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 OF FORMER STATE DEPARTMENT LEGAL ADVISERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici are former Legal Advisers to the United States Department of State.[2] The signatories to this brief have collectively served for more than 20 years under both Democratic and Republican Presidents. During that period, *amici* were responsible for the review and ratification of more than 200 treaties. *Amici* have personally testified before the Senate in support of numerous treaties.

The Legal Adviser is the highest-ranking officer in the executive branch with specific responsibility for the legal aspects of treaty-making, including negotiation, ratification, and implementation. Especially relevant here, the Legal Adviser is charged with determining whether the United States has an appropriate domestic legal framework to become a party to a proposed treaty. "Any draft of a proposed treaty or agreement, or any action regarding the negotiation, conclusion, ratification or approval, or termination, as well as the existence, status, and application, of any international agreement to which the United States is or may become a party, should be cleared with the Office of the Legal Adviser." *Guidelines for Concluding International Agreements*, 11 Foreign Affairs Manual § 713.2 (2006). Moreover, the Legal Adviser "consults periodically with Congress on the full range of treaty issues," 11 Foreign Affairs Manual § 751, and the Legal Adviser's Office of Treaty

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

[2] A list of *amici* is contained in the appendix.

Affairs serves as the U.S. depository for multilateral agreements. *See* Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 Am. J. Int'l L. 633, 640, 648-54 (1962).

Amici thus are particularly well-suited to address the legal and practical implications of the issues presented in this case. The questions before the Court can only be properly answered with an understanding of the process for making and joining treaties, the role treaties play in American law and policy, and the compelling national interests served by compliance with international agreements.

Amici will focus on how petitioner's arguments affect the President's and Congress's treaty powers and will not address other questions, such as how the particular treaty and its implementing legislation should be interpreted and applied here.

SUMMARY OF ARGUMENT

Citing the "structural guarantees of federalism," petitioner asks this Court to prohibit Congress from implementing treaties that, in her view, affect matters of purely "local" concern. Petitioner attempts to reassure the Court that limiting Congress's implementation power in this way need not impair the United States' power to make treaties. But this is a false assurance. Adopting petitioner's proposed rule would significantly complicate the federal government's treaty powers and hamper the President's management of foreign affairs.

The Constitution reflects the Framers' recognition, based on experience under the Articles of Confederation, that the power to enter and implement treaties

must rest with the national government in order for the United States to be an effective sovereign on the international stage. Those same imperatives pertain today. The power to make treaties and the need to implement them are inherently intertwined. If Congress cannot fully implement a validly executed treaty, the United States may be unable to honor its international commitments. This would undercut the United States' foreign policy priorities, diminish the President's leverage to pressure nations to comply with their own obligations, and injure the United States' credibility as a world leader—not to mention undermine the efficacy of the treaty itself.

Petitioner's position also would hinder the President's ability to negotiate new treaties that may serve the national interest. If our treaty partners perceive that the United States cannot guarantee enforcement of a treaty that may regulate "local" conduct, they may walk away from the negotiating table or try to extract otherwise unwarranted concessions.

Nor is petitioner's proposed limitation on the treaty power necessary to protect state interests. The treaty-making process is already designed to address federalism concerns, including through the requirement that two-thirds of the Senate give its advice and consent. Both the executive and legislative branches account for federalism concerns during the treaty-making process. The President tailors negotiations to address important domestic policies. Once an agreement is reached, the President, the Senate, or both can set forth formal reservations, understandings, and declarations to clarify how the treaty will be implemented in the United States consistent with our federal system. Where U.S. ratification of a treaty requires implementing legislation, Congress may pass

a law that is necessary and proper to implement the treaty's terms under domestic law.

As a result of the careful attention paid to federalism in the treaty-making process, the federal government only joins treaties that strike the appropriate federal-state balance. A nebulous rule that limits the treaty power to certain subject areas would call existing treaties into question and prevent the United States from joining future treaties that advance national interests, without providing additional protections for federalism.

The debate over Congress's power to implement treaties that touch "local" concerns did not arise for the first time in petitioner's brief. Efforts to limit that power have been made and rejected at various points throughout the nation's history. Most notably, when Congress failed to adopt the Bricker Amendment in the 1950s, it rejected the type of limitation that petitioner proposes because of the undesirable consequences that would result. Then-President Eisenhower vehemently objected that the Bricker Amendment would "restrict the authority that the President must have, if he is to conduct the foreign affairs of this Nation effectively." Dwight D. Eisenhower, *The President's News Conference of March 26, 1953*, Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953, 132 (U.S. Gov't Printing Office 1954). This Court should not read into the Constitution a new limitation on the federal government's treaty power, especially where Congress has refused to amend the Constitution to add that limitation.

