No. 01-5

In the Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim that approval and implementation of the North American Free Trade Agreement (NAFTA) had to be accomplished through the advice and consent of the Senate under the Treaty Clause of the Constitution, Article II, Section 2, Clause 2, rather than through bicameral legislation and presentment to the President, is justiciable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 242 F.3d 1300. The opinion of the district court (Pet. App. 37a-231a) is reported at 56 F. Supp. 2d 1226.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2001. On May 21, 2001, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 28, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Treaty Clause of the Constitution, Article II, Section 2, Clause 2, provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The Constitution also recognizes other types of understandings and arrangements with foreign nations. In particular, Article I, Section 10 provides categorically that "No State shall enter into any Treaty, Alliance, or Confederation," but further provides that no State shall enter into "any Agreement or Compact with another State, or with a foreign Power," without the consent of Congress. The Constitution does not specifically distinguish a treaty from an agreement or compact, nor does it describe the understandings or arrangements that are subject to the advice and consent procedure of the Treaty Clause.

2. In 1990, the United States, Mexico, and Canada initiated negotiations concerning a North American Free Trade Agreement (NAFTA) with the goal of eliminating or reducing tariffs and other trade barriers and creating a free-trade zone that encompasses the three countries. Pet. App. 3a. In December 1992, the leaders of the three nations signed NAFTA.

NAFTA was negotiated and given effect in United States law pursuant to so-called "fast track" procedures specified in the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2901, and Section 151 of the Trade Act of 1974, 19 U.S.C. 2191. Those laws allowed the President to negotiate trade agreements and submit them—together with implementing legislation—to Congress for bicameral consideration under expedited legislative procedures. See 19 U.S.C. 2191, 2902(b)-(c), 2903(b)-(c). The fast track procedures di-

rect the President to consult with Congress before and during trade negotiations, 19 U.S.C. 2902(d), but also require an expedited yes-or-no vote by Congress on the final agreement and proposed implementing legislation, 19 U.S.C. 2191.

Congress approved and implemented NAFTA in the NAFTA Implementation Act (Implementation Act), Pub. L. No. 103-182, 107 Stat. 2057, codified at 19 U.S.C. 3301 *et seq.* To bring domestic law into conformity with the provisions of NAFTA as signed by the President and submitted to Congress, the Implementation Act amended various federal statutes and created entirely new provisions of federal law. See 2 Pet. Lodging 223-341 (Statement of Administrative Action, summarizing changes to existing law and administrative regulations necessary to implement NAFTA). Congress made clear that the provisions of NAFTA have no domestic legal effect if they are inconsistent with federal law. 19 U.S.C. 3312(a)(1).

3. Petitioners and other plaintiffs filed this action in the United States District Court for the Northern District of Alabama, asserting that NAFTA is unconstitutional and invalid because, together with the Implementation Act, it constitutes a treaty that was not approved by two-thirds of the Senate under the Treaty Clause. See Pet. App. 1a, 2a n.1, 39a-40a. Petitioners sought declaratory relief and an order "directing the President to notify the governments of Mexico and Canada that, within thirty days, the United States is terminating its participation in NAFTA." *Id.* at 60a.

The government moved to dismiss the case, arguing that the case raises a political question not appropriate for judicial resolution and that petitioners lack standing to bring their claims. The parties also filed cross-motions for summary judgment on the merits. See Pet.

App. 37a. The district court denied the government's motion to dismiss but granted summary judgment in favor of the United States. *Id.* at 37a-231a.

The district court found that petitioners have standing, concluding that their alleged injury is traceable to NAFTA (Pet. App. 54a-59a) and likely would be redressed by a decision in petitioners' favor (*id.* at 59a-89a). The district court also held (*id.* at 90a-139a) that the case does not raise a nonjusticiable political question. On the merits, however, it found—after what the court of appeals characterized as "remarkably learned and thorough" analysis (*id.* at 2a)—that the Treaty Clause is not the exclusive mechanism for approving international trade agreements such as NAFTA. Rather, the court concluded, the President had authority to negotiate and conclude NAFTA under his executive authority and under the fast track legislation, and NAFTA was permissibly approved and implemented through an Act of Congress. *Id.* at 218a-231a; see also *id.* at 139a-218a.

4. The United States Court of Appeals for the Eleventh Circuit vacated the district court's decision on jurisdictional grounds and remanded with instructions to dismiss the action. Pet. App. 36a. Like the district court, the court of appeals held that petitioners have standing. In particular, the court of appeals found it likely that petitioners' alleged injury would be redressed by a ruling in their favor because terminating NAFTA and reimposing barriers to trade likely would increase the domestic availability of American-made products (thus benefitting the members of petitioner Made in the USA Foundation who wish to buy American-made products) and expand employment in the manufacture of American products (thus benefitting the labor-union petitioners). *Id.* at 9a-19a.

