WHO#1-RAGA Email Intro

The following was the opening email to RAGA

Dear Attorney General,

It has two main purposes:

1. To inform you of a grave threat to each state's sovereign right to manage their healthcare systems; and
2. To solicit immediate cooperation in stating opposition to the process from each state's chief legal officer.

The imminent threat is based on President Biden's participation in efforts to enact the WHO's (World Health Organization's) Pandemic Preparedness Treaty as well as a radically transformed version of the IHR's (International Health Regulations') current Amendments. It is widely documented that the Pandemic Treaty and Amendment updates would grant extraordinary and unconstitutional powers to an unelected, opaque international bureaucracy. The proposed treaty has serious implications for civil liberties, individual rights, and state sovereignty. In sum, the proposed treaty and reworded amendments would:

- Enable the WHO to unilaterally declare a pandemic and exercise authority over pandemic-related health measures;
- Empower the WHO to regulate, at the state and national level, pandemic responses – including vaccine and mask mandates, lockdowns, business closures and other measures; and
- Authorize the WHO to censor, under the guise of "fighting misinformation," the constitutional free speech rights of individuals.

Unfortunately, indications are the Biden Administration is anticipating approval of either the Pandemic Treaty or Amendment updates - or both, and planning to participate, fund, and enforce the WHO's new program. Action before the May 27th vote in Geneva is of the upmost importance.

AG Letterhead

April ___, 2024

Hon. Joe Biden
The White House
Washington, D.C.
20500

Re: Threats to the constitutional rights of U.S. citizens posed by proposed amendments to the World Health Organization's International Health Regulations (IHR) and a new Pandemic Treaty.

Dear Mr. President:

As the chief legal officers of our respective States, charged not only with enforcing the law, but also with securing the civil and other rights of our citizens, we oppose two instruments now under negotiation that would give the World Health Organization (WHO) unprecedented *and unconstitutional* powers over the United States and her people.

If adopted, these proposed accords: a) would radically transform the WHO's existing International Health Regulations (IHRs); and b) would, via a new "Pandemic Agreement," threaten national sovereignty, undermine states' rights, and imperil constitutionally guaranteed freedoms.

The object of these instruments is to grant the WHO, and specifically its unelected, unaccountable Director-General, the authority to restrict U.S. citizens' rights, for example, to freedom of speech, privacy, movement (especially travel across borders) and informed consent, and otherwise violate our Constitution's First, Fourth, Fifth, Tenth and Fourteenth Amendments.

We must, therefore, oppose such accords on the following grounds:

1. <u>If the two proposed instruments were to be adopted, the WHO would be transformed from an advisory, charitable organization into the world's governor of public health.</u>

   The WHO is currently limited to an advisory role and has no authority to enforce its recommendations. But, under the proposed IHR amendments and Pandemic Treaty, the WHO's Director-General would achieve the power unilaterally to declare a "public health emergency of international concern" (PHEIC) in one or more member nations. Such declarations can include perceived or *potential* emergencies other than pandemics, including for example: climate change, immigration, gun violence or even "emergencies" involving plants, animals or ecosystems.

2. <u>The proposed IHR amendments and Pandemic Treaty would further surrender sovereignty to the WHO</u>.

The WHO's Director-General would be authorized to dictate *what must be done* in response to such a declared PHEIC. America's elected representatives would no longer set the nation's public health policies. And, under the WHO's proposed agreements, American citizens would be obliged to comply with whatever the Director-General directs concerning mitigation of these emergencies. That would include permitted treatments during a declared public health emergency.

3. Other problems abound with both the proposed IHR amendments and the Pandemic Treaty.

   These include: the institution of a global surveillance infrastructure, ostensibly in the interest of public health, but with the inherent opportunity for *control*, as with Communist China's "social credit system"; obliging states parties to establish means of censoring speech; and requiring what would amount to the proliferation of potential biological weapons.

4. Responsibility for public health policy is not among the federal government's enumerated powers under the U.S. Constitution.

   It is, therefore, reserved for the states. The federal government certainly cannot transfer any authority for public health policy to the WHO given that it does not, in fact, exercise that authority.

We, the undesigned State Attorneys General, will resist any attempt to transfer authority to the World Health Organization for public policy affecting our citizens and any effort the WHO might undertake to assert such authority over them.

Respectfully,

VIA EMAIL: Republican Attorneys General Association
ATTN: David Johnson and Peter Bisbee

April 18, 2024

RE: Taking Action Regarding the World Health Organization.

Dear Attorneys General:

Thank you for taking the time to discuss with me the concerns we have raised regarding the Biden Administration's plans to support and agree to the proposed IHR Amendment updates and the Pandemic Treaty, both of which threaten our nation's sovereignty.

I am respectfully asking that the Republican Attorneys General band together and consider the following responses to these threats:

1. Sign and send the attached letter of protest to President Biden. Coordinated by David Johnson. WHO - 1-RAGA Biden Letter-4.18.24 - FINAL

2. Ask Attorneys General to issue formal advisory opinions covering these issues, including the unconstitutional nature of the WHO instruments and the necessity of ensuring that no Pandemic Treaty shall have effect without US Senate approval.

    - TX-OK vs HHS key insights for Opinion. WHO - TX OK Law Suit vs HHS.pdf

3. Consider initiating legal action by the States against the Biden Administration to mandate that any Pandemic Treaty be presented to the Senate for its consideration. We have legal brief that we can provide in support of such litigation.

    - WHO Brief attached for review, Michael Farris, JD, LLM. WHO-Michael Farris, JD, Brief- Senate Must Vote

Thank you again for the opportunity to raise these significant issues. Your actions are a part of a national effort including all 50 State GOP Chairs and potentially the 27 Governors under the RGA. For further background, we have attached documents further elaborating the dangers presented by the WHO's incursion on our national sovereignty.

Regards,

Joe Gebbia

Founder and CEO
www.state-shield.org

3112 Windsor Rd., A370 | Austin, TX 78703 | (737) 230-4833 | Joe@State-Shield.org

BACKGROUND PAPER ON THE PROPOSED TRANSFORMATION OF THE W.H.O.

With the active support of the Chinese Communist Party, the World Economic Forum, the European Union, Bill Gates, Big Pharma, and the Biden administration, two accords are being finalized that would give the World Health Organization (WHO) wholly unprecedented *and actually unconstitutional* powers over the United States and her people.

If adopted, these two proposed governing protocols – a package of major amendments to the WHO's existing International Health Regulations (IHRs) and a new treaty being described as the Pandemic Agreement – could threaten national sovereignty, undermine states' rights, and imperil constitutional freedoms and basic individual liberties.

