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 CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case. *Amicus* submits this brief to demonstrate that the text, structure, and history of the Constitution all support Congress's authority to enact laws to implement validly-enacted treaties. *Amicus* does not, however, take a position on whether the particular prosecution challenged in this case is permissible under the terms of the Chemical Weapons Convention Implementation Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Carol Bond ("Bond") was convicted of violating, *inter alia*, the Chemical Weapons Convention Implementation Act of 1998, Pub. L.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

No. 105-277, 112 Stat. 2681-856, *codified* at 18 U.S.C. §§ 229 *et seq.*, a statute enacted to implement the United States' obligations under the Chemical Weapons Convention. Petitioner argues, *inter alia*, that her conviction cannot stand because the statute does not apply to her conduct or, if it does, that it is unconstitutional as applied to her case. *See, e.g.*, Pet. Br. 12, 42.

Amici Cato Institute, the Center for Constitutional Jurisprudence, and Atlantic Legal Foundation (collectively, "Cato et al.") press a much broader argument, namely, that this Court should overrule *Missouri v. Holland*, 252 U.S. 416 (1920), which held that "[i]f [a] treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.[2] *Amicus* submits this

[2] Petitioner also argues that *Holland* should be overruled, but only if that case is construed to hold that "Congress' power to implement treaties is immune from the Constitution's structural constraints." Pet. Br. 33. She concedes that "a valid non-self-executing treaty may alter the scope of what legislation is necessary and proper, just as valid commerce power legislation might allow Congress to enact a record-keeping requirement under the Necessary and Proper Clause that it would otherwise lack the authority to impose." *Id.* at 35-36. To be sure, as Petitioner notes, *Holland* recognized that there might be structural constraints on the Treaty Power, but it examined whether *the treaty* at issue was "forbidden by some invisible radiation from the general terms of the Tenth Amendment," *Holland*, 252 U.S. at 433-34, not whether the implementing legislation was. The Court need not decide in this case what structural constraints, if any, impose limits on the scope of the Treaty Power. All this Court must decide is whether Congress has the power to enact implementing legislation for any treaty that does come within

brief to demonstrate that the text, structure, and history of the Constitution all support Congress's authority to enact laws that are, as this Court put it in *McCulloch v. Maryland*, 17 U.S. 316, 357 (1819), "appropriate means" to implement validly-enacted treaties.

The Constitution's Necessary and Proper Clause empowers the Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [i.e., Congress's Article I, § 8 powers], and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As this Court has repeatedly recognized, the authority conferred by the Necessary and Proper Clause is a broad one, and the Framers did not limit it to executing laws enacted by Congress. Rather, they expressly extended it to "*all other powers* vested . . . in any Department or Officer thereof." Thus, by its terms, the Necessary and Proper Clause plainly confers on Congress the authority to make laws "necessary and proper for carrying into Execution" the powers granted to the President, including the Treaty Power. Read naturally then, the Necessary and Proper Clause authorizes Congress to enact legislation that is an "appropriate means" of implementing validly-enacted treaties.

Cato et al. dispute this basic proposition, arguing that the only treaty-related authority the

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those limits. *Holland* held that it does, and that decision should be re-affirmed.

Necessary and Proper Clause confers is the authority to pass laws to facilitate *making* treaties, not implementing them. But their approach to applying the Necessary and Proper Clause is inconsistent with the Framers' intent and might render unconstitutional other congressional powers that are beyond dispute. Moreover, even if Cato et al. were correct that Congress may only implement laws to facilitate the making of treaties, that fact would not undermine the holding in *Holland*. Because other countries will be reluctant to enter into agreements with the United States if it is unable to fulfill its international obligations, the Government's ability to implement ratified treaties is critical to its ability to *make* future treaties.

