the Land," *id*. Art. VI, Cl. 2.

Together, the Constitution's multiple and interlocking provisions regarding treaties promote national sovereignty by giving the U.S. government the authority to engage in a unified and effective foreign policy. This was a deliberate choice. The Framers recognized that only a treaty power that was unified and that encompassed all "external regulations" could ensure the "interest and safety of the community." 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, at 514-515 (Jonathan Elliot ed., William S. Hein & Co., Inc. 2d ed. 1996) (1891) [hereinafter Debates]. Moreover, they placed the Treaty Clause in Article II, making clear that it was not limited to the enumerated powers of Article I, but instead stood as an independent source of authority.

At the Convention, the Framers refused to accept proposals to limit the scope of the federal government's treaty power. To impose such limits, the

Framers concluded, would risk impeding the federal government's ability to conduct foreign relations. See, *e.g.*, 3 Debates at 363 (quoting Peyton Randolph, who argued that "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition"); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1132-1133, 1138, 1145 (2000).

The Framers were keenly aware of the Articles of Confederation's failed treaty-enforcement regime, which had left the country deeply vulnerable. Several States had refused to honor provisions of the Treaty of Paris, which required repayment of debts owed to British creditors. This failure, in turn, led the British to delay withdrawing from forts in the American Northwest, thereby placing the entire country at risk. See Akhil Amar, *America's Constitution: A Biography* 47 (2005) (explaining that "[t]he shirking states did not bear the full cost of their defaults, which put sister states at risk by giving Britain a pretext for further North American interventions"); see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127, 1198-1199 (2000) (stating that the failure to abide by the Treaty of Paris led to the British failure to withdraw militarily).

As Alexander Hamilton observed:

> The treaties of the United States, under the present Constitution [of the Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

The Federalist No. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Framers sought to avoid such self-inflicted wounds by crafting a Constitution that grants the federal government power to enforce treaty obligations even in the face of inconsistent state law. See 3 Debates, *supra*, at 515 (quoting James Madison, who explained that "the supremacy of a treaty" was necessary because otherwise "as far as [state laws] contravene its operation, it cannot be of any effect," which "would bring on the Union the just charge of national perfidy, and involve us in war"). In short, "[t]he treaty powers assigned to the federal government by the Constitution were designed to address specific problems experienced under the Articles of Confederation," and "[t]he clearest problem was that states had

failed to abide by federally negotiated treaties." Swaine, 49 Duke L.J. at 1198.

B. Congress Has Authority to Implement Treaties to the Full Extent of the National Government's Treaty Power.

In light of this historical context for the Constitution's treaty powers, the Framers could not plausibly have intended to bar Congress from implementing treaties by legislation to the full extent of the national government's authority to make such treaties. Indeed, because many treaties are *not* self-executing, the power of Congress to implement treaties by legislation may in some cases be the *only* means to give effect to the nation's treaty obligations. As this Court has made clear, when "'[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'" *Medellín* v. *Texas*, 552 U.S. 491, 504-506 (2008) (quoting *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888)).

Petitioner's core argument – that the subject-matter limits of treaty-implementing legislation must be cabined to the scope of Congress's enumerated powers – runs counter to the Framers' intent to empower the national government to make effective treaties. Thus, this Court has long recognized that Congress's authority under the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with

the advice and consent of the Senate to insert in a treaty with a foreign power." *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901).[2]

In *Missouri* v. *Holland*, 252 U.S. 416 (1920), this Court similarly upheld the authority of Congress to implement in full the national government's treaty power. Confronted with a federal statute that regulated a matter of asserted state concern (bird hunting), the Court nonetheless upheld the statute as a valid exercise of Congress's authority to make effective the terms of an international migratory bird protection treaty. Speaking through Justice Holmes, the Court correctly concluded 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." *Id.* at 432.

The Court in *Holland* also rejected the argument that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Ibid.* It correctly concluded that

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[2] Amici's misleading Question Presented asks whether "the President [can] increase Congress's legislative power by entering into a treaty." Cato Amicus Br. at i. But framing the question in terms of increasing congressional power only makes sense if one assumes that the Constitution does not already grant Congress the power to implement a valid treaty under the Necessary and Proper Clause. This cart-before-the-horse reading of the Clause flies in the face of the Framers' intent because Congress has always been able to implement valid treaties under the Necessary and Proper Clause.

"[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Id.* at 433 (citation omitted). See also *De Geofroy* v. *Riggs*, 133 U.S. 258, 266 (1890) (observing that a treaty may extend to "all proper subjects of negotiation between our government and the governments of other nations").