Specifically, the WHO and its unelected officials would be granted the authority to restrict U.S. citizens' rights to freedom of speech, privacy, movement (especially travel across borders), choice of medical care and informed consent. The WHO would also be empowered to ignore intellectual property rights and impose a massive and unaccountable surveillance system on the world. Most significantly, the proposed instruments would violate Americans' basic civil rights under the First, Fourth, Fifth, Tenth and Fourteenth Amendments.

The following are of particular concern:

1. If the two proposed governing protocols are adopted, the WHO would be transformed from an advisory, charitable organization into the world's governor of public health, *whose orders must be obeyed*.

The World Health Organization was founded in 1948 as a specialized agency of the United Nations with a mandate to coordinate international health issues. The WHO carries out its mandate issuing guidance, making recommendations, and establishing protocols for dealing with medical emergencies. Currently, the World Health Organization (WHO) is in the final stages of considerably amending its existing International Health Regulations (IHR) and negotiating an international Pandemic Treaty. The ostensible purpose is to enable a global response to "Public Health Emergencies of International Concern" (PHEICs).

Although the WHO does not presently have the authority to enforce its recommendations, under the proposed IHR amendments and new Pandemic agreement, both of which would be binding, the WHO would gain the authority to issue mandates, not simply give advice, transforming its role from an advisory and charitable agency to one that will govern public health worldwide.

During a declaration of an actual or potential PHEIC, the IHRs would be in force. The Treaty would always be in force.

2. The proposed IHR amendments and Pandemic Treaty confer essentially unlimited powers over public health globally to the WHO's Director-General.

The IHR amendments would require states parties to surrender sovereignty over public health to the WHO's unelected and unaccountable Director-General, who would – among other things – be empowered to direct nations as to what laws they must pass and enforce. For example, the IHR amendments insert the word "shall" a total of 168 times. The clear intent and meaning of these changes is to establish that such dictates will be mandatory for member countries to follow, especially during a declared "emergency." (Note that the protocols establish compliance and implementation committees, as well as a "focal point" in each country to report back to the WHO on compliance. Moreover, the defined scope of the proposed IHR has been expanded to include "all risks with a *potential* to impact public health" (*Article 2, Scope and purpose*).[1]

Moreover, if the proposed IHR changes and Pandemic Treaty are adopted in late May 2024, America's elected representatives would no longer solely set our public health policies. Instead, they could be dictated by the WHO's Director-General, who would be authorized to declare unilaterally public health emergencies of regional or international concern. Such declarations can include perceived or potential emergencies other than pandemics, including for example: climate change, immigration, gun violence or even emergencies involving plants, animals, or ecosystems. And, under the WHO's proposed agreements, American citizens would be obliged to comply with whatever the Director-General says must be done about these emergencies.

3. Both the proposed Pandemic Treaty and IHR indicate a disconcerting intent to suppress free speech criticism of public health concerns, establish global surveillance, and support the proliferation of potential biological weapons.

Other problems abound with the WHO's Pandemic Treaty and International Health Regulations amendments. For example, they would require the establishment of a global surveillance state that threatens the basic privacy rights of all Americans and reflects the organization and its partners' determination to suppress free speech that is at odds with the WHO's public health policies. While nominally promoting "unhindered" access to information (*Treaty Article 3. General principles and approaches*),[2] there is a contradictory requirement for nations to "combat false, misleading, misinformation or disinformation" (*Treaty Article 18, Communication, and public awareness*).[3] Notably, under these protocols, social media could be

[1] https://apps.who.int/gb/wgihr/pdf_files/wgihr2/A_WGIHR2_7-en.pdf. (page 3)
[2] https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf. (page 7)
[3] https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf. (page 22). The Treaty defines "infodemic" as "too much information, false or misleading information, in digital and physical environments during a disease outbreak. It causes confusion and risk-taking behaviors that can harm health." It then requires "Parties" to engage in "infodemic management at local, national, regional and international levels. " Treaty at pp. 5, 13. The Treaty also requires that Parties "harmonize … regulatory requirements" (p. 20) so it contemplates that each government will bind private parties, including any that contribute to the "infodemic." The First Amendment prohibits this kind of speech control.

monitored and censored; citizens could be inoculated and subjected to lockdowns at the sole discretion of the WHO; and Americans' medical data, from birth to death, could be shared globally.

Both documents also support the proliferation of potential biological weapons. While the stated goal of the Pandemic Treaty is to reduce pandemics, it establishes a "Pathogen Access and Benefit-Sharing System" (*Treaty Article 12, Access and benefit sharing*)[4] that requires nations to share "potential pandemic pathogens" – a formula for proliferating potential biological weapons, which increases the risk of pandemics.[5]

Furthermore, the WHO's Director-General would appoint experts to supervise genetic engineering and Gain-of-Function research on potential pandemic pathogens (*Article 24, Scientific Advisory Committee*), which appeared in the February 14, 2024, draft of the Pandemic Treaty.[6] Such research will further increase the risk of escape of highly pathogenic microorganisms. A serious effort to prevent pandemics would require the WHO to end such dangerous research.

4. Implementation of public healthcare policy is a state, not federal, responsibility.

The responsibility to define and implement public health policies is not an enumerated power in the U.S. Constitution, and therefore is an authority reserved to the states. The federal government cannot transfer authority for U.S. public health policy to the WHO because it is not, in fact, entitled to exercise such authority, let alone relinquish it to a foreign entity.

The Biden administration is, nonetheless, strongly supportive of both of the proposed WHO accords. The U.S. State Department has indicated that it does not intend to request Senate advice and consent on the IHR amendments or the Treaty. And the U.S. Senate has, to date, refused to agree to require either or both to be submitted pursuant to its constitutional role in the ratification of such accords.[7] [8]

It falls, therefore, to the states' Attorneys General to stand against these agreements and thereby safeguard such state prerogatives and their constituents' medical freedom, lest one or both be irreparably harmed.

Resources:
https://SovereigntyCoalition.org
https://DoortoFreedom.org
https://State-Shield.org

---

[4] https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf. (page 16)
[5] https://brownstone.org/articles/who-amendments-increase-man-made-pandemics/
[6] https://doortofreedom.org/wp-content/uploads/2024/02/INB8_Chapter-III.pdf
[7] https://www.ronjohnson.senate.gov/2023/2/sen-johnson-leads-colleagues-in-effort-to-protect-american-sovereignty-against-world-health-organization
[8] https://oversight.house.gov/hearing/reforming-the-who-ensuring-global-health-security-and-accountability/

TALKING POINTS:

A TRANSFORMED W.H.O. WILL THREATEN OUR SOVEREIGNTY AND FREEDOMS

There is a stealthy plan afoot to **replace our sovereign, constitutional Republic and the freedoms it guarantees** all of us. Neither you nor the rest of the American people have been consulted about this insidious idea, let alone *consented to it*.