ARGUMENT

The treaty power is a central part of the President's constitutionally vested "lead role in foreign policy." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citation omitted); *see also Missouri v. Holland*, 252 U.S. 416, 435 (1920). The Constitution gives the President power "to make treaties," U.S. Const. art. II, § 2, cl. 2, that are capable of confronting a "variety of national exigencies." The Federalist No. 23, at 59 (A. Hamilton) (Roy P. Fairfield ed., 1981). While there may be superficial appeal to preventing Congress from implementing treaties that affect what petitioner believes to be purely "local" conduct, such a rule would be unworkable. It would frustrate the federal government's exercise of the treaty power, complicate the President's management of foreign affairs, and hobble the President's efforts to pursue the national interest on behalf of U.S. citizens.

I. THE COURT SHOULD NOT IMPOSE NEW CONSTRAINTS ON THE FEDERAL GOVERNMENT'S POWERS TO NEGOTIATE AND IMPLEMENT TREATIES

A. Restricting Federal Implementation Would Impair the United States' Ability To Comply with Its Obligations and Would Complicate the President's Ability to Manage Foreign Affairs

1. The national government is responsible for the United States' compliance with all treaties. The Framers of the Constitution provided a centralized treaty power specifically to ensure that the United States would be capable of implementing and complying with its international obligations. *See, e.g.*, The Federalist No. 22, at 56 (A. Hamilton) (Roy P.

Fairfield ed., 1981) (without a centralized treaty power, "[t]he 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"); The Federalist No. 42, at 264 (J. Madison) (Clinton Rossiter ed., 1961) (The United States must "be one nation . . . in respect to other nations.").

Petitioner's brief ignores the important role of treaty compliance in the President's management of foreign affairs. Unless the federal government has ample authority to ensure compliance with treaties, the President cannot effectively conduct foreign policy and present the United States as "one nation . . . in respect to other nations." *Id.*

2. In order to fulfill its international obligations, the federal government must have the ability to implement treaties. Many treaties are not self-executing. States may fail to pass or enforce necessary legislation, and the federal government cannot require states to do so. As a result, the interest of full compliance sometimes compels the United States to implement a treaty through federal measures.

Nowhere is the importance of federal legislation more evident than in U.S. efforts to combat the international drug trade. Stopping the sale of illicit narcotics has been among the United States' most important foreign relations priorities for decades. In a concerted effort to limit the international production and supply of certain dangerous drugs, the United States joined the 1961 Single Convention on Narcotic Drugs, as amended, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204; the 1971 Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725,

1019 U.N.T.S. 174; and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, May 20, 1988, 1582 U.N.T.S. 95. Congress enacted the Controlled Substances Act (CSA), Pub. L. No. 91-513, 84 Stat. 1236 (1970), in large part to implement U.S. obligations under the 1961 Convention, *see* 21 U.S.C. § 801(7). Since then, Congress periodically has enacted new legislation to implement other obligations under subsequent conventions related to narcotics. *See, e.g.,* Chemical Diversion and Trafficking Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The United States relies on these federal statutes to remain in compliance with international agreements.

Federal implementing legislation is particularly important in light of recent state referenda decriminalizing marijuana, a drug that is outlawed by international conventions. *See* U.N. Office on Drugs and Crime, Cannabis: A Short Review 22 (2012), *available at* https://www.unodc.org/documents/drug-prevention-and-treatment/cannabis_review.pdf. The head of the International Narcotics Control Board, which administers the drug conventions, has warned that state referenda may be inconsistent with the United States' treaty obligations. *See* Int'l Narcotics Control Bd., Report of the International Narcotics Board 11-12, 116 (2012), *available at* http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E.pdf. Thus, federal implementing legislation serves as an essential backstop that saves the United States from non-compliance with its treaty obligations. Were the United States to fail to comply with the international narcotics conventions that it has long championed, the United States would have little basis to complain if other countries failed to satisfy their own obligations.