That the Necessary and Proper Clause authorizes Congress to enact laws to implement validly enacted treaties makes perfect sense in light of the importance the Framers attached to the Treaty Power and the Nation's ability to live up to its international obligations. When the Framers drafted our enduring Constitution, they departed in several critical respects from the precursor Articles of Confederation. As relevant here, the Framers were deeply concerned about the young Nation's reputation and credibility abroad and wanted to ensure that the federal government had the authority both to negotiate with foreign nations and to fulfill any obligations it might make to foreign nations. State interference with the Nation's treaty obligations was a serious problem under the Articles of Confederation and one of the primary impetuses for drafting the new Constitution in the first place. Thus, the new

Constitution conferred on the President the power, with the advice and consent of two-thirds of the Senate, to "make Treaties" with foreign nations that would then be the supreme law of the land. It would significantly undermine the Framers' intent in establishing the new Constitution if the federal government lacked the power to fulfill whatever treaty obligations the President and Senate might choose to create.

Indeed, in congressional debates subsequent to the Constitution's ratification, there was a great deal of agreement that the Necessary and Proper Clause provided Congress this power. For example, members of Congress who argued (contrary to the general assumption at the Framing) that not all treaties were self-executing and thus required implementing legislation often used the Necessary and Proper Clause to support their position. According to these representatives, treaties need not be self-executing precisely because Congress had the power to implement them by enacting legislation pursuant to the Necessary and Proper Clause—a conclusion that followed naturally from the Constitution's structure and text. In fact, such statements were a frequent refrain by both proponents and opponents of a robust Treaty Power throughout the nineteenth century. Thus, when this Court held in *Holland* that "there can be no dispute about the validity of" a statute implementing a treaty so long as the treaty is valid, 252 U.S. at 432, it was merely recognizing a point on which there was already considerable agreement: the Constitution's text and structure require that Congress have the power to implement

validly enacted treaties. This Court should reaffirm that holding now.

ARGUMENT

I. THE CONSTITUTIONAL TEXT CONFIRMS THAT CONGRESS HAS THE POWER TO IMPLEMENT TREATIES PURSUANT TO THE NECESSARY AND PROPER CLAUSE.

The Treaty Clause gives the President the "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, cl. 2. The Necessary and Proper Clause, in turn, provides Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" both "the foregoing Powers" enumerated in Article I, § 8, and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18. The Framers thus expressly gave Congress the additional power necessary to legislate on subjects that were not otherwise enumerated in Article I, § 8, namely, subjects necessary to "carry[] into Execution" the powers granted to the President. Read most naturally, these provisions, taken together, provide Congress with the power to pass laws that are "necessary and proper" to execute the treaties agreed upon by the President and the Senate.

As this Court re-affirmed just last Term, "[t]he scope of the Necessary and Proper Clause is broad." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013); *see United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 1956 (2010) ("the Necessary and Proper Clause grants Congress broad authority to enact federal legislation"). The reason for its breadth is self-evident: as this Court long ago recognized, although the federal government is "one of enumerated powers," "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch v. Maryland*, 17 U.S. 316, 405, 408 (1819). Thus, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956; *see Kebodeaux*, 133 S. Ct. at 2503 (noting that even though the Constitution "makes few explicit references to federal criminal law," "the Necessary and Proper Clause nonetheless authorizes Congress, in the implementation of other explicit powers, to create federal crimes, . . . to hire guards and other prison personnel, to provide prisoners with medical care and educational training," and to take other actions not otherwise enumerated in Article I).

Applying this fundamental principle in *Missouri v. Holland*, this Court held that "[i]f [a] 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. *Amici* Cato et al. dispute this basic proposition, arguing that the only treaty-related authority the Necessary and Proper Clause confers is the authority to pass laws to facilitate *making* treaties, not implementing them. Cato Br. 23-24. According to Cato et al., this result follows from a "proper[] conjoin[ing]" of the Treaty Clause and the Necessary and Proper Clause: "[w]hen the two clauses are properly conjoined," they argue, it is clear that "what may be carried into execution is the 'Power . . . *to make* Treaties." *Id.* at 23.