The initiative, which is being touted by those who want to establish a "New World Order," is aimed at substituting **"global governance"** for the sovereignty of nations like ours.

The leading edge of such a transformation is supposed to be adopted at **the end of May 2024**. The World Health Organization (WHO), led by its Director-General, Dr. Tedros Ghebreyesus, and with the strong support of the Biden administration, is finalizing agreements that would allow Tedros to ***dictate global public health policy***.

These accords would *oblige* the U.S. and 195 other states parties to submit to whatever the WHO's Director-General deems to be **an actual *or potential* "Public Health Emergency of International Concern"** (PHEIC). They must also carry out whatever he determines is **the appropriate response**.

In addition, such public health emergencies can – and *will* – include **perceived emergencies *other than pandemics***, including for example: climate change, immigration, gun violence or even potential emergencies involving plants, animals or ecosystems.

The result would be the **supplanting of our representative form of limited government** and its role in safeguarding public health – including, under our Constitution, ***the states'* sole responsibility** for such matters.

The idea of giving the WHO *any* additional power is all the more outrageous given its **disastrous performance in the COVID-19 pandemic**. After all, Tedros Ghebreyesus was the one who promoted the so-called **"China Model"** of social distancing, lockdowns, mask mandates and the required use of inadequately tested and actually dangerous "vaccines," contributing to the **needless deaths** of millions, here and around the world.

Even more ominous is the specific power Tedros seeks, namely, to *tell us* when we have a public health emergency and what we must do in response. It will have a devastating effect, not least insofar as it will preclude Americans from being able to make potentially **life-and-death decisions with their own doctor**.

There is still time to prevent such outcomes. We may not be able to stop the completion and approval of the two agreements now being secretly finalized by the WHO, its "stakeholders" and its member nations. That's because the process is basically rigged. But we can **make sure that *they will not apply to us***.

We need to deal the whole idea of global governance a body blow and protect our national, state and personal sovereignty by doing three things immediately: 1) **withdraw from the World Health Organization**, 2) **defund it** and 3) make clear that **we will not be bound by any of its dictates**.

Resources:
https://SovereigntyCoalition.org
https://DoortoFreedom.org
https://State-Shield.org

FURTHER INSIGHTS ON THE DANGERS OF A TRANSFORMED W.H.O.

The World Health Organization (WHO), led by its Director-General Dr. Tedros Ghebreyesus, the Chinese Communist Party that controls him and the Biden administration, are finalizing documents that would allow Tedros to dictate global public health policy. The result will be a crushing of both national sovereignty and individual medical freedoms, in the United States and the world.

The WHO would accomplish this via a Pandemic Treaty and by amending International Health Regulations that would *oblige* the U.S. and 195 other states parties to submit to whatever its Director-General deems to be an actual *or potential* "Public Health Emergency of International Concern" (PHEIC). They must also carry out whatever he determines is the appropriate response. Such PHEICs can include perceived emergencies *other than pandemics*, including for example: climate change, reproductive health, immigration, gun violence or even potential emergencies involving plants, animals, or ecosystems.

The two proposed WHO "instruments" are: 1) transformative amendments to the existing **International Health Regulations** (IHRs); and 2) **a new accord** governing "pandemic prevention, preparedness and response." With the Biden administration's strong support, the WHO refuses to characterize either of them as "treaties" so as to circumvent the U.S. ratification process. The Congressional Research Service, however, says that, for purposes of international law, both *are* treaties.[1]

All other things being equal, both instruments will likely be approved between May 27 and June 1, 2024. That should not be the case since the *WHO is in violation of its own rules* requiring the proposed IHR amendments to be provided to member states *four months* in advance of the scheduled vote. And since the current draft of the Pandemic Agreement incorporates references to the amended IHRs, it is clearly not ready for a vote, either. Furthermore, the WHO Constitution delineates the limited scope of Regulations that may be issued by the WHO. The proposed amendments far exceed this scope, requiring them to be included in the treaty, which needs a 2/3 vote of the World Health Assembly to pass.

Even if the United States were not to support the radically transformative amendments to the International Health Regulations, **it will bound by them** if they are approved by a simple majority of the World Health Assembly since, as with the UN General Assembly, every nation has just one vote and *the United States cannot exercise a veto*.

A two-thirds majority is required to adopt the Pandemic Agreement. Given the Biden administration's support for this accord and refusal to submit it (or the IHR amendments) for Senate advice and consent, our country will also be bound by the Pandemic Agreement for **at**

[1] https://www.everycrsreport.com/files/2022-06-22_IF12139_1b82a7b4554a5dfbbf8981b345ee175d0516c28d.pdf

least 2 years. Once the accords' infrastructure and arrangements are in place, moreover, a future president may find it very difficult to disentangle the United States.

***Neither instrument can be fixed,* as they inherently violate our Constitution and rights**. Unless the United States withdraws from the World Health Organization, it will be bound by whatever the majority of WHO members agree upon, to the detriment of our national sovereignty and personal freedoms.

After Tedros and the World Health Organization's catastrophic mishandling of the COVID-19 pandemic, it is utterly unacceptable to give the WHO *still more*, let alone *binding*, control over our public health in order to impose the very same measures that failed so spectacularly last time. In light of the enormity of the stakes, preventing our country from being subjected to such medical tyranny masquerading as "global health and pandemic preparedness" has taken on critical urgency.

Consequently, if the United States is to be spared such an unacceptable surrender of its national sovereignty – with all that portends for its people, their freedoms and well-being**, Congress must insist that this country: exit the World Health Organization; defund its operations; and not be bound by any WHO treaties or regulations.**

Examples of Unacceptable Provisions in the WHO Instruments

Among the amendments that would fundamentally transform **the International Health Regulations** are the following:

- The voluntary character of the World Health Organization would be replaced by an "international health government" that could issue mandates to member states that must be obeyed., The proposed amendments replace the word "may" with "shall" over 100 times. In addition, the word "non-binding" has been deleted to make the "recommendations" of the WHO **binding.**
- The WHO will be able to intervene not only when an active public health risk exists, but also when the public health risk is only **potential.**
- Article 9 would be amended to authorize the WHO to rely on **undisclosed sources** for information when declaring a public health emergency, which need not be shared with the affected nation(s).
- Article 12 would be amended to authorize **the Director-General to declare unilaterally a potential or actual public health emergency of international concern**. That authority can justify the imposition and enforcement of sanctions on nations that insist on exercising their sovereign right not to comply with WHO dictates.