Criminal drug laws are not the only area where the United States depends upon federal law to ensure treaty compliance with respect to conduct that may generally be considered a matter of state law. For example, federal legislation in the realm of family law is necessary to effectuate U.S. participation in The Hague Convention on Civil Aspects of International Child Abduction. *See infra* Part II.B.

Petitioner is mistaken that the Vienna Convention on Consular Relations (VCCR), Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 (1969), serves as a "perfect example" of a treaty that may rely entirely upon states for compliance. State non-compliance with the VCCR—which requires federal, state, and local officials to inform foreign nationals detained in the United States of their right to have a consular officer of their home country notified of their detention—actually has been a source of significant international tension, leading to three claims against the United States before the International Court of Justice and additional protests from foreign states. Federal legislation therefore may be the only way to implement U.S. obligations under the VCCR. *See* S. 1194, 112th Cong. (2011); *see also Medellin*, 552 U.S. at 525-26 ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."). In other words, where a "national interest of very nearly the first magnitude is involved . . . [i]t is not sufficient to rely upon the States." *Holland*, 252 U.S. at 435.

3. Many U.S. treaty obligations require not only federal implementing legislation but also federal enforcement. The Convention on the Prohibition of the Development, Production, Stockpiling and Use

of Chemical Weapons and on their Destruction ("Chemical Weapons Convention"), Jan. 13, 1992, 1974 U.N.T.S. 45, 32 I.L.M. 800, is one such example. Where states decline to prosecute the use of chemical weapons, the federal government may need to enforce the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, in order to protect national interests. Just as drug sales may pose national or international concerns, so may the use of chemical weapons. And the greater the opportunity for individuals to use chemical weapons with impunity, the greater the opportunity for terrorists to learn about and use chemical weapons themselves.

Moreover, treaty compliance is a two-way street. If the use of chemical weapons goes unenforced here in the U.S., then the nation loses critical leverage should Pakistan, for example, decline to fulfill its obligations under the Chemical Weapons Convention to investigate and prosecute arguably "local" conduct in its autonomous tribal regions. The same is true for numerous other important national security treaty implementing regimes. *See, e.g.*, 18 U.S.C. § 175(A) (implementing the Biological Weapons Convention).

Conduct that may appear to be purely "local" when viewed in isolation can actually have a much broader impact. The federal government is better positioned than the states to appreciate the national and international consequences of certain law enforcement actions. And it is the political branches—not the courts—that have the competence to set national and foreign policy.

B. Limiting Federal Power To Implement a Vague Category of Treaties Would Constrain the President's Ability To Negotiate an Ever-Changing Array of Important International Agreements

1. A new rule rendering the federal government powerless to implement treaties that touch on traditionally "local" behavior would impose significant and unworkable constraints on the President's negotiating power. The President needs flexibility in the negotiation of treaties. That is why the Constitution's broad language provides the President maximum leverage and reflects the "concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quotation omitted); *see* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L. J. 1127, 1201-1202 (2000) (describing the Founders' "overwhelming consensus on the need to maximize U.S. leverage through unified, centralized treaty negotiations").

To use this leverage in negotiations, the President and his representatives must not approach the bargaining table with their hands tied. See The Federalist No. 64, at 189 (J. Jay) (Roy P. Fairfield ed., 1981) (explaining that broad presidential treaty power would "tend to facilitate the attainment of the objects of the negotiation"). As in any negotiation, perceived constraints on a party's bargaining power limit that party's ability to optimize its outcome.

Many factors influence a negotiator's leverage. For instance, a nation's reputation for compliance based on past actions affects its bargaining position When a

state with a history of compliance problems "seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions . . . . If there is enough suspicion, potential partners may simply refuse to deal with the state." Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579, 596 (2005).

Perceived constraints can diminish U.S. bargaining power in other ways as well. For example, potential treaty partners occasionally have asked for additional assurances from the United States to compensate for fears that the federal structure of the U.S. government will complicate treaty implementation. *See* Brian R. Opeskin, *International Law and Federal States*, *in* International Law and Australian Federalism 1, 3 (Brian R. Opeskin & Donald R. Rothwell eds., 1997). At times, these fears may prove insurmountable and derail negotiations. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 442, 478 (2003).

Other nations closely monitor legal developments in the United States relating to treaty implementation, including the efforts of the President and Senate to account for federalism concerns during negotiation and advice and consent. *See infra* Part II. Treaty partners also follow U.S. judicial decisions affecting U.S. treaty obligations, such as the decision of this Court in *Medellin*.