Despite petitioner's effort to portray *Holland* as a rogue or outlier precedent, *Holland* was fully consistent with earlier authority (*De Geofroy* and *Neely*), and this Court has repeatedly reaffirmed *Holland*'s recognition of a broad and unified national treaty power. See *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (explaining that while "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties,'" "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal'") (quoting *Holland*, 252 U.S. at 433); *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (noting that the "treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations" and that "any conflicting law of the state must yield"); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United

States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.") (quoting *De Geofroy*, 133 U.S. at 266).[3]

Petitioner challenges only an individual application of the Implementation Act, while refraining from a facial challenge to the Act and conceding that the treaty power allows the federal government to regulate chemical weapons. Pet. at 26. Indeed, the Chemical Weapons Convention clearly falls squarely within the treaty power even under the most constrained view of the federal government's authority. The Convention is, after all, a multilateral treaty with 188 parties that seeks to "prohibit[ ] and eliminat[e] * * * all types of weapons of mass destruction" by "exclud[ing] completely the possibility of the use of chemical weapons" in any setting. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, pmbl., *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45. To that end, the Convention seeks to effect the "complete and effective prohibition of the development, production, acquisition,

[3] As discussed below, this Court acknowledged in both *Holland* and *De Geofroy* that the treaty power may not transgress the Constitution's individual rights protections. See Subsection II.A.4, *infra*, for more on rights-protecting checks on the treaty power.

stockpiling, retention, transfer and use of chemical weapons." *Ibid.* It thus advances a core national security interest on which national unity is essential.[4] The Implementation Act's substantive provisions mirror almost exactly the text of the Convention. See Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856. The criminal penalties it imposes are rationally related to the purpose of the treaty as set out in the Convention's Preamble and Article I.[5]

In short, the Framers intended to vest our national government with a broad and unified treaty power and to ensure that the federal government could effectively enforce the nation's international treaty obligations. The courts have long affirmed this understanding of the federal treaty power. The treaty

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[4] Petitioner claims that "[h]ere * * * the federal interest in treaty-compliance is non-existent," Pet. at 26, but addressing the dangers posed by chemical weapons is clearly a "national interest of very nearly the first magnitude," *Holland*, 252 U.S. at 435.

[5] Since the enactment of the Implementation Act in 1998, it appears that federal prosecutors have rarely charged defendants with violations of 18 U.S.C. § 229. A search for "18 U.S.C. s. 229" "18 U.S.C. ss" /5 "229" & DA (AFT 1/1/1998) in the "ALLCASES" database of Westlaw reveals written decisions issued for only 6 unique cases in which the statute has been cited as a charge against a criminal defendant, resulting in 17 total decisions. The apparent infrequency of prosecutions under the statute undermines petitioner's assertion that the Implementing Act signals the federal government's attempt to acquire "a general police power." Pet. at 33.

and implementing law at issue in this case clearly fall squarely within that tradition.

II. THE FRAMERS INSTITUTED MANY CHECKS ON THE TREATY POWER THAT CONTINUE TO EFFECTIVELY PROTECT FEDERALISM VALUES.

The Framers were deeply concerned about protecting the rights of the States as well as individuals against federal overreaching. Indeed, at the debates over the Constitution, some argued against a broad and capacious treaty power for this very reason. See, *e.g.,* Golove, 98 Mich. L. Rev. at 1141-1142, 1147. The Framers ultimately decided to protect the States not by restricting the treaty power to certain enumerated matters, see, *e.g.*, 3 Debates, *supra*, 514-515, but instead through a web of structural, political, and diplomatic checks. The courts have also ensured that treaties do not infringe on individual constitutional rights. These checks are effective, and they make it unnecessary for this Court to intervene to impose new constitutional limitations on the national government's treaty powers.

A. The Constitution Places Structural, Political, Diplomatic, and Rights-Protecting Checks on the Treaty Power.

1. Structural Checks

The Constitution protects federalism by requiring that two-thirds of the Senate consent to a treaty

before the President may ratify it. U.S. Const. Art. II, § 2, Cl. 2. The Framers gave the power to consent to treaties to the Senate precisely because they considered the Senate – in which each State is equally represented – uniquely suited to defend the interests of the States.