The proposed **Pandemic Treaty**:

- **Establishes global surveillance requirements**.
- **Commits governments to censor dissenting views** (Article 18)**. "**The Parties shall strengthen science, public health and pandemic literacy…with the aim of countering and combating false, misleading misinformation or disinformation."

- **Embraces a "One Health Approach"** (Article 5)**.** That approach includes not only human health, but also the health of animals, agricultural plants, and the environment. **If passed, the WHO would have control over every aspect of existence on earth.**

Resources:
https://SovereigntyCoalition.org
https://DoortoFreedom.org
https://State-Shield.org

United States District Court
Northern District of Texas
Fort Worth Division

STATE OF TEXAS, STATE OF OKLAHOMA, *Plaintiffs*, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, MARVIN FIGUEROA, in his official capacity as Director of Intergovernmental and External Affairs of the Department of Health and Human Services, *Defendants*.	Case No:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The United States Department of Health and Human Services and its officials have unlawfully denied a petition to remove an unlawful regulation from federal law.

2. The Department's definition of "public health emergency" in 42 C.F.R. § 70.1 exceeds the agency's authority, as it unlawfully delegates to the World Health Organization (WHO) the authority to invoke emergency health powers in the United States—infringing on U.S. and state sovereignty.

3. The Plaintiffs requested repeal of this unlawful rule through a petition for rulemaking brought under the Administrative Procedure Act (APA). The Defendants rejected the petition, and in so doing, did not provide a rational explanation for keeping an unlawful regulation in federal law. Accordingly, the Defendants' denial of the petition is arbitrary and capricious.

4. This Court should either (a) issue declaratory and injunctive relief against the plainly unlawful delegation of power to a foreign entity, or (b) provide injunctive relief granting the petition for rulemaking. At a minimum, the Defendants unlawfully withheld an adequate response to the Petition. This Court should therefore declare the plain meaning of the regulation and remand the Petition for a meaningful response on the regulation at issue.

II. JURISDICTION AND VENUE

5. Jurisdiction is proper in this United States District Court under 28 U.S.C. §§ 1331, 1346, 2201, 2202, and 2241.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because at least one Plaintiff resides here.

III. PARTIES

7. Plaintiff State of Oklahoma is a sovereign state. Its legal interests are represented by the Attorney General of Oklahoma, who submitted the petition for rulemaking at issue in this case.

8. Plaintiff State of Texas is a sovereign state. Its legal interests are represented by the Attorney General of Texas, who signed the petition for rulemaking at issue in this case.

9. Defendant United States Department of Health and Human Services is an agency of the United States. HHS received and responded to the petition for rulemaking at issue in this case.

10. Defendant Xavier Becerra is the Secretary of Health and Human Services. He received the petition for rulemaking, and the response was submitted on his behalf.

11. Defendant Marvin Figueroa is the Director of Intergovernmental and External Affairs of the Department of Health and Human Services. He responded to the petition for rulemaking on behalf of Defendant HHS and Defendant Secretary Becerra.

IV. BACKGROUND

The Regulation

12. HHS has the authority to enact rules to "prevent the introduction, transmission, or spread of communicable diseases" either from foreign countries into the United States or between the states themselves. 42 U.S.C. § 264(a).

13. When enforcing these rules, HHS may inspect, alter, or destroy animals or articles found to be sources of dangerous infection. *Id.* In addition, HHS may provide for the apprehension and examination of individuals in certain infected states. *Id.* § 264(d). Upon recommendation of the HHS Secretary, the President of the United States may also authorize the detention of individuals under certain circumstances. *Id.* § 264(b).

14. On January 19, 2017, one day before President Barack Obama's second term expired, HHS promulgated a rule defining the term "public health emergency." *See* 82 Fed. Reg. 6890 (Jan 19, 2017). It provided five definitions for the term:

i. The first definition relies on determinations of the Director of the Centers for Disease Control and Prevention (CDC). A "public health emergency" is "(1) Any communicable disease event as determined by the [CDC] Director with either documented or significant potential for regional, national, or international communicable disease spread or that is highly likely to cause death or serious illness if not properly controlled." 42 C.F.R. § 70.1.

ii. The second definition relies on determinations of the Defendant Secretary. A "public health emergency" is "(2) Any communicable disease event

described in a declaration by the Secretary pursuant to 319(a) of the Public Health Service Act (42 U.S.C. 247d (a))." 42 C.F.R. § 70.1.

iii. The final three definitions rely solely on information from, and determinations by, the WHO. A "public health emergency" according to those WHO determinations is:

> (3) Any communicable disease event the occurrence of which is notified to the World Health Organization, in accordance with Articles 6 and 7 of the International Health Regulations [IHR], as one that may constitute a Public Health Emergency of International Concern;[1] or
>
> (4) Any communicable disease event the occurrence of which is determined by the Director-General of the World Health Organization, in accordance with Article 12 of the International Health Regulations [IHR], to constitute a Public Health Emergency of International Concern; or
>
> (5) Any communicable disease event for which the Director-General of the World Health Organization, in accordance with Articles 15 or 16 of the International Health Regulations, has issued temporary or standing recommendations for purposes of preventing or promptly detecting the occurrence or reoccurrence of the communicable disease.

42 C.F.R. § 70.1.

15. In 2017, when responding to public comments criticizing this approach as a breach of United States sovereignty, HHS argued that it would not actually use definitions (3), (4), and (5) of public health emergency. 82 Fed. Reg. 6890, 6905-06.

[1] The IHR define "public health emergency of international concern" as "an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response." IHR, art. 1.

Instead, HHS insisted that it "will continue to make its own independent decisions regarding" public health emergencies. *See id.* at 6906.

16. Contradicting HHS's responses, the plain text of the rules purports to confer authority on HHS to rely solely on determinations by the WHO, rather than making independent decisions. Indeed, HHS admitted in 2017 that the declaration by the WHO or notification to the WHO of a Public Health Emergency of International Concern is a "way for HHS/CDC to define when the precommunicable stage of a quarantinable communicable disease may be likely to cause a public health emergency if transmitted to other individuals." *Id.* at 6905. Then, despite disclaiming any need to use definitions (3), (4), and (5) of public health emergency, HHS proceeded to finalize a rule containing those very definitions, without change or alteration.

The Petition for Rulemaking

17. The Plaintiffs oppose the unlawful regulation because it encroaches on their reserved powers, authority, and sovereignty.