This Court should not impose a new rule that feeds foreign perceptions that the federal government cannot enforce U.S. treaty obligations. The resulting uncertainty could severely undercut the U.S. bargaining position on the international stage.

2. The President must maintain flexibility to negotiate treaties on a broad range of subjects. The Constitution envisions a treaty power capable of addressing diverse and unforeseeable international problems. *See* 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, 514 (Jonathan Elliot ed., 1891) (J. Madison) ("I do not think it possible to enumerate all the cases in which such external regulations would be necessary."). The President must have flexibility commensurate with that of treaty negotiating partners and not be singularly hamstrung when entering into international agreements. As the Court stated in *Holland*, "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." 252 U.S. at 433 (citation and internal quotation omitted).

Preserving the President's flexibility is especially important given the dynamic scope and substance of treaties. The Framers understood that treaties could affect domestic issues involving local matters—indeed, the early nation's inability to ensure treaty compliance animated the Article II treaty power and the Supremacy Clause. *See* Res. Br. 29-30. Over time, treaties have come to play an even broader role in domestic law. Modern treaties establish limits on air pollutants, *see* Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29; create reciprocal protections for foreign investors, *see* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S. Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993); establish rules governing the recognition of foreign driver's licenses, *see* Convention

on Road Traffic, art. 24(1), Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22; regulate the treatment of endangered species, *see* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; and combat dangerous crime syndicates, *see* U.N. Convention Against Transnational Organized Crime (2005), Nov. 15, 2000, 2237 U.N.T.S. 343.

The role that treaties play in U.S. foreign relations and domestic law will continue to evolve as the country encounters new challenges. A vague "local" or "federalism" limit on the treaty power could severely limit the United States' ability to meet such challenges.

3. Congress has rejected the constitutional limitation petitioner seeks precisely because of the drastic effects that the limitation would have on the President's treaty power and conduct of foreign policy. In the 1950s, Senator John Bricker proposed an amendment to the Constitution providing that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." Duane Tananbaum, The Bricker Amendment Controversy, A Test of Eisenhower's Political Leadership 91-92 (1988). Proponents of the amendment were motivated, along the same lines as petitioner, by fears that treaties would extend to local laws regulating "all education, including public and parochial schools[,]. . . all matters affecting civil rights, marriage, divorce, etc, [and] all our sources of production of foods and the products of the farms and factories." Frank E. Holman, The Story of the "Bricker Amendment" 38 (1954).

President Eisenhower vehemently opposed the "Bricker Amendment" and related proposals, on the

ground that such a limitation "*would work to the disadvantage of our country, particularly in making it impossible for the President to work with the flexibility that he needs in th[e] highly complicated and difficult*" world of foreign affairs. Dwight D. Eisenhower, *The President's News Conference of March 26, 1953*, Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953, 132 (U.S. Gov't Printing Office, 1954) (emphasis added). He further warned that the proposals would "shackle the federal government so that it is no longer sovereign in foreign affairs." Letter from President Eisenhower to Majority Leader Knowland (Jan. 25, 1954) cited *in* "Foreign Policy," Congressional Quarterly Almanac 10 (1954). In light of these concerns, the Bricker Amendment never made it out of the Senate.

This Court should not read into the Constitution what would effectively be an amendment that was already considered and rejected by the political branches.

II. ADDITIONAL RESTRICTIONS ON THE POWER TO MAKE AND IMPLEMENT TREATIES ARE NOT NECESSARY TO PROTECT FEDERALISM

Petitioner argues that "absent meaningful limits" on Congress's implementation power, "nothing would stop Congress from invoking treaties to override large swathes of state and local law." Pet. Br. 38. Petitioner's assertion—which is unsupported by two hundred years of experience—is intended to scare the Court into limiting the treaty power in a way that is neither necessary nor appropriate. The President and Senate follow a careful process to make treaties that protect domestic interests, including federalism.

Through this process, the federal government successfully has maintained an appropriate federal-state balance.

A. The Executive Branch, in Consultation with the Senate, Employs a Rigorous Process to Negotiate and Join Treaties that Benefit the United States and Protect Domestic Interests

1. Treaties are "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and a significant undertaking in international law. As such, the treaty-making process involves numerous checks on a treaty's potential political, practical, and legal impact. These checks most notably include, but are not limited to, the need for the advice and consent of two-thirds of the U.S. Senate—a requirement specifically designed to account for our federal structure of government.