The court of appeals further held, however, that it lacked jurisdiction because the case presents a nonjusticiable political question. Pet. App. 20a-34a. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court identified six indicia of a political question, any one of which will support a finding of nonjusticiability:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Applying those criteria, the court of appeals noted that the Foreign Commerce Clause and other constitutional provisions constitute "broad textual grants of authority" over foreign policy to Congress and the President, "leav[ing] only a narrowly circumscribed role for the Judiciary." Pet. App. 24a. The court also explained that petitioners' argument that all "major and significant" agreements must be entered into pursuant to the Treaty Clause failed to provide any judicially manageable standard for resolving controversies about the Clause's applicability. *Id.* at 28a-29a. Finally, the court noted that a decision invalidating NAFTA would risk international embarrassment to the United States and affect the Nation's relations with Canada and Mexico; endanger the nation's economy; and "run

the risk of intruding upon the respect due coordinate branches of government." Accordingly, the court of appeals held that the case is not justiciable. *Id.* at 32a-34a.

Because the court of appeals concluded that the case presents a political question, it did not decide whether Senate advice and consent to NAFTA under the Treaty Clause was required. The court stressed, however, that it was not granting the political Branches "unfettered discretion" to decide whether international agreements must be approved pursuant to the Treaty Clause. Pet. App. 35a. Rather, the court's holding was limited to "the context of international commercial agreements such as NAFTA," where Congress's enumerated power to regulate foreign commerce was directly implicated and there was no identifiable standard for determining whether a particular agreement must be regarded as a "treaty" that requires the advice and consent of the Senate under the Treaty Clause. *Id.* at 36a.

ARGUMENT

The court of appeals' holding that this case presents a nonjusticiable political question is correct and does not conflict with any decision of this Court. Petitioners have not asserted a conflict between the decision below and a decision of another court of appeals. This case also is not an appropriate vehicle for addressing the reach of the Treaty Clause, Article II, Section 2, Clause 2, because it presents serious standing questions and questions about the appropriateness of judicial relief that provide alternative bases for dismissing the case. Finally, if the merits were considered, the provisions of the Implementation Act that remove barriers to trade fall squarely within Congress's enumerated powers under Article I of the Constitution. Congress's express

approval of NAFTA in the Implementation Act did not vitiate Congress's powers to legislate in the area of foreign commerce and to establish trade rules. Furthermore, even if the proper focus of this suit were approval of NAFTA itself, as petitioners suggest, the express constitutional powers of the President and Congress over foreign policy and foreign trade, as well as the decisions of this Court, demonstrate that the Treaty Clause is not the exclusive means for approving foreign commercial agreements such as NAFTA.

1. a. "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). Accordingly, a case presents a nonjusticiable question if it involves, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. In this case, overlapping textual commitments to the political Branches establish the political nature of petitioners' claims.

The President exercises foreign-affairs powers as Commander-in-Chief of the armed forces (Art. II, § 2, Cl. 1), through his power to "receive Ambassadors and other public Ministers" (Art. II, § 3), and in the course of "tak[ing] care that the Laws be faithfully executed" (*ibid.*). He is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted).

With respect to foreign commerce, however, the Constitution vests Congress with broad regulatory power. In particular, the Foreign Commerce Clause, Article I,

Section 8, Clause 3, empowers Congress to "regulate Commerce with foreign Nations." Congress also is authorized to take various other actions that may affect foreign commerce, such as raising revenue (Art. I, § 7, Cl. 1), laying and collecting taxes, duties, imposts, and excises (Art. I, § 8, Cl. 1), and regulating the value of foreign currency (Art. I, § 8, Cl. 5). This Court has recognized that "[t]he Constitution gives Congress broad, comprehensive" and "plenary" powers to regulate foreign commerce. *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123, 125-126 (1973); accord *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974) ("[t]he plenary authority of Congress over * * * foreign commerce is not open to dispute"). In the language of *Baker* v. *Carr*, the Foreign Commerce Clause and the other provisions cited above constitute "a textually demonstrable constitutional commitment" of foreign-commerce powers to Congress, 369 U.S. at 217, which is tempered only by the assignment of general foreign-affairs powers to the President.