18. The Plaintiffs are sovereign states. Because the Plaintiffs retain all sovereignty not delegated to the federal government, *see* U.S. Const. amend. X, the Plaintiffs have an interest in any action of the federal government that might unduly encroach on Plaintiffs' reserved police powers.

19. The applicable statute for public health emergencies asserts that the exercise of federal authority preempts conflicting State laws. 42 U.S.C. § 264(e). The Plaintiffs seek to protect the applicability of their health and safety laws against unlawful preemption by the actions of federal officials.

20. The federal statute and regulations also permit the federal government to encroach on State property and detain State personnel in public health emergencies. The Plaintiffs seek to protect their property and personnel against unlawful action or delegation by federal officials.

21. The statute and regulations for public health emergencies also potentially permit the federal government to encroach on the property or person of the Plaintiffs' citizens.

22. The Plaintiffs seek to protect their quasi-sovereign interest in the health and well-being of their residents against unlawfully intrusive action delegation by federal officials. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

23. In furtherance of these interests, the Plaintiffs filed a petition for rulemaking with Defendant HHS and Defendant Secretary. *See* Ex. 1. The petition requested the deletion of definitions (3), (4), and (5) of public health emergency in 42 C.F.R. § 70.1. *See id.*

24. The petition asserted three bases for the requested rulemaking. *See id. First*, the existing definitions exceed HHS's authority by unlawfully delegating their decisions to foreign nations or international organizations, absent express permission from Congress. *See id. Second*, changed circumstances justify further rulemaking because events since the adoption of the regulation in 2017 demonstrate that the WHO allows political factors to influence its health determinations. *See id.* In particular, the WHO was undeniably subject to politically based manipulation in its

handling of the COVID pandemic, making it a particularly untrustworthy repository for delegation of United States sovereignty. *See id. Third*, rulemaking is appropriate because HHS has openly denied that it needs to use the unlawful rules as written, and leaving the regulation in place therefore threatens State interests without advancing any current federal interest. *See id.*

The Response to the Petition

25. On October 31, 2022, the Defendants denied the Plaintiffs' petition for rulemaking in a response letter. *See* Ex. 2.

26. After some statutory and regulatory background, the Defendants first re-asserted their position that HHS "will continue to make its own independent decisions" and will only "give consideration" to information from the WHO. *Id.* at 3. The Defendants provided examples to confirm that HHS has exercised independent judgment over the past few years. *Id.* at 3-4.

27. Next, the Defendants asserted that it is nevertheless "important to include references to WHO in the definition of 'public health emergency' to inform the public of the circumstances that HHS/CDC may consider." *Id.* at 4.

28. As stated in the petition, HHS's position that definitions (3), (4), and (5) merely inform the public of sources consulted is not a plausible reading of the text of the regulation. *See* Ex. 1 at 3 ¶ 6. The plain text defines "public health emergency" to include "[a]ny communicable disease event" that is "determined by the Director-General of the World Health Organization" as meeting certain criteria or is "notified to the World Health Organization" by a member. 42 CFR § 70.1. Recasting that text

as merely a source list for CDC or HHS decision-making ignores the plain meaning of that text.

29. The Defendants did not address this plain meaning point even though it was raised in the petition, nor did they otherwise address why the Plaintiffs' reading of the regulation is incorrect. *See generally* Ex. 2.

30. The Defendants instead assumed, without explaining, the implausible reading of the regulation in order to avoid addressing the problems raised in the petition.

31. In particular, the Defendants did not explain why influencing the WHO requires deferring to the WHO's unilateral decision-making process. *See id.* Instead, the Defendants appear to assume that the regulation does not delegate any decisions to the WHO in order to analyze why regulatory changes are unnecessary. *See id.*

32. Significantly, the Defendants did not dispute the Plaintiffs' charge that political influence is warping the WHO's analysis, but instead emphasized the importance of "strengthening WHO" from its current status. *See* Ex. 2 at 4. The Defendants then discussed the history and value of the International Health Regulations. *See id.* at 4-5.

33. At the end, the Defendants asserted, remarkably, that deleting or amending regulations that HHS does not currently use is not worth "the expenditure of agency resources." *Id.* The Defendants also offered no plausible explanation why agency resources should be spent adopting unlawful or unnecessary regulations but should not be spent repealing unlawful or unnecessary regulations.

34. Because the Defendants have effectively conceded that the WHO needs changes to be reliable and should not be a sole source of authority or power, the disputes between the Plaintiffs and the Defendants are (1) whether the regulation is unlawful, and (2) whether the regulation should be repealed when it threatens state interests without advancing federal interests.

V. CLAIMS FOR RELIEF

COUNT ONE: UNLAWFUL AND UNREASONABLE REFUSAL TO ADEQUATELY ANSWER A PETITION FOR RULEMAKING— 5 U.S.C. §§ 553(E), 706

35. The Plaintiffs adopt and incorporate by reference all preceding allegations.

36. When given their plain meaning, definitions (3), (4), and (5) of public health emergency 42 C.F.R. § 70.1 are unlawful delegations of United States and/or state authority to foreign nations or international organizations.

37. Definition (1) of public health emergency in 42 C.F.R. § 70.1 is the sole definition of that term that refers to a decision of the CDC Director.

38. Definition (2) of public health emergency in 42 C.F.R. § 70.1 is the sole definition of that term that refers to a decision of the Defendant Secretary.

39. Definition (3) of public health emergency in 42 C.F.R. § 70.1 defers to communicable disease events notified to the WHO and does not refer to a decision of the CDC Director or the Defendant Secretary.

40. Definition (4) of public health emergency in 42 C.F.R. § 70.1 defers to a determination of the Director of the WHO and does not refer to a decision of the CDC Director or the Defendant Secretary.

41. Definition (5) of public health emergency in 42 C.F.R. § 70.1 defers to a decision of the Director of the WHO and does not refer to a decision of the CDC Director or the Defendant Secretary.

42. The Defendants' response to the Plaintiffs' petition denies and ignores the plain meaning of the regulation at issue.

43. The Defendants' failure to accurately address the law at issue renders their decision unlawful within the meaning of the APA. *See* 5 U.S.C. § 706.

44. A response to a petition for rulemaking must "clearly indicate that it has considered the potential problem identified in the petition" and is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 857 (9th Cir. 2017).

45. The Defendants cannot meaningfully address the legality of delegations of authority to foreign nations or international organizations without first admitting that those delegations occur by the plain import of the regulation in question.