Within the Executive Branch, treaty-making must follow a rigorous vetting process. A critical part of this process is the formal procedure established by the State Department's Circular 175 ("C-175"). C-175 "facilitates the application of orderly and uniform measures to the negotiation, conclusion, reporting, [and] publication" of treaties. *Guidelines for Concluding International Agreements*, 11 Foreign Affairs Manual § 721 (2006).

Through the C-175 process, the State Department must authorize both the negotiation and the signing of a treaty. Neither the negotiation nor the signing of a treaty can be authorized by the Secretary of State without a comprehensive legal memorandum addressing all legal and political issues associated with the proposed treaty. *See* 11 Foreign Affairs Manual

§§ 724.3(h), 731.2-1. This process ensures that negotiators appreciate the full range of consequences from their actions.

In its review process, the State Department coordinates with other concerned federal agencies. For example, the State Department works closely with the Department of Defense on arms control treaties and the Department of Justice on treaties that carry criminal law requirements, as the Chemical Weapons Convention does.

Although it is the President who "alone negotiates" international agreements, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the executive branch, as a matter of sound practice, consults with the Senate throughout the negotiation process. Consultation occurs through regular briefings of Senate staff, and sometimes Senators themselves, by the Legal Adviser's Office or others in the executive branch. This interactive process allows Senators to share concerns about a treaty's potential impact on domestic law generally or on their states in particular.

U.S. negotiators bear in mind existing domestic law and whether any difficult changes or additions to domestic law will be necessary to implement a treaty. If federal implementing legislation will be required, as would typically be the case where criminalization is part of a treaty, the implementing legislation itself is often developed long before ratification. Indeed, the State Department has a policy of not ratifying a treaty unless existing U.S. law is sufficient to implement the treaty or until appropriate implementing legislation is enacted.

2. Once a treaty is signed, the State Department conducts another review and determines whether to recommend that the treaty be submitted by the President to the Senate for advice and consent. All concerned executive branch departments, including the Justice Department, have an opportunity to review the signed treaty, raise any issues regarding its scope, and assess whether any implementing legislation will be needed before the U.S. can become a party. Working with others in the U.S. Government, the Legal Adviser's Office prepares a detailed article-by-article analysis of the treaty for the President and for transmittal to the Senate.

During this process, the Legal Adviser's Office recommends whether the United States should include with its instrument of ratification any reservations, understandings, or declarations ("RUDs"). Reservations are formal legal caveats that modify a party's international legal obligations. *See* Vienna Convention of the Law of Treaties (VCLT) arts. 2, 19-23, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (United States Notes). "Understandings are interpretive statements that clarify or elaborate provisions but do not alter them." Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. No. 106-71, at 11 (2001). Declarations state a Party's position on general matters rather than on specific provisions and, like understandings, may set forth how the federal government intends to implement a treaty. In addition to RUDs, Provisos—which are not included in the final instruments of ratification provided to treaty partners—may clarify the United States' position on an issue for domestic purposes.

If and when a treaty will be transmitted to the Senate is left entirely to the President. The President may transmit a treaty, along with a transmittal package containing the executive branch's analysis of the treaty, shortly after submission to him by the Secretary of State. He may postpone transmittal for several years. Or he may even decide not to transmit it at all.

3. Once transmitted to the Senate, treaties receive extensive review. A supermajority of the Senate may approve a treaty "as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval." Treaties and Other International Agreements, S. Prt. No. 106-71, at 3.

A treaty submitted by the President to the Senate is a public document and is referred to the Senate Foreign Relations Committee for action. The Committee carefully considers the treaty's legal and policy implications. *See* Senate Rule XXV. The Committee reviews the President's transmittal package, receives briefings from the State Department and other agencies, holds one or more hearings with expert witnesses from the President's Administration or elsewhere, and submits formal "questions for the record" to hearing witnesses or other Administration officials.

When the Committee is prepared to recommend that the full Senate consider a treaty, it develops a Resolution of Advice and Consent. The Resolution may include additional RUDs as a condition to ratification. Those RUDs may undergo further changes when before the full Senate. Although the Senate considers RUDs and amendments by simple majority, the final determination of advice and consent—

whether to approve, reject, or seek modification of the treaty—may be made only by a two-thirds supermajority vote. *See* U.S. Const. art. II, § 2, cl. 2.

