No. 12-158

In The
SUPREME COURT OF THE UNITED STATES

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES,

Respondent.

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

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress's authority to enact legislation to implement a treaty?

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has a longstanding interest in issues of federalism. It litigated *United States v. Morrison,* 529 U.S. 598 (2000), and has participated in a number of other litigations, representing both *amici* and parties, concerning the proper scope of the federal government's reach under the Commerce Power and other enumerated powers. The Center for Individual Rights has an interest in this Court's interpretation of the Treaty Power here, where the government argues for an interpretation with the potential to make any constitutional limitations on federal power meaningless.

This *amicus curiae* brief outlines the serious danger to federalist principles that the government's view creates. That view could undermine this Court's repeated interpretation of our Constitution as one endowing only enumerated and limited powers on the national government.

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[1] This brief is filed with the parties' consent evidenced by petitioner's blanket consent letter filed with this Court and respondent's letter of consent filed with the Clerk. 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 of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Constitution established a national government with limited powers, with those not granted to that government reserved to the states or the people. If the view of the Third Circuit about the scope of the Necessary and Proper Clause with respect to treaties is correct, and if (as widely assumed) there are no strong subject matter or federalist constraints on what constitutes a valid treaty, it follows that the federal government has (or might soon have) powers much broader than those identified in the Constitution.

The federal system established in the Constitution plainly precludes the possession of, or the means of acquiring, such powers by the political branches of the federal government.

Thus, the above views are wrong. As a charter of a national government that is limited for the purposes of protecting individual rights and keeping the broadest governmental functions close to the people's control, the Constitution places robust structural limits on treaties and laws implementing them.

ARGUMENT

I. THE EXPANSIONIST VIEW OF THE TREATY POWER AND THE NECESSARY AND PROPER CLAUSE WOULD ENLARGE THE FEDERAL GOVERNMENT'S JURISDICTION BEYOND ITS MANIFEST STRUCTURAL LIMITATIONS

Relying on *Missouri v. Holland,* 252 U.S. 416 (1920), the Third Circuit held in this case that if a law implementing a valid treaty has a rational relationship to that treaty, the law is within Congress's power under the Necessary and Proper Clause, even if that law would not be within Congress's authority absent the treaty. *United States v. Bond,* 681 F.3d 149, 157 (3d Cir. 2012). And this Court has held that a treaty is valid if it 1) implicates a national interest that can only be adequately addressed by concerted action with foreign powers and 2) does not violate any prohibitory words of the Constitution, including those in the Bill of Rights. *Missouri,* 252 U.S. at 433; *Reid v. Covert,* 354 U.S. 1, 15-19 (1957) (plurality opinion). It is widely asserted by legal scholars, moreover, that there are no strong subject matter limitations on the Treaty Power, *e.g.,* Curtis A. Bradley, *The Treaty Power and American Federalism,* 97 Mich. L. Rev. 390, 432-33 (1998) (describing that view as "the accepted view"), and a plurality of this Court has stated that the Tenth Amendment has no bearing on the scope of that power. *Reid,* 354 U.S. at 18. The combination of the Third Circuit's Necessary and Proper Clause holding in this case and the view that there are neither strong subject matter constraints nor federalist or Tenth Amendment limita-

tions on what constitutes a valid treaty will hereinafter be referred to as "the Expansionist View."

Several examples of existing treaties are enough to illustrate the nearness of the danger to our federalist system if the Expansionist View were adopted – and thus to illustrate the serious constitutional maldistribution of powers between the national government and the states that view entails.

A. The United Nations Convention On The Rights Of The Child

If the Expansionist View were adopted, the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 ("CRC") would stand but one step – that of ratification – away from being the supreme law of the land (it was signed by President Clinton in 1995 but has yet to be ratified). To put it mildly, the Convention has a very broad scope. As explained in an academic study on the subject:

> By its very nature, the Convention on the Rights of the Child addresses issues unequivocally within the domain of family law or juvenile justice. Its provisions span a range of issues, including abuse, neglect, education, labor, and capital punishment. The scope of the Convention is truly grand and ambitious, and there are many occasions where its articles may overlap with state laws. The Convention, for example, includes provisions addressing family separation, reunification, and alternative placement of the child, and protects children from abuse, neglect, sexual exploitation, and exploitative child labor. The Convention also guarantees children a right

> to social security, an adequate standard of living, education, and juvenile justice (encompassing protections such as a ban on capital punishment, the deprivation of liberty, and due process). Moreover, an important general principle of the Convention is that the "best interests of the child" will be followed in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."

Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States,* 5 Geo. J. on Fighting Poverty 327, 330-331 (1998) (quoting CRC, Art. 3) (footnotes omitted).

Clearly, there would be a rational relationship between this treaty and, for example, a detailed national code of law pertaining to children, preempting wide swaths of the family law of all of the states under the Supremacy Clause and providing a uniform way of vindicating the rights of children spelled out in the treaty. Under the Expansionist View, it follows that the national government would acquire the power to enact such a code if only the treaty were ratified as non-self-executing. Yet the federal government has never been thought to have, under the current Constitution, wholesale jurisdiction over such matters, which instead are left to the states. *See, e.g., Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979) (""The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United

States.'") (quoting *In re Burrus,* 136 U.S. 586, 593-94 (1890)).

B. The United Nations Convention For The Elimination Of All Forms Of Discrimination Against Women

Another existing treaty that, if the Expansionist View were true, would be one step away from being the supreme law of the land is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, which was signed by President Carter in 1980 but has yet to be ratified. As its title indicates, that treaty gives broad protections to women against discrimination of "all forms."