46. Where the response to a petition for rulemaking misstates the law, the proper remedy is for the Court to declare what the law is and remand the petition for a response that adequately considers the problems presented by the petition. *See*

Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n, 520 F.2d 432, 446 (D.C. Cir. 1975).

COUNT TWO: ARBITRARY AND CAPRICIOUS REFUSAL TO REPEAL AN UNLAWFUL REGULATION—
5 U.S.C. §§ 553(E), 706

47. The Plaintiffs adopt and incorporate by reference all preceding allegations.

48. The Constitution prohibits all federal agencies, including HHS, from delegating their decisions to foreign nations or international organizations absent express provision or permission from Congress. *See, e.g.*, *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 926 (D.C. Cir. 2008).

49. Here, there is no treaty or international agreement that calls for or requires delegation like that present in the challenged regulation. Even if there were such a treaty, Congress would need to implement such a treaty through the statutory process. Because Congress has not authorized delegating declarations of public health emergencies to the WHO, HHS has exceeded its authority by promulgating rules that make just such a delegation.

50. These limits matter because unlawful delegations outside the federal government undermine accountability for executive decisions. When federal officers make executive decisions, the President can hold officers responsible for those decisions, and voters can in turn hold the President responsible for those decisions. Delegating the decision outside the executive branch allows the President and his officers to disclaim responsibility for important policy decisions, effectively

rendering the key decisionmakers beyond the reach of the voting public. In contrast, keeping decisions regarding public health emergencies with HHS and not the WHO allows voters to continue having a say in whether officials are wisely using their authority.

51. While delegation to any outside group is unlawful, delegating decisions to a foreign or international organization causes particular harm to the sovereignty of both the United States and the Plaintiffs.

52. A core aspect of sovereignty is that the authority to govern is derived from the people governed. The Federalist No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). The federal government and the states can share sovereignty because their authority derives from the same people. Delegations to groups inside the United States inappropriately rebalance the authority that the American people have conferred, and delegations outside the United States inappropriately seek to strip authority from the people entirely.

53. By allowing the WHO to determine when a public health emergency exists, transferred police power to an international organization, assigning the sovereign police power outside the constitutional order. This delegation of authority not only violates nondelegation principles but also infringes state sovereignty, as states would otherwise retain a wide range of police powers to address public health emergencies subject only to congressional action. *See Kelly v. Washington*, 302 U.S. 1, 9–10 (1937); *accord Breard v. City of Alexandria*, 341 U.S. 622, 634 (1951) (emphasizing state power cited in *Kelly*). Allowing an international organization to

determine when public health emergencies exist *in the United States* necessarily allows that organization to use or authorize the use of police powers that were neither given to it or to the federal government by the states.

54. Definition (3) of "public health emergency," which defers to any communicable disease event reported to the WHO, *see* 42 C.F.R. § 70.1, is a direct affront to the sovereignty of the U.S. government and the States. Definition (3) delegates some authority to the WHO by referring to reportable events under the IHR, and it further delegates authority to WHO member nations who make reports under those regulations. A foreign nation's decision to report a novel strain of influenza is not remotely contemplated as a public health emergency in U.S. statutes, and delegating our sovereign decisions to those foreign nations making reports is a quintessential and outlandish violation of both State and federal sovereignty.

55. Nothing in any federal statute forbids the Surgeon General or the Secretary from considering information from the WHO as part of exercising their judgment. Nevertheless, "[a]n agency may not . . . merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice,' nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 568 (D.C. Cir. 2004) (internal citations omitted). As a result, definitions (3), (4), and (5) are problematic because their plain text allows the delegation of determinations of a public health emergency to the WHO and to WHO member nations.

56. Accordingly, although HHS may consider the WHO's views, the determination of a public health emergency should occur under HHS's judgment, and definitions (3), (4), and (5) of a public health emergency should be repealed as unlawful.

57. HHS has not articulated any reason to retain an unlawful regulation.

58. An agency cannot merely refer to past answers when denying a petition for rulemaking involving changed circumstances. *See Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 913 (D.C. Cir. 2004). HHS's tacit admission that circumstances have changed since 2017 and that the WHO now needs strengthening to be trustworthy indicate that the delegations are not as defensible now as they were in 2017.

59. By failing to articulate why the delegations are lawful, HHS has arbitrarily and capriciously denied a petition to remove those delegations from federal regulations.

COUNT THREE: ARBITRARY AND CAPRICIOUS REFUSAL TO REPEAL A REGULATION THAT HHS CONCEDES IT DOES NOT NEED— 5 U.S.C. §§ 553(E), 706

60. The Plaintiffs adopt and incorporate by reference all preceding allegations.

61. HHS has openly admitted it does not intend to use definitions (3), (4), and (5) of public health emergency in 42 C.F.R. § 70.1.

62. HHS's and CDC's independent decisions would continue to be cognizable under definitions (1) and (2) were the Defendants to repeal the other definitions.

63. Retaining definitions (3), (4), and (5) serves no legitimate federal governmental purpose if those definitions are truly unnecessary.

64. Declining to repeal an unlawful regulation because of the time, effort, and burden it might take to initiate such a repeal is not a valid reason to avoid repealing a regulation; otherwise, no regulation would ever be repealed.

65. Retaining definitions (3), (4), and (5) could serve the purpose of permitting a future HHS to change its views on the WHO without notice and comment. By including the additional definitions deferring to the WHO, HHS is facilitating complete deferral to the WHO in the future even if it professes no intent to defer to WHO now.

66. HHS's decision to include definitions of public health emergency that serve no federal purpose but threaten State interests was an arbitrary and capricious decision because there is no explanation or rationale for those definitions.

COUNT FOUR: VIOLATION OF THE U.S. CONSTITUTION (NON-DELEGATION)

67. The Plaintiffs adopt and incorporate by reference all preceding allegations.

68. The U.S. Constitution vests all legislative power in Congress and all executive power in the President. U.S. Const. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1

69. Agencies "may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so." *Defenders of Wildlife*, 532 F.3d at 927.

70. The WHO is an outside entity.

71. The member nations of the WHO other than the United States are outside entities.

72. No statute authorizes the Defendants to delegate decisions regarding public health emergencies to the WHO or to members of the WHO.

73. Construing any general authority over public health to silently authorize such delegations would unlawfully commit a major policy decision to agencies instead of to Congress. Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks and citation omitted). Even if HHS has "a colorable textual basis" or a "merely plausible textual basis" for its definitions, it cannot enact major policy changes without demonstrating "clear congressional authorization" for the power it claims. *Id.*

74. The Defendants have objected to taking the time necessary to repeal these unlawful rules. *See* Ex. 2 at 6.

75. Direct declaratory and injunctive relief from this Court would remedy the States' harm without compelling the agency to engage in rulemaking.