Petitioners do not dispute that the subjects addressed by the Implementation Act lie within the broad reach of Congress's plenary powers under Article I of the Constitution, including those over foreign commerce and the laying of taxes, imposts, duties, and excises. They do not argue, for example, that the subject matter of the Implementation Act is inherently beyond the power of Congress to address under the Constitution in the absence of a prior treaty to which the Act of Congress gives effect. Cf. *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). Petitioners nevertheless suggest that in order for the Implementation Act to be valid, it must also be supported by the exercise of the President's power under Article II of the Constitution to make treaties by and with the advice and consent of

the Senate. We know of no authority, however, for the proposition that a court may invalidate provisions of an Act of Congress that raise or lower tariffs or enact other trade regulations that are within Congress's legislative power, simply because the Act of Congress was in turn based on standards that were previously negotiated by the President with other nations and approved by Congress in the Act itself.[1] Whether a law that is independently within the power of Congress to enact should be accompanied by the President's making of a treaty addressing the same subject matter would appear to be a classic example of a question that is for the political Branches to decide.

b. Petitioners in effect argue (Pet. 25-28) that Congress's legislative powers are limited by the Treaty Clause and that measures approving international commercial accords are an exception to Congress's plenary legislative power over foreign commerce and the laying of taxes, duties, imposts, and excises. Even then, petitioners do not dispute that the Constitution reserves to the political Branches "the power to make such international agreements as do not constitute treaties in the

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[1] Congress not infrequently enacts laws that embody principles that have been the subject of negotiations by others, see, *e.g.*, *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 170 n.3 (1980), as well as laws providing for the raising or lowering of tariffs and other trade barriers with a view toward the adoption of reciprocal measures by other nations, see, *e.g.*, *Field* v. *Clark*, 143 U.S. 649, 680, 682-690 (1892); 19 U.S.C. 2701-2707 (1994 & Supp. V 1999) (Caribbean Basin); 19 U.S.C. 3101-3111 (telecommunications trade). The fact that the President has received a commitment from the leader of another nation concerning reciprocal measures in advance of Congress's enactment of a law does not render it impermissible for Congress to take that action into account and, indeed, to approve the action as part of its enactment.

constitutional sense." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (citation omitted); see *Weinberger* v. *Rossi*, 456 U.S. 25, 30 n.6 (1982) ("We have recognized * * * that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause."); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). Yet petitioners fail to propose—and the Constitution does not provide—an analytical framework for distinguishing between international trade agreements that must be entered into by the President by and with the advice and consent of the Senate under the Treaty Clause, and international trade agreements that Congress may approve and give effect to through the passage of a law pursuant to its express powers under the Foreign Commerce Clause and other provisions of Article I of the Constitution.

The most that petitioners can say is that "historical materials" indicate that "substantial international commercial agreements like NAFTA" are subject to the Treaty Clause. Pet. 23. As the court of appeals held, however, that "nebulous argument" (Pet. App. 28a) based on extra-textual sources puts this case squarely within *Baker* v. *Carr*'s rule that a case also presents a political question if there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217; see Pet. App. 28a-29a. See also *Goldwater* v. *Carter*, 444 U.S. 996, 1003 (1979) (plurality opinion) (challenge to procedure by which President terminated mutual defense treaty with Taiwan is nonjusticiable because of "the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties"); *Nixon* v. *United States*, 506 U.S. 224, 230 (1993) (finding political ques-

tion because "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions").[2]

Petitioners note (Pet. 22-24) that this Court has sometimes found cases judicially manageable despite a lack of clarity in the relevant provisions of the Constitution. See, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654 (1988); *INS* v. *Chadha*, 462 U.S. 919 (1983). But as the court of appeals noted, none of the cases on which petitioners rely bore directly on foreign policy or threatened to undermine the authority of the President and Congress "to manage our external political and economic relations." Pet. App. 31a.

By contrast, and as the court of appeals also explained (Pet. App. 31a-34a), for the judiciary to attempt to resolve the question of whether NAFTA was required to be approved under the Treaty Clause of Article II as well as pursuant to Congress's enumerated powers under Article I would "express[] [a] lack of the respect due coordinate branches of government" and

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[2] In *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540 (1840), a plurality of the Court explained that "[t]he power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it." *Id.* at 569. Although the plurality suggested that the Treaty Clause could be applied to "all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments," the Court did not "attempt[] to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it." *Ibid.* Nor did the plurality address the question of whether any particular measure *must* be adopted by the federal government by entering into a treaty rather than through the exercise of Congress's plenary legislative powers.

create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* v. *Carr*, 369 U.S. at 217. A judicial declaration invalidating NAFTA would "clearly risk" international embarrassment of both the Executive and Legislative Branches (Pet. App. 32a) and produce "serious repercussions for our nation's external relations with Mexico and Canada" (*id.* at 33a). Indeed, the court of appeals noted that "granting the [petitioners'] requested relief in this case * * * would potentially undermine every other major international commercial agreement made over the past half-century." *Ibid.* Particularly given that there is no dispute between the Executive and Legislative Branches regarding the procedures used to approve NAFTA, see *id.* at 34a, judicial restraint is appropriate. Cf. *Goldwater* v. *Carter*, 444 U.S. at 997 (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.").