Amici's approach to reading the constitutional text produces a result that is contrary to the Constitution's text, purpose, and structure. Indeed, *Amici* do not cite a single case suggesting that this is the proper way to approach interpretation of the broad authority conferred by the Necessary and Proper Clause. Rather, the Necessary and Proper Clause does exactly what it says it does—it confers the authority to make laws "necessary and proper for carrying into Execution . . . all other powers vested by this Constitution." One of those powers is the Treaty Power, the power to enter into and execute agreements with foreign nations that the Framers viewed as critical to the future success of our young Nation, *see infra* at 11-16.

Moreover, extending *Amici's* approach beyond the Treaty Power would call into question the existence of other congressional powers that cannot be seriously contested. For example, under their approach, the Necessary and Proper Clause

"only justifies legislation that facilitates the 'establish[ing] of post offices and postal roads (as opposed to matters like their maintenance) or that facilitates the 'constitut[ing]' of inferior federal courts (as opposed to matters like their operation)." Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice* 12 (2013) (working paper; available at http://ssrn.com/abstract=2275355). Perhaps *Amici* mean to suggest that the Necessary and Proper Clause should be read differently in conjunction with the Treaty Power than with the enumerated powers of Article I, § 8. But this reading would "relegate[] [the Treaty Power] to the status of a poor relation," *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), a result for which there is no support in the Constitution's text.

Further, even if *Amici*'s general approach were correct, Congress would still enjoy the power to enact implementing legislation because such legislation is necessary and proper for the "making" of treaties. Most generally, if the United States is unable to honor its international obligations, there is no reason to think that other countries will continue to enter into treaties with the United States. *See infra* at 14-15. Thus, the enactment of implementing legislation for prior treaties facilitates the United States' ability "to make" treaties in the future.

More specifically, Congress will sometimes need to enact implementing legislation in order to "make" the very treaty that is being implemented. Cato et al. argue otherwise, relying on this Court's

admonition in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that "the right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established," *id.* at 177 (emphasis added), quoted in Cato Br. 25. But this misses the point. In the context of treaties—unlike private contracts—the contract relation often is not established until *after* implementing legislation has been passed because the treaty itself may make its entry into force conditional on the enactment of implementing legislation, or the President may delay joining the treaty until after Congress has acted. *See* Galbraith, *supra*, at 13 ("historically U.S. practice has sometimes required that the implementation of treaties occur prior to their ratification or entry into force"); Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 Am. Soc'y Int'l L. Proc. 412, 414 (2008) (explaining that "the Executive almost always waits for Congress to enact [implementing] legislation *before* joining the treaty").[3] In these cases then, implementing legislation is necessary to *make* the Treaty in the most basic sense of the term.

Thus, as this Court recognized nearly a century ago, the text of the Constitution authorizes Congress to enact laws that are "proper means" of implementing validly enacted treaties. *See*

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[3] Hollis provides a specific example of this phenomenon: as of his article's publication in 2008, "even though the Senate gave advice and consent to ratification of the Basel Convention on Hazardous Wastes in 1992, the President ha[d] withheld U.S. ratification because Congress ha[d] still not enacted the statutes necessary for U.S. compliance." Hollis, *supra*, at 414.

Holland, 252 U.S. at 432; *McCulloch*, 17 U.S. at 358.[4]

II. CONGRESS'S AUTHORITY TO ENACT IMPLEMENTING LEGISLATION IS CRITICAL TO THE FRAMERS' VISION OF A ROBUST TREATY POWER.

That the Constitution's text provides Congress the power to enact treaty-implementing legislation makes sense in light of the importance the Framers attached to the Treaty Power. To the Framers, the federal government's authority to make treaties with foreign nations was a significant one, essential to the future success of the young Nation. Indeed, "the failure of the States to comply with treaties [under the Articles of Confederation] . . . and the absence of any mechanism in the central government for assuring compliance with such treaties" were "[p]rominent among the reasons the Founders decided to abandon the Articles of Confederation and write a new Constitution." Carlos Manuel Vázquez, Missouri v. Holland*'s Second Holding*, 73 Mo. L. Rev. 939, 940 (2008); *see* David M. Golove, *Treaty-*

[4] To be sure, this rule confers some discretion on Congress, but that was exactly as the Framers intended it. *Cf.* Brief of Yale Law School Center for Global Legal Challenges ("YLS Center Br.") 10-11 (Framers recognized that treaty power must be "flexible"); *id.* at 2 ("The Framers considered proposals to qualify the Treaty Power, but ultimately rejected them all."). Moreover, there is an important structural check on the Treaty Power: approval of any treaty requires a two-thirds vote in the Senate. *See* YLS Center Br. 11 ("the power is subject to its own stringent *procedural* checks"); *see also id.* at 28-32; U.S. Br. 32.

Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075, 1102 (2000); *see also* U.S. Br. 29-32; YLS Center Br. 4-7.

As James Madison explained in the Federalist Papers, the Articles of Confederation provided the federal government with "[t]he power to make treaties," but the power, as set out in the Articles, was insufficient because "of an exception, under which treaties might be substantially frustrated by regulations of the States." The Federalist Papers No. 42. This deficiency was perhaps most strikingly illustrated when the States resisted "carrying out the [Treaty of Peace's] painful financial and amnesty stipulations," and "severe tensions with Great Britain" were the result. *See* Golove, *supra*, at 1115-16. These tensions "concretely demonstrated the need" for a more robust treaty power and "the imperative for a mechanism that could ensure state compliance with treaty stipulations." *Id.* at 1116; *see* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 934 (2010); *see also* YLS Center Br. 5-10 (discussing tensions produced by the United States' inability to fulfill its obligations under the Treaty of Paris).[5] Stated

[5] The Framers' fear that the States would interfere with negotiations and treaty relations with foreign countries was so great that they not only "[gave] the entire Treaty Power [to] the federal government," but also "prohibit[ed] States from participation in foreign agreements not once but twice," YLS Center Br. 15, and otherwise limited the States' ability to interfere in the Nation's foreign affairs, *cf.* U.S. Const. art.

bluntly, the limitations placed on the treaty power under the Articles "were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration, and utter imbecility of the confederation." Joseph Story, Commentaries § 1501.

Thus, to the Framers, there was no question that the power to make treaties, along with other powers related to the "regulat[ion] [of] intercourse with foreign nations," "form[ed] an obvious and essential branch of the federal administration." The Federalist No. 42 (James Madison); *see id.* ("The powers to make treaties and to send and receive ambassadors, speak their own propriety."); The Federalist No. 64 (John Jay) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce . . . ."); Story § 1503 ("The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce."). Accordingly, the Framers drafted a broad Treaty Power Clause that would give the new Nation considerable flexibility in its negotiations and interactions with foreign nations. *See* YLS Center Br. 10-11; Golove, *supra*, at 1102 ("there was, by

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I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws"). Madison also "argued for a presidential role in treaty making—which did not exist under the Articles of Confederation—precisely because he feared Senators would be so loyal to states' sovereign prerogatives." Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 249 (2013).

1787, a fairly widespread consensus on the broad scope of the treaty power, especially among the most influential figures").

The Framers also designed the Constitution to ensure that the federal government would be empowered not only to enter into treaties with foreign nations, but also to make good on the commitments it made in those treaties. *See* Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 Mo. L. Rev. 1007, 1016 (2008) (noting that the "Framers were wholly convinced of the need to systematically develop a compliance capacity precisely in order to sustain the U.S. treaty power"); YLS Center Br. 4 (federal government's inability "to secure state compliance with treaty obligations" "placed the very existence of the new nation at risk"). Informed by their experiences under the Articles of Confederation, the Framers feared that if the United States could not fulfill its treaty obligations, it would damage the young country's reputation and credibility abroad, *cf.* Golove & Hulsebosch, *supra*, at 935-36 (arguing that an important purpose of the Constitution was to help the new Nation achieve international recognition and respect), and it would make other nations less willing to enter into treaties with the United States, *see* The Federalist No. 64 ("a treaty is only another name for a bargain, and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it"); *id.* No. 75 (Alexander Hamilton) ("Its objects are CONTRACTS with foreign nations,

which have the force of law, but derive it from the obligations of good faith."); *see also* U.S. Br. 30-31; *cf.* Galbraith, *supra*, at 13 (arguing that "basic accounts of treaty negotiation . . . recognize that treaty negotiators take the likelihood of compliance into account and may demand stiffer terms or decline to negotiate with countries known to have past difficulties complying with treaties").