VI. PRAYER FOR RELIEF

For these reasons, the Plaintiffs respectfully request the following relief:

a) A declaration that the plain text of definitions (4) and (5) of public health emergency in 42 C.F.R. § 70.1 authorizes agency action based solely on decisions of the Director of the WHO;

b) A declaration that the plain text of definition (3) of public health emergency in 42 C.F.R. § 70.1 authorizes agency action based solely on decisions of WHO member states;

c) A declaration that those definitions are unlawful delegations of authority to outside entities;

d) Injunctive relief setting aside the unlawful definitions;

e) Alternatively, injunctive relief granting the petition for rulemaking;

f) Alternatively, a remand for an adequate response to the petition based on those declarations;

g) A judgment for costs as appropriate under 28 U.S.C. § 2412; and

h) Such other relief as the Court may deem just and proper.

Dated: January 18, 2023

Respectfully Submitted,

GENTNER F. DRUMMOND
Attorney General of Oklahoma

GARRY M. GASKINS, II
Solicitor General

OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 12st Street
Oklahoma City, OK 73105
(405) 521-3921

/s/ Zach West
ZACH WEST***
Director of Special Litigation
zach.west@oag.ok.gov

Counsel for the State of Oklahoma

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

/s/ Aaron F. Reitz
AARON F. REITZ
Lead Counsel
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704
aaron.reitz@oag.texas.gov

GRANT DORFMAN
Deputy First Assistant Attorney General
Texas Bar No. 00783976
grant.dorfman@oag.texas.gov

GENE P. HAMILTON
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

Counsel for the State of Texas

*** Application for admission forthcoming.

THE PROPOSED WHO TREATY MUST BE SENT TO THE SENATE FOR RATIFICATION

Michael Farris, JD, LLM[1]

The reaches of the President's power to make executive agreements remain highly uncertain as a matter of constitutional law, which might tempt activist Presidents into far-reaching understandings.

–Louis Henkin[2]

I

Background

On March 29, 2021, 23 heads of government,[3] including the Prime Minister of the United Kingdom, the President of France, and the Chancellor of Germany, together with the President of the European Council, and the Director-General

---

[1] J.D., Gonzaga University, (1976); LL.M. University of London (2011) (Public International Law).

[2] Louis Henken, *Foreign Affairs and the US Constitution, Second Edition,* Oxford University Press, New York (1996), p. 224.

[3] The full list:
J. V. Bainimarama, Prime Minister of Fiji
António Luís Santos da Costa, Prime Minister of Portugal
Klaus Iohannis, President of Romania
Boris Johnson, Prime Minister of the United Kingdom
Paul Kagame, President of Rwanda
Uhuru Kenyatta, President of Kenya
Emmanuel Macron, President of France
Angela Merkel, Chancellor of Germany
Charles Michel, President of the European Council
Kyriakos Mitsotakis, Prime Minister of Greece
Moon Jae-in, President of the Republic of Korea
Sebastián Piñera, President of Chile
Carlos Alvarado Quesada, President of Costa Rica
Edi Rama, Prime Minister of Albania
Cyril Ramaphosa, President of South Africa
Keith Rowley, Prime Minister of Trinidad and Tobago
Mark Rutte, Prime Minister of the Netherlands
Kais Saied, President of Tunisia
Macky Sall, President of Senegal
Pedro Sánchez, Prime Minister of Spain
Erna Solberg, Prime Minister of Norway
Aleksandar Vučić, President of Serbia
Joko Widodo, President of Indonesia
Volodymyr Zelensky, President of Ukraine
Dr Tedros Adhanom Ghebreyesus, Director-General of the World Health Organisation

of the World Health Organisation, issued a call for "a new international treaty for pandemic preparedness and response."[4]

The main goal of this treaty:

> would be to foster an all of government and all of society approach, strengthening national, regional and global capacities and resilience to future pandemics. This includes greatly enhancing international co-operation to improve, for example, alert systems, data-sharing, research and local, regional and global production and distribution of medical and public health counter-measures such as vaccines, medicines, diagnostics and personal protective equipment.
>
> It would also include recognition of a "One Health" approach that connects the health of humans, animals and our planet. And such a treaty should lead to more mutual accountability and shared responsibility, transparency and co-operation within the international system and with its rules and norms.[5]

The initial draft of the treaty (called the Zero Draft) was published on February 1, 2023. The collaborators intend to present the final version of the treaty at the 77th World Health Assembly in May 2024.[6] The most recent publicly available draft is dated October 30, 2023.[7]

The draft text consists of 36 articles organized into three chapters:

I. Introduction

II. The world together equitably: Achieving equity in, for and through pandemic prevention, preparedness and response

III. Institutional arrangements and final provisions

Even though the title page of the "negotiating text" uses a variety of possible nomenclature,[8] there is absolutely no doubt that this instrument proposes an

---

[4] https://www.gov.uk/government/speeches/no-government-can-address-the-threat-of-pandemics-alone-we-must-come-together

[5] *Id.*

[6] *Id.*

[7] Attached as Exhibit 1.

[8] SEVENTH MEETING OF THE INTERGOVERNMENTAL NEGOTIATING BODY TO DRAFT AND NEGOTIATE A WHO CONVENTION, AGREEMENT OR OTHER INTERNATIONAL INSTRUMENT ON PANDEMIC PREVENTION, PREPAREDNESS AND RESPONSE.

international treaty. The Vienna Convention of the Law of Treaties has established a settled, worldwide definition of the term "treaty":

> "[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation

VCLT Art. 2(a).[9]

The structure of the draft WHO Treaty is familiar to those acquainted with other UN multilateral treaties.

As the accompanying appendix[10] demonstrates, UN human rights treaties[11] commonly possess several common elements. The latest draft of the WHO treaty demonstrates that it possesses each of these elements:

- A statement of purpose
  - Art. 2
- Definitions
  - Art. 1
- Statement of general principles
  - Art. 3
- Substantive provisions
  - Art. 4-20
- Creation of governing entities for the ongoing implementation and management of the treaty

---

[9] Even though the United States has not ratified the VCLT, the Supreme Court has cited this provision of the VCLT as an authoritative definition of "treaty" for international law purposes. *Weinberger v. Rossi*, 456 U.S. 25, 30, fn. 5. (1982).