2. The court of appeals found that petitioners have Article III standing. Pet. App. 9a-19a. Nonetheless, this case presents serious standing questions that add to the likelihood that the case would be found nonjusticiable if further review were granted and, therefore, further counsel in favor of denying the petition.

To establish standing, petitioners would have to show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). The standing inquiry is "especially rigorous" when the constitutionality of legislation is at issue. See *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

Petitioners allege that the political Branches' approval and implementation of NAFTA has injured them in their efforts to buy American-made products, in employment, and in the labor union petitioners' representation of their members. Pet. App. 56a-57a. Even assuming that the petitioners have suffered constitutionally sufficient injury (which was not contested before the district court in the context of the motion to dismiss, see *id.* at 54a n.40), judicial invalidation of NAFTA would redress those injuries only if it resulted in a greater availability of American-made products and caused particular businesses to increase their employment in the United States. Indeed, to satisfy the "redressability" requirement, petitioners would have to establish, at a minimum, that (1) if the United States ceased to consider itself bound by NAFTA and ceased to apply the Implementation Act, it would raise trade barriers rather than pursuing policies consistent with NAFTA under other provisions of law, see, *e.g.*, 19 U.S.C. 2461 (1994 & Supp. V 1999) (authorizing President to provide duty-free treatment for articles from developing countries); (2) the new trade barriers would cause firms to produce more in the United States and to extend additional jobs or more favorable terms to workers represented by the petitioner unions, rather than continuing production in their current locations or shifting production to new locations outside the United States; and (3) such changes would not be offset by ensuing economic or policy changes in Mexico, Canada, or other countries that cause a reduction of production and jobs in the United States. A coalescence of political, economic, social, and other forces therefore would determine whether petitioners' asserted injuries would be ameliorated by the relief they seek. Where, as here, redressability "depends on the unfettered choices made

by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," standing "is ordinarily substantially more difficult to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted).

Petitioners' request for a judicial injunction ordering the President to notify Canada and Mexico that the United States is withdrawing from NAFTA presents an additional redressability issue, because a court has no power to enjoin the President to perform such an undertaking. See *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (opinion of O'Connor, J.); *id.* at 826-827 (Scalia, J., concurring in part and concurring in the judgment); see also Pet. App. 14a-19a & n.20.

Finally, petitioners face an especially high hurdle in showing standing because NAFTA serves as a framework to facilitate the parallel enactment of tariff reductions and other trade laws that each signatory nation could have adopted unilaterally and that, under our Constitution, lie within the plenary power of Congress to enact on behalf of the United States. Wholly aside from their relationship to NAFTA, the trade rules established by the Implementation Act were a valid exercise by Congress of its authority to regulate foreign commerce through legislation. See Point 1, *supra*. Thus, the Implementation Act's provisions could well remain in force even if, as petitioners request, the

courts declared Congress's approval of NAFTA invalid.[3]

3. Quite apart from the applicability of the political question doctrine, the defects in petitioners' standing, and the unavailability of relief against the President, there are other serious problems concerning the appropriateness of judicial relief in this case. As the court of appeals correctly noted (see Pet. App. 14a-15a n.20), the Administrative Procedure Act (APA), 5 U.S.C. 701-706, does not furnish a cause of action in this case because only the President can terminate this Nation's participation in NAFTA and the President is not an "agency" for purposes of the APA. Although other Executive Branch officials have responsibilities for carrying out the Implementation Act, petitioners do not name any such officials in their complaint, and they do not base their challenge on any particular "final agency action" by one of those officials that adversely affects their members in a distinct and concrete way. See Pet. App. 18a n.25. Petitioners instead have brought a broad-based challenge to NAFTA itself. Cf. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 890-894 (1990).

It is true that in *Franklin*, *supra*, the Court entertained a constitutional challenge to the compilation of state census totals even though the plaintiffs had no cause of action against the President under the APA.