To guard against this possibility, the Framers drafted multiple constitutional provisions that would safeguard the Treaty Power and ensure that the new Nation could live up to any international obligations it made for itself. *See* YLS Center Br. 20-22 (discussing the Supremacy Clause and the Article III provision for judicial enforcement of treaties in the federal courts). As noted earlier, the Constitution also ensured that individual states would not disrupt any agreements the federal government negotiated with foreign states by preventing them from entering into treaties under all circumstances and international compacts without congressional consent. *See supra* at 12 n.5.

Given the importance the Framers attached to the Treaty Power and to the Nation's ability to honor its international commitments, it would plainly "contradict one of the Founders' key convictions" if the President could ratify a treaty that the Government would be without the power to implement, Vázquez, *supra*, at 940, and there is no reason to think the Framers would have designed such a system. Yet that would be the result if Congress does not have the authority to

enact implementing legislation for all validly enacted treaties. This cannot be right.

Amici Cato et al. do not explain how their view that Congress lacks the authority to enact treaty-implementing legislation can be reconciled with the Framers' view of a robust Treaty Power and the importance they attached to the ability of the United States to fulfill its international obligations. Instead, Cato et al. argue that the discretion *Holland* confers on Congress is "inconsistent with the basic constitutional scheme of enumerated powers" and in "deep tension with the Tenth Amendment's premise of reserved powers." Cato Br. 7; *see id.* at 12 ("Another way to put the point is that *Holland* permits evasion of Article V's constitutional amendment mechanism" because "the legislative power of Congress may be increased not just by constitutional amendment but also by treaty."). But the ratification of a new treaty does not increase the legislative power of Congress; it simply serves as the predicate for the exercise of Congress's pre-existing and enumerated power to make all Laws "which shall be necessary and proper for carrying into Execution" the Treaty Power. There is nothing novel about this result. Every enumerated power can be exercised in different ways as the topic it covers changes. For example, as the interstate economy grows or shrinks, the scope of Congress's authority to act pursuant to the Commerce Power also changes; likewise, when the country goes to war, Congress has more power to act pursuant to its War Power than it did before. This is a feature—not a bug—of our constitutional structure.

Thus, *Amici*'s constitutional argument runs up against the Constitution itself. Both the Treaty Power and the Necessary and Proper Clause are themselves powers expressly given to the federal government, and it is no answer to the question this case presents to say that our Constitution is one of enumerated powers. The question is how broadly each of those powers should be construed, and both the Constitution's text and structure confirm that those provisions allow Congress to pass appropriate implementing legislation for validly enacted treaties.

III. CONGRESSIONAL DEBATES AFTER THE FRAMING REVEAL A GENERAL UNDERSTANDING THAT CONGRESS HAS THE POWER TO IMPLEMENT TREATIES PURSUANT TO THE NECESSARY AND PROPER CLAUSE.

At the time of the Framing, there was little debate about the interaction between the Treaty Power and the Necessary and Proper Clause. This is hardly surprising: the Necessary and Proper Clause incontestably encompasses the Treaty Power, and that Power was among the most necessary and least controversial powers granted to the federal Government. Moreover, the Framers "assumed that most treaties would be self-executing," Hathaway, *supra*, at 250-51; *see* YLS Center Br. 23 n.5 (noting that Convention delegates rejected proposals to make treaties non-self-executing), thus making additional implementing legislation unnecessary.

Post-ratification statements in congressional debates did specifically address the issue, however, and suggest overwhelming support for the understanding that the Necessary and Proper Clause conferred on Congress the power to enact implementing legislation. For example, shortly after ratification, some members of Congress challenged the assumption that most treaties were self-executing and used the Necessary and Proper Clause to support their position. According to these representatives, the Necessary and Proper Clause was itself evidence that treaties need not be self-executing because it meant Congress had the power to implement them by enacting legislation.