For example, it calls upon contracting parties to ban prostitution (Art. 6); declares that "the right to work" is "an inalienable right of all human beings" (Art. 11(1)(a)); and calls upon contracting parties to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (Art. 2(e)).

Under the Expansionist View, Article 2(e) would give jurisdiction to Congress to pass laws now beyond its power. For example, Subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, provides a right of action for gender-bias-motivated violence (a form of discrimination by a person). This Court held Subtitle C unconstitutional as applied to violence between private individuals in *United States v. Morrison,* 529 U.S. 598 (2000).

More generally, many possible laws would be rationally related to promoting the policies of this trea-

ty. For example, the federal government would acquire jurisdiction to go beyond 18 U.S.C. § 2421 (the Mann Act) and to make all prostitution a federal crime, even in state jurisdictions where it is and historically has been legal. The federal government would also have jurisdiction to require employers to give jobs to all unemployed persons, contravening this Court's ruling that Congress cannot regulate the absence of a commercial transaction. *See National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566, 2589 (2012) ("[A nation in which] Congress use[s] its …. power to compel citizens to act as the Government would have them act …. is not the country the Framers of our Constitution envisioned."). The federal government would also have jurisdiction to enact a detailed code of law over all relations between the sexes, thus overriding state legislation (or the lack thereof) in this area. Under the plurality view in *Reid v. Covert,* such a code could not contravene the Bill of Rights, but it might include, for example, a ban on separate sporting teams for women and men, or even on such traditional courtesies extended to women by men as the opening and holding of doors.

If some of these possible laws likely would never be passed, even by a distant federal government, it is still the case that that government has never been supposed to have the power to pass them under the current Constitution. Yet under the Expansionist View this treaty would transfer just such power from the states to the national government.

C. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 ("ICCPR"), actually has been ratified, in relevant part as non-self-executing, by the United States, albeit under the understanding that it does not enlarge the jurisdiction of the federal government.[2]

That understanding is fortunate for our constitutional order, for the Convention establishes a plethora of rights, including ones going beyond anything in our Bill of Rights.

For example, Article 17 of the ICCPR guarantees to everyone "the protection of the law" against "unlawful attacks on his honor and reputation," a provision to which a national defamation code, overriding state defamation laws, would be rationally related. Even more broadly, Article 23 reads as follows:

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[2] U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. 8071 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing"); *id.* ("[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments"); U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.) ("The proposed understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States.")

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Federal legislation establishing a national code of marriage and divorce law, preempting that of the states, clearly would have a rational relationship to this Article and to the ICCPR. Yet authority over such matters in our federalist system resides in the states, not the national government. *See, e.g., Hisquierdo,* 439 U.S. at 581.

II. THE EXPANSIONIST VIEW WOULD GRANT THE FEDERAL GOVERNMENT EXTREMELY BROAD POWERS PURSUANT TO THE CHEMICAL WEAPONS CONVENTION

To be sure, the United States has not ratified two of the above treaties, and has ratified the ICCPR with the understanding that it does not expand Congress's jurisdiction. Indeed, the president and the Senate so far have largely acted so as to respect fed-

eralism limits on treaties. Peter J. Spiro, *Resurrecting* Missouri v. Holland, 73 Mo. L. Rev. 1029, 1032-33 (2008). But political actors are not to be trusted always to understand properly or to fulfill their duty to protect the structure of the very document meant to keep them in check. As Thomas Jefferson wrote, "In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." 8 *The Writings of Thomas Jefferson* 475 (P. Ford ed. 1897). *See Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) (noting Congress's "underdeveloped capacity for self-restraint"). And the political forces that so far have resulted in political actors' adherence to ideas of federalism when it comes to treaties may well be aligning differently than in the past. *See* Spiro, *supra,* at 1035-38 (finding it likely that the political process, in part because of foreign pressure, would not continue to protect federalism in the future; "The [reservations, understandings, and declarations] dodge worked until the rest of the world caught on to the fact that the United States was doing effectively nothing by acceding to human rights treaties.").

Indeed, the line between federalism and a national government with police power-like authority already has been crossed, if the Expansionist View holds. The treaty at issue in this case, the Chemical Weapons Convention, 32 I.L.M. 800 (1993) ("CWC"), confers staggering powers on the federal government under this view. Not only can it pass the implementing legislation at issue here, outlawing every non-terroristic assault (such as the one here) committed

with the use of chemicals, but there certainly would be a rational relationship between that treaty and all manner of regulation of chemicals, harmful or not. Such regulations could include, for example, a law establishing a national registry of all household chemicals, with harsh penalties for possessors of chemicals who fail to comply. How better to prevent chemical attacks than by keeping track of all chemicals in the country? *See* CWC, 32 I.L.M. at 804, 810. It certainly would be rational for Congress to suppose that no board or scheduling process could keep up with all the ways otherwise harmless chemicals might be combined to become dangerous, and to believe that a registry of all chemicals (without undue harm to the nation's economic development[3]) would make it easier to trace chemicals used in attacks to their source, and thus apprehend and deter offenders. It is not merely that such a registration law would be extremely intrusive, but that it is beyond question that the power to pass such a law is not one that the Framers and ratifiers of the Constitution lodged in the national government. Yet under the Expansionist View, the Chemical Weapons Convention lodges it there now.

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[3] *See* CWC, 32 I.L.M. at 810 ("The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties").

CONCLUSION

This Court should set forth strong structural limits on the federal government's power either 1) to override state sovereignty by means of the treaty power or 2) to enlarge its jurisdiction in comparison with that of the states by exploiting a combination of the Treaty Power and the Necessary and Proper Clause. Accordingly, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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