If a treaty receives advice and consent, the Senate returns it to the President, who makes the final decision whether the United States will ratify it. The President may not remove RUDs added by the Senate. Furthermore, the Legal Adviser's Office will not concur in the exchange or deposit of the instruments of ratification "until it has determined U.S. domestic law comports with whatever international law obligations the treaty imposes." Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 Am. Soc'y Int'l L. Proc. 412, 413 (2008).

Once ratified, a treaty binds the United States as a matter of international law. *See* VCLT art. 16, 1155 U.N.T.S. 331. With respect to domestic law, some treaties are self-executing and some are not. The provisions of self-executing treaties are judicially enforceable upon ratification. Non-self-executing treaties, on the other hand, require either existing or new legislation to be judicially enforceable in the U.S. For example, implementation of the Chemical Weapons Convention depended on domestic criminal laws prohibiting certain conduct. In the case of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, the federal government formulated implementing legislation prior to ratification, and the Convention's instrument of ratification was deposited only after the legislation went into effect. 136 Cong. Rec. S17,486-01 (daily ed. Oct. 27, 1990); *see* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 463 (1994) (codified at 18 U.S.C.

§§ 2340, 2340A). When new laws are required, the President or Congress proposes implementing legislation, which both houses of Congress must pass and the President must sign through the ordinary legislative process.

4. The judiciary, of course, also may serve as a check on the abuse of treaty power. The judiciary may review implementing legislation and narrowly construe or even strike down legislation that is not necessary and proper to implement a treaty that has been ratified by the United States.

B. The Federal Government Exercises the Treaty Power with Full Regard for the Laws and Interests of the States

1. The new "meaningful limits" that petitioner asks this Court to impose on the treaty power are wholly unnecessary. The executive and legislative branches already undertake great efforts to account for domestic laws and policies—including federalism—throughout the treaty-making and implementation process.

As discussed, the State Department's approval process requires that all relevant legal issues be considered. *See supra* Part II.A.1; *see also* 11 Foreign Affairs Manual §§ 722(1), 723.2-1. These considerations guide the negotiating process and may cause negotiators to avoid politically sensitive subject areas or alter potential treaty terms. For instance, the executive branch may decide to draft treaty terms in a way that minimizes federalism concerns, especially where doing so will help secure the two-thirds vote of the Senate required for advice and consent. *See, e.g.,* Letter of Transmittal of Pres. Harry S. Truman, Convention on Road Traffic, May 3, 1950 (discussing

how the Convention on Road Traffic "makes allowance for the Federal-state relationship" through use of the phrase "a Contracting State or subdivision thereof").

2. A President's proposed reservations, understandings, and declarations are another way to address domestic issues, such as federalism. For example, when transmitting to the Senate the United Nations Convention Against Corruption (2006), Dec. 14, 2005, 2349 U.N.T.S. 145, and the U.N. Convention Against Transnational Organized Crime (2005), Nov. 15, 2000, 2237 U.N.T.S. 343, the President attached a proposed reservation regarding the "fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Convention." *See* 152 Cong. Rec. S8971 (daily ed. Sept. 5, 2006); 151 Cong. Rec. S9644 (daily ed. Aug. 31, 2005).

Even if neither the President nor the Foreign Relations Committee includes any conditions based on constitutional issues, the full Senate might nonetheless insist that an issue be addressed. For example, declarations stating that "there is no intention to change State law and practice by Federal action through ratification" allowed certain international labor conventions to obtain the required two-thirds approval of the Senate. *See* 134 Cong. Rec. S324 (daily ed. Feb 1, 1988). Another instance of the Senate's ability to give conditional advice and consent is Condition 28 to the Chemical Weapons Convention. That condition ensures that Fourth Amendment protections apply to searches that the Convention may require. *See* 143 Cong. Rec. S3486 (daily ed. Apr. 23, 1997)

3. Most major multilateral treaties receive the Senate's supermajority approval with at least some

conditions. Of the forty multilateral treaties that the President transmitted to the Senate from 1993 to 2000, the Senate approved 31, and only seven of those did not include conditions. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1985-86 (2003). These figures reflect "the continuing effectiveness of the special procedural safeguards that the Framers created for treaty-making purposes—the two-thirds rule for Senate advice and consent." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1278 n.695 (2000).