James Madison observed in the discussion of the Treaty Clause that "the Senate represented the States alone." 2 The Records of the Federal Convention of 1787, at 392 (Max Farrand ed., 1937). Another Convention delegate argued that "small states would not consent to confederate without an equal voice in the formation of treaties." 4 Debates, *supra*, at 120 (statement of William R. Davie at the North Carolina Ratifying Convention). Similarly, Alexander Hamilton argued that "the senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states. Will not this form a powerful check?" 2 Debates, *supra*, at 317-318 (statement of Alexander Hamilton at the New York Ratifying Convention).

Treaties that require implementing legislation face an *additional* structural hurdle: The treaty must not only win the consent of two-thirds of the Senate, but the implementing legislation must also pass through both the Senate and the House of Representatives, as well as be subject to a potential presidential veto. Indeed, if congressional enactments are entitled to a

presumption of constitutionality,[6] that presumption ought to apply all the more to instances in which the legislative and executive branches have acted not once, but twice.[7]

2. Political Checks

In addition to the structural checks specific to the Treaty Clause, the federal government's treaty-making is subject to significant political checks –

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[6] Because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984), the "Court[s] do[ ] and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

[7] This check is so powerful that proponents of a series of proposed constitutional amendments in the 1950s, known collectively as the Bricker Amendment, aimed to reduce the scope of the federal government's treaty power by requiring that a treaty that altered or abridged federal or state law could become effective only after Congress passed an act or joint resolution to that effect "and then only to the extent that, Congress shall so provide by act or joint resolution." S.J. Res. 130 § 3, 82nd Cong. (1952) (cited in Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 222 (1988)). President Eisenhower regarded that Amendment as unduly restrictive of the treaty power; the Amendment was, under his leadership, defeated. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1303 (2008).

most important, re-election. A President who might attempt to abuse the treaty power to expand the federal government's authority at the expense of the States can be disciplined at the polls. Indeed, the Framers made explicit their reliance on the President's nation-wide constituency to keep him in check. George Nicholas of Virginia argued: "The consent of the President is a very great security. He is elected by the people at large. He will not have the local interests which the members of Congress may have. If he deviates from his duty, he is responsible to his constituents." See 3 Debates, *supra*, at 240 (statement of George Nicholas at the Virginia ratifying convention).

Moreover, one-third of the Senate faces reelection every two years. As a consequence, the Senate may be held accountable for any abuse of the treaty power, not through the courts but through the political process. This was, again, by design. James Madison explained that the Senate's biennial turnover meant that a President seeking to abuse the treaty power could not long "seduce a part of the Senate to a participation in his crimes * * * ." *Id.* at 516 (statement of James Madison at the Virginia ratifying convention).

3. Diplomatic Checks

Yet another check on the exercise of the treaty power is the necessity of obtaining the consent of a foreign government treaty partner. As Thomas Jefferson noted, no Article II treaty could exist without the "consent of a foreign nation." Thomas Jefferson, *A*

Manual of Parliamentary Practice: For the Use of the Senate of the United States (1812) § 52, reprinted in *Jefferson's Parliamentary Writings* 353, 420 (Wilbur S. Howell ed., 1988). Implicit in this recognition is the fact that the treaty power is effectively limited to those matters for which the U.S. government can find a willing foreign state partner.

It would be highly unlikely for a foreign state to enter into a treaty whose true purpose was to circumvent the limits imposed on the U.S. federal government's legislative power. Suggestions to the contrary lack any empirical support in centuries of treaty-making practice. See Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 Wayne L. Rev. 841, 862 & n.99 (2001) ("Why would the negotiating partner simply do the U.S. treaty-maker a favor?"). And, indeed, in this case, there is no suggestion that the United States' treaty partners entered into the Convention for any reason other than to secure their mutual interests.

The vast majority of foreign states with whom the United States enters treaties have substantial political limits on their own treaty-making authority. A recent empirical review of the treaty-making process of almost every country in the world concluded that "most states require that international law be made through a simple or absolute majority vote in the legislature." Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1272 (2008).

4. Rights-Protecting Checks

While these structural, political, and diplomatic checks protect against federal encroachment upon the prerogatives of the States, the courts have occasionally intervened to protect individual rights. It has always been clear that under the U.S. Constitution, treaties could not "alienate any great, essential right." 3 Debates, *supra*, at 514. The courts have consistently upheld this principle.