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[3] Relying on 19 U.S.C. 3311 (approving NAFTA) and 3331 (tariff modifications to implement NAFTA), the court of appeals concluded (Pet. App. 19a n.26) that the entirety of the Implementation Act would be void if NAFTA were not valid. Neither of the provisions cited by the court of appeals requires such a result, and the court of appeals' severability analysis is open to serious question. Cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (declining to address severability question after invalidating provisions of the Brady Act on constitutional grounds).

But there the plaintiffs challenged a discrete governmental decision, issued by the Secretary of Commerce under the Census Act and approved by the President under the Apportionment Act, that had an immediate and direct impact on what the plaintiffs alleged to be their distinct rights under the Constitution to a particular apportionment of Representatives. See 505 U.S. at 797-800. Petitioners here do not rest their challenge to NAFTA on an alleged direct and immediate interference with any comparably distinct and personal constitutional rights. In the absence of an express statutory cause of action for the sort of generalized challenge that petitioners raise, the courts at the very least should decline to entertain petitioners' suit for declaratory and injunctive relief as a matter of equitable discretion.

4. Even if this case could properly be entertained, the district court was correct in its ruling on the merits that the political Branches exercised valid constitutional authority in providing a framework for negotiating NAFTA and then approving and giving effect to NAFTA in United States law through the passage of a law, rather than under the Treaty Clause. See Pet. App. 139a-231a.

First, and as discussed above, the revisions to United States trade laws made by the Implementation Act are independently within Congress's plenary power. The Implementation Act is not the sort of law that is valid only because it was enacted to implement a treaty that was made by the President by and with the advice and consent of the Senate. Cf. *Missouri* v. *Holland*, 252 U.S. at 432. There accordingly is no basis for a court to invalidate that law simply because it enacts standards that were embodied in a trade agreement that the President negotiated for presentation to Congress.

With respect to approval of the NAFTA agreement itself, moreover, Congress followed permissible procedures. While the Treaty Clause establishes a procedure by which the President may enter into treaties on behalf of the United States, Article I, Section 10 of the Constitution recognizes that sovereigns additionally may enter into "agreements" and "compacts" with foreign nations. The Constitution does not specify any particular procedures for forming international understandings or arrangements by means other than a treaty. Nor, as noted in Point 1, above, does it specify circumstances under which an international agreement may be approved *only* pursuant to the Treaty Clause.

Although the President and the Senate could have approved NAFTA through the Treaty Clause, the existence of that option does not suggest that it was exclusive. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), for example, the Court upheld the suspension of judicial claims against Iran by an Executive Order that was issued by the President as part of a settlement with Iran, even though similar settlement agreements had been adopted under the Treaty Clause. "Though [similar] settlements have sometimes been made by treaty," the Court explained, "there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate," *id.* at 679 (footnote omitted), which Congress has implicitly approved, *id.* at 680-686. In *Weinberger* v. *Rossi*, moreover, the Court noted that "Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements," 456 U.S. at 30, but the Court did not intimate that the latter agreements are constitutionally defective.

From its earliest days, Congress has used bicameral legislation to approve rules governing trade with for-

eign nations. See, *e.g.*, Act of June 13, 1798, ch. 53, 1 Stat. 565 (suspending trade between United States and France); Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (suspending prohibition on importation of certain goods and authorizing President to extend suspension); Act of Mar. 1, 1809, ch. 24, 2 Stat. 528 (imposing embargo on commercial dealings between United States, Great Britain, and France). For more than a century, moreover, Congress has provided advance legislative approval of presidential trade initiatives. See Pet. App. 109a (citing trade acts of 1890, 1897, and 1934); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 322-326 & n.2. In *Field* v. *Clark*, 143 U.S. 649 (1892), this Court upheld the constitutionality of one such provision (the McKinley Tariff Act, ch. 1244, 26 Stat. 567), which provided advance approval for the President to revise tariffs in response to the actions of other countries, and empowered him to enter into tariff agreements with foreign nations. See Pet. App. 179a-180a. In sustaining the Act, the Court specifically rejected the contention that the Act impermissibly delegated not only lawmaking power, but also treaty-making power to the President. See 143 U.S. at 694. Such "long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" relating to the operation of government. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Petitioners suggest that approving and implementing NAFTA through bicameral passage and presentment to the President avoided a constitutional "check." Pet. 21. But as this Court stated in holding that Congress may override a treaty by a duly enacted law, an Act of Congress is not "less entitled to respect * * * than a treaty" on the basis that it was approved by majorities of the House and Senate rather than "two thirds of the

Senators present," Article II, Section 2, Clause 2. *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 599 (1884). "If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies [*i.e.*, the President, the Senate, and the House] participate." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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