For example, in 1796, shortly after the Constitution was adopted, the President ratified the Jay Treaty, which resolved lingering disputes between Great Britain and the United States. The decision to ratify the treaty was a controversial one, and many in the House of Representatives argued that the treaty could not take effect as domestic law without congressional approval. *See* Galbraith, *supra*, at 18. In arguing that the treaty could not take effect without congressional approval, these representatives often pointed to the Necessary and Proper Clause as evidence that Congress had the power to enact laws to implement treaties. Representative Page, for instance, observed that "Congress is authorized to make all laws necessary and proper to carry into effect all the powers granted by the Constitution, the Treaty-making power as well as others," and later commented that "Congress may and ought to pass laws to carry into

effect all such Treaties, provided they are not inconsistent with the general welfare." 5 Annals of Cong. 560, 561 (1796).

Representative Milledge also used the existence of the Necessary and Proper Clause—and the authority it provided Congress to enact implementing legislation—as evidence that such legislation was necessary before a treaty could have domestic effect. He argued that "Treaties ought to be bottomed on a law before they can have any binding influence," and then read aloud the Necessary and Proper Clause, explaining that "whatever powers are vested in [the President and Senate as the Treaty-making department] by the Constitution cannot be carried into execution but by a law, otherwise the clause in the Constitution means nothing." 5 Annals of Cong. at 651 (1796). And tellingly proponents of the Jay Treaty, although they did not believe that congressional implementation was required, did not "dispute the claim that [the Necessary and Proper Clause] authorized Congress to pass legislation implementing treaties." Galbraith, *supra*, at 20. To be sure, the laws to implement the Jay Treaty may have otherwise been within the scope of Congress's Article I powers, but these statements make clear that these representatives viewed the Necessary and Proper Clause as an additional source of authority to enact laws implementing the treaty. *See* Galbraith, *supra*, at 25 ("They clearly interpreted the Necessary and Proper Clause to apply to legislation passed to implement treaties, as opposed to legislation passed simply to facilitate the negotiation of treaties.").

The same dynamic played out in debates over subsequent treaties, as well. For example, in debating the 1815 commercial treaty with Britain following the conclusion of the War of 1812, members who argued that implementing legislation was required invoked the Necessary and Proper Clause in support of their position. *See, e.g.*, 29 Annals of Cong. 538-39 (1816) (statement of Rep. King) ("whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution . . . such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress. . . . [T]his construction is strengthened by a part of the general power given to Congress, following the enumerated powers, 'to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof.'"); *id.* at 66 (statement of Sen. Roberts) (citing the Necessary and Proper Clause as a "clause of especial importance" to the question whether a treaty can become a law without legislative sanction).[6] And during the Nineteenth Century, the Necessary and Proper Clause was also regularly invoked as a basis for enacting laws to

[6] Of course, as the Framers intended and this Court has repeatedly recognized, treaties may be self-executing, in which case no implementing legislation is necessary to give them domestic effect. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (noting that some treaties "automatically have effect as domestic law").

implement treaties, and at times as a basis for enacting treaty-implementing legislation even where there was no other source of congressional authority. *See generally* Section II.A of Brief for Professors David M. Golove, Martin S. Lederman and John Mikhail.

Accordingly, when *Missouri v. Holland* was decided, this Court's recognition that a statute implementing a validly enacted treaty was itself valid pursuant to the Necessary and Proper Clause was not a controversial one. Rather, there was considerable agreement on this point, reflecting both the text of the Constitution and the structural importance the Framers attached to the Treaty Power and the broad authority conferred by the Necessary and Proper Clause. This Court should re-affirm its decision in *Holland* and hold that Congress has the power to enact treaty-implementing legislation, regardless of whether Congress would otherwise have the power to enact that legislation under Article I.

CONCLUSION

The text, structure, and history of the Constitution all support the rule this Court adopted in *Holland*. Accordingly, *amicus* urges the Court to hold that Congress has the power to pass a statute to implement a validly enacted treaty, even if it does not otherwise have the power under Article I, § 8.

Respectfully submitted,

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