"It would not be contended," this Court wrote in 1890, that the treaty power "extends so far as to authorize what the constitution forbids." *De Geofroy*, 133 U.S. at 267. Treaties may not "contravene any prohibitory words to be found in the Constitution." *Holland,* 252 U.S. at 433. There is an important distinction between the violation of affirmative constitutional guarantees and the violation of "some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 434. The former is firmly prohibited, while the latter does not constrain the treaty power, *id.* at 433-434, because "[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." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (holding that an international

agreement could not override an accused U.S. citizen's constitutional right to trial by jury).[8]

B. The Existing Checks on the Treaty Power Effectively Protect Federalism.

The empirical record demonstrates the effectiveness of the treaty system the Framers created, because it takes no less than an "extraordinary level of consensus" to conclude a traditional Article II treaty from negotiation through ratification. Hathaway, 117 Yale L.J. at 1312. Today, Article II treaties make up a vanishingly small portion of the international

[8] Seizing upon cases in which courts were confronted with intrusions upon individual rights, petitioner mistakenly characterizes the lower courts as "confus[ed]" by the proper scope of the treaty power. Pet. at 17. But the cases petitioner cites all stand for the undisputed proposition – not even at issue in this case – that a treaty may not intrude upon a citizen's individual constitutional rights. In *Charles T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.,* 651 F.2d 800, 813 n.20 (1st Cir. 1981), the First Circuit affirmed that "neither the President nor Congress may exercise their powers so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations." In *Plaster* v. *United States,* 720 F.2d 340, 348 (4th Cir. 1983), the Fourth Circuit similarly affirmed that "the judiciary has jurisdiction to ensure that the Executive's power to extradite is not being exercised so as to violate individual constitutional rights" under the Due Process Clause. And in *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1309 (9th Cir. 1982), the Ninth Circuit concluded that a treaty "must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution," including the rights of due process, equal protection, and the right to travel.

agreements concluded by the United States (and those that require implementing legislation are still fewer). Moreover, when Article II treaties *are* ratified, the political branches take pains to excise or modify the treaty obligation to accommodate federalism principles. And where advisable, the federal government ordinarily accommodates federalism by tempering its enforcement strategies. By design, all of this federalism accommodation occurs without requiring court involvement, and these trends all point to the *de minimis* practical importance of the Court's intervening to resolve the legal issues in this case.

1. Article II Treaties Make Up a Vanishingly Small Portion of U.S. International Agreements.

Petitioner claims that "the question presented raises an especially important and recurring issue," Pet. at 16, and that "the need to enforce constitutional restraints on the treaty power is all the more pressing" because of a "recent trend[ ]" involving "the expanding scope and number of international treaties." Pet. at 32. Nothing could be further from the truth.

In the modern era, traditional Article II treaties have been almost entirely supplanted by congressional-executive agreements.[9] The number of treaties

[9] Congressional-executive agreements are authorized by both houses of Congress through the ordinary legislative

(Continued on following page)

approved each year has remained roughly the same since the Founding of the country despite an immense increase in other forms of international lawmaking beginning in the 1940s. Hathaway, 117 Yale L.J. at 1287-1288. In the last decade of the twentieth century, executive agreements – the vast majority of which were congressional-executive agreements – outnumbered Article II treaties by a ratio of approximately ten-to-one. *Id.* at 1287 ("249 treaties and 2857 executive agreements [were] concluded during this period.").

More recently still, from 1997 to 2010, the federal government entered into about 15 treaties on average per year.[10] The United States has ratified only two treaties during the 112th Congress: a Mutual Legal Assistance Treaty with Bermuda and an Investment Treaty with Rwanda. U.S. Senate, *Treaties Approved by the Senate During The Current Congress* (Sept. 26, 2011), http://www.senate.gov/pagelayout/ legislative/one_item_and_teasers/trty_rtf.htm (last visited Sept. 30, 2012).

Furthermore, only a small fraction of those Article II treaties require new implementing legislation. The vast majority of Article II treaties are either

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process. Unlike Article II treaties, their scope is limited to Congress's enumerated powers under Article I. See Hathaway, 117 Yale L.J. at 1328-1329, 1339.

[10] See Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 Cornell L. Rev. (forthcoming 2013) (manuscript at 57), http://ssrn.com/abstract=2155179.

self-executing or may be implemented using existing statutory authority. Between 1989 and 2010, only about one of ten Article II treaties expressly required new implementing legislation.[11]

The historical record shows, moreover, that the Senate is much more likely to reject treaties that might implicate federalism concerns. Of the 14 submitted treaties that the Senate did not approve between 1997 and 2010, 11 were multilateral agreements, a category of treaties often cited as raising particular federalism concerns. See Hathaway et al., 98 Cornell L. Rev. (manuscript at 64). Because of the difficulty of securing approval of an Article II treaty that implicates areas of traditional state authority, the executive branch does not submit many such treaties to the Senate. Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327, 1363 (2006) ("executive self-restraint on federalism grounds has become an increasingly visible feature of U.S. treaty-making").