Of course, even with significant RUDs, the Senate still may decide not to approve a treaty out of a concern for federalism. Federalism objections have driven the Senate's decision not to provide advice and consent to ratification of the Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448. Indeed, the last treaty the Senate considered, the United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 189 U.N.T.S. 137, failed to secure advice and consent due in large measure to concerns among some members of the Senate that the treaty would infringe on issues of local concern. Thus, as a matter of both constitutional design and practice, the Senate serves as a "guardian of state interests." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 548 (1954); *see* The Federalist No. 62, at 183 (J. Madison) (Roy P. Fairfield ed., 1981) (describing the Senate as "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty").

4. Finally, the need to implement non-self-executing treaties through legislation provides the House of Representatives, as well as the Senate, with a further opportunity to consider federalism or any other issues that may arise with respect to the United States' fulfillment of its international obligations. In rare cases, Congress may even condition implementation of a treaty on certain actions by the states. *See, e.g.*, H.R. 1896, 113th Cong. (2013) (requiring amendments to state law in order to implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No.110-21, 47 I.L.M. 257).

The treaty process is designed to take federalism concerns into consideration, from negotiation through implementation.

C. The Federal Government Must Maintain the Authority and Flexibility to Implement Treaties That Strike the Appropriate Federal-State Balance

1. The federal government has a strong and successful record of joining and implementing treaties in a manner that strikes an appropriate federal-state balance. While some treaties regulate conduct in areas governed exclusively at the federal level, other treaties touch conduct that is ordinarily governed by states but that may have national or international effect. The latter category includes conventions obligating the United States to establish a particular domestic penal regime as part of an international enforcement system—for example, the Chemical Weapons Convention, or the Convention Against Hostage Taking, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205, implemented through the Act for

the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. No. 98-473, Title II, § 2002(a), 98 Stat. 1837 (1984).

The United States is party to various multilateral treaties that require the states to take action on what may be deemed "local matters" in order for the U.S. to meet its international obligations. The Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, codifies special privileges and immunities for diplomats, including preventing local law enforcement from arresting certain individuals for local offenses. In a similar vein, the Vienna Convention on Consular Relations requires state and local officials to inform foreign nationals of their right to have their consulate notified if they are detained or arrested. *See* VCCR art. 31.

Yet another example is the Convention on Road Traffic art. 24(1), Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22, which requires local and state officials to take certain actions with respect to driver's licenses—a matter traditionally left to the states. Specifically, the Road Traffic Convention requires parties to issue a driver's license to a person holding a license from another convention member, without an additional driver's test. If the individual states do not fulfill the obligations that the federal government assumed under these treaties, U.S. citizens could be denied reciprocal benefits.

Moreover, the United States is party to treaties intended to facilitate international cooperation through federal legislation that touches on certain matters traditionally governed by state law. For instance, the Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670,

1343 U.N.T.S. 89, S. Treaty Doc. No. 99–11 (1988), establishes an international framework for the return of a child abducted from one contracting state to another. Congress implemented this convention through the International Child Abduction Remedies Act, which allows for local remedies but also establishes a federal cause of action for the return of an abducted child. 42 U.S.C. § 11603(a); *see Chafin v. Chafin*, 133 S. Ct. 1017, 1021-22 (2013). The international framework that the U.S. joined has yielded tangible benefits: As this Court noted, "324 children removed to or retained in other countries were returned to the United States under the Convention." *Id.* at 1022.

The Vienna Conventions on Dipolmatic and Consular Relations, the Road Traffic Convention, and the Child Abduction Convention touch on areas traditionally regulated by the states, but they also advance compelling national interests. Because these treaties are managed in a way that respects our federal system, they are widely accepted in the United States. *Accord* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 320 (2013). This Court should not adopt a new limit on federal power that would preclude the President from being able to pursue other treaties deemed to be in the national interest, such as the signed (but not yet ratified) Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No. 110-21, or the Hague Convention on the Law Applicable to Trusts and on Their Recognition, Oct. 20, 1984, 23 I.L.M. 1388.

Establishing the nebulous rule petitioner seeks would prevent the federal government from addressing issues of national and international concern. The discrete prosecution in this case should not be an occasion to disrupt a carefully designed system that has effectively served the enduring interests of the United States.

CONCLUSION

This Court should not place additional and unnecessary restrictions on the federal treaty power.

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APPENDIX

APPENDIX

List of *Amici Curiae*[*]

Leonard C. Meeker served as Legal Adviser for the U.S. Department of State from 1965 to 1969.

Herbert J. Hansell served as Legal Adviser for the U.S. Department of State from 1977 to 1979.

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