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[11] Analysis of treaties submitted from 1989 to 2004 was conducted using Christian L. Wiktor, *Treaties Submitted to the United States Senate: Legislative History, 1989-2004* (2006). Analysis of treaties submitted from 2005 to 2010 was conducted by searching the text of each individual treaty, along with the Message from the President of the United States, Letter of Transmittal, and Letter of Submittal for each treaty, for the words "self-executing" or "implementing." These documents are available online at Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Sept. 30, 2012).

2. The Political Branches Address Federalism Concerns by Modifying Treaty Obligations.

The political branches regularly modify the content of treaty obligations to address federalism concerns. "Throughout U.S. history, the treatymakers have used their conditional consent powers to guard against undue intrusions on state prerogatives * * * [t]he federalism clauses attached by the treatymakers to the U.S. ratification of modern human rights treaties reflect this tradition." Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent,* 149 U. Pa. L. Rev. 399, 409-410 (2000). The tailoring of U.S. treaty obligations to protect States' prerogatives occurs not only through modification of the treaty's text during negotiations but also through the addition of "Reservations, Understandings, or Declarations" (RUDs). A typical federalism RUD distributes implementation authority among federal, state, and local jurisdictions. Representative language can be found in reservations asserted by the United States to several major human rights treaties.[12] See Hathaway et al., 98 Cornell

[12] See, *e.g.*, International Covenant on Civil and Political Rights, Apr. 2, 1992, S. Treaty Doc. No. 95-20; International Convention on the Elimination of All Forms of Racial Discrimination, June 21, 1994, S. Treaty Doc. No. 95-18; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20.

L. Rev. (manuscript at 63-64) (describing federalism-oriented RUDs commonly placed by the United States on major human rights treaties).

Indeed, of the twenty-five international human rights treaties that the United Nations has identified as "core" treaties, the United States has signed 20 (80%), but the President has only submitted 17 (68%) to the Senate. *Id.* at 58. The Senate gave its advice and consent to only 12 (48%), placing explicit federalism RUDs on four. *Ibid.* Of the eight core treaties that the United States has joined without federalism RUDs, six involve international matters like armed conflict or genocide that are unlikely to raise federalism issues. *Ibid.* The remaining two were specifically tailored to avoid any conflict with state interests.[13] In addition, the transmittal package for the Convention on the Rights of Persons with Disabilities, which is currently under consideration in the Senate, includes an express federalism RUD. Letter of Transmittal, UN Convention on the Rights of Persons with Disabilities, S. Treaty Doc. No. 112-7, at 1 (2012),

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[13] Protocol Relating to the Status of Refugees art. VI(b), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (the federal government must make a "favourable recommendation" to the States, but need not adopt legislation to ensure state compliance); United Nations Treaty Collection, *United Nations Convention to Combat Desertification* ("no changes" to existing laws "will be required to meet [U.S.] obligations under . . . the Convention"), http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTONLINE&tabid=2&mtdsg_no=XXVII-10&chapter=27&lang= en#EndDec (last visited Sept. 30, 2012).

http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf.

3. The United States Ordinarily Accommodates Federalism Values by Tempering Its Enforcement Strategies.

When a treaty obligation of the United States involves matters traditionally subject to state regulation, the United States frequently accommodates federalism concerns by relying on state implementation. Hathaway et al., 98 Cornell L. Rev. (manuscript at 72-75) (describing "bottom-up federalism"). It has done so without court intervention, on the basis of the political branches' judgment about the best way to carry out the country's treaty obligations.

For example, the United States frequently relies on existing state laws to enforce its obligations under the two optional protocols to the Convention on the Rights of the Child to which it is a party. Hollis, 79 S. Cal. L. Rev. at 1382-1383. The Convention on the Form of an International Will has been implemented thus far exclusively through state implementing legislation. See Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties*, 73 Mo. L. Rev. 1063, 1067 (2008).

In each case in which the United States has relied on States to implement treaty obligations, it has done so not because a court *required* it to do so, as petitioner would have it. Pet. at 26. It was instead

because the political branches decided that this was an appropriate means of effectively enforcing the treaty, consistent with federalism principles.

* * *

In short, a web of structural, political, diplomatic, and rights-protecting checks already exist to limit the application of the federal government's treaty power. These checks have been extraordinarily successful in constraining the treaty power and accommodating federalism concerns, while allowing for the flexibility the federal government needs to properly handle foreign affairs.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari in this case.

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