Additionally, the Court has, on several occasions, used the rules of the VCLT as an authoritative source for the rules of international law with respect to treaties. See, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993) (a treaty must first be construed according to its "ordinary meaning") citing VCLT Art. 31.1; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations) citing VCLT Art. 27; *Abbott v. Abbott*, 560 U.S. 1, 40 (2010) ("Recourse may be had to supplementary means of interpretation … when the interpretation … (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable") quoting VCLT Art. 32; Art. 56(1), *New York v. New Jersey*, 598 U.S. 218, 228 (2023) (although "nations generally may not withdraw from a treaty absent express authorization, the Convention acknowledges that the nature of the treaty may nonetheless imply a right of withdrawal") citing VCLT Art. 56(1).

[10] See Appendix 2.

[11] It should be remembered that health and health care are repeatedly recognized as protected human rights within the UN human rights treaty regime. See e.g., U.N. Convention on the Rights of the Child, Art. 24; U.N. Convention to Eliminate all form of Discrimination Against Women, Art. 11(f); International Covenant on Economic, Social, and Cultural Rights, Art. 12.

    - Art. 21-22 (Conference of the Parties)
    - Art. 24 (Secretariat)
- Periodic reporting requirements for each of the state parties
    - Art. 23
- Provisions concerning ratification or accession
    - Art. 31-32
- Provisions concerning reservations
    - Art. 26 (Reservations are prohibited by the WHO Treaty)
- Provisions concerning amendments, protocols
    - Art. 28-30
- Provisions concerning entry into force
    - Art. 33
- Provisions concerning withdrawal or denunciation
    - Art. 27
- Provisions concerning deposits of instruments
    - Art. 35
- Provisions concerning authentic texts (languages)
    - Art. 36

In light of the undisputed and indisputable fact that the WHO Treaty is a treaty for international law purposes, it would acquire the following attributes once it enters into force:

- It would be legally binding. ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (*Pacta sunt servanda*). VCLT Art. 26.
- "A state party may not invoke internal law as a justification for its failure to perform" the duties and obligations arising from the treaty. VCLT Art. 27.
- The United States would lose the right to claim that the treaty was adopted by an improper process. VCLT Art. 46.[12]

The provisions of Article 27 have significant implications for our constitutional system. Specifically, once the U.S. enters into this treaty, the failure of state governments within the United States to enact legislation to implement its provisions will not justify any failure of the U.S. to perform its duties under the treaty. Our Constitution's reservation of non-delegated powers to the states is a rule of our internal law that is overridden by treaties. "What is within the domestic jurisdiction of a state in the absence of a treaty ceases to be so when

[12] One treatise opines that Article 46 "might have been included in the VCLT with the U.S. in mind." Mary Ellen O'Connell, Richard F. Scott, Naomi Roht-Arriaza, Daniel D. Bradlow, *The International Legal System, Seventh Edition,* Thompson Reuters/Foundation Press, St. Paul, Minn. (2015) p. 1025.

that state enters into an international agreement on the subject."[13] Once the U.S. enters this treaty, Congress would acquire the corresponding legislative authority to enact implementing legislation through the Necessary and Proper Clause. *Missouri v. Holland.*[14] See also, *Restatement (Third) of Foreign Relations Law of the United States* § 207 (Comment a) (Am. Law. Inst. 1987): ("A federal state is bound to carry out its obligations regardless of the degree of autonomy which its constituent states, provinces, *Laender*, or other subdivisions enjoy under the constitutional system....")

While Executive Agreements have been employed since the early days of the Republic, there is no doubt that the frequency of their use is rapidly escalating.

A 2001 Congressional Research Report revealed the following numbers of international agreements by category.

	Treaties	Exec. Ag.
1789-1839.....	60	27
1839-1889.....	215	238
1889-1939.....	524	917
1939-1989.....	702	11,698
Total.....	1,501	12,880

Currently, the United States enters into about 200 treaties (using the VCLT definition) per year;[15] but in the 12-year period from 2011-2022, the Senate

---

[13] Louis Henken, *Foreign Affairs and the US Constitution, Second Edition,* Oxford University Press, New York (1996), p. 473.

[14] "To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *State of Missouri v. Holland*, 252 U.S. 416, 432 (1920).

[15] https://www.state.gov/policy-issues/treaties-and-international-agreements/#:~:text=The%20United%20States%20enters%20into,environmental%20matters%2C%20and%20many%20others.

only ratified a total of 63 treaties.[16] Thus, only about 2.6% of all U.S.-adopted treaties have been sent to the U.S. Senate for ratification in the last 12 years.

II

Should the WHO Treaty Require Senate Ratification?

A. Current Supreme Court Case Law Narrowly Limits the Classification of "Executive Agreements" that Do Not Require Senate Ratification

The Supreme Court has adopted an approach allowed for two classes of treaties within our constitutional system:

> The word "treaty" has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word "treaty" has a far more restrictive meaning. Article II, § 2, *30 cl. 2, of that instrument 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.

Weinberger v. Rossi, 456 U.S. 25, 29–30 (1982) (Internal citations omitted.)

There is no authoritative answer to the question: What kinds of instruments must be considered "treaties" requiring Senate ratification under Article II? But there are many voices which have recognized this lacuna in our constitutional law and have suggested, sometimes strongly, that it is time to obtain an authoritative answer.

> One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *United States v. Belmont*, 301 U.S. 324 (1937)] nor any one else has told us which are which. L. Henkin, *Foreign Affairs and the United States Constitution* 222 (2d ed.1996).

---

[16] https://www.congress.gov/quick-search/treaty-documents?wordsPhrases=ratified&wordVariants=on&searchIn=anyField&congresses%5B%5D=all&treatyNumbers=&executiveReportNumbers=&treatyTypes%5B%5D=Any+Topic&q=%7B%22treaty-status%22%3A%22Approved%22%2C%22congress%22%3A%5B%22118%22%2C%22117%22%2C%22116%22%2C%22115%22%2C%22114%22%2C%22113%22%2C%22112%22%5D%7D

Quoted by *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 436, fn. 3 (2003) (Dissent by Ginsburg, joined by Scalia, Thomas, and Stevens).

> While the Supreme Court has made clear that some executive agreements are constitutional, no court has held that executive agreements are fully interchangeable with treaties. Nor have courts articulated standards to determine what types of agreements must be submitted to the Senate as treaties and what types of agreements the President can conclude as executive agreements.

"International Law and Agreements: Their Effect Upon U.S. Law," Congressional Research Service, July 23, 2023, p. 9.

This gap in our law has been apparent for a very long time.

> It will not be pretended by any one that the president can make any and every kind of an international agreement without the co- operation of the Senate, for the constitution expressly requires that "treaties" shall be made by him "by and with the advice and consent" of that body, signified by the approving vote of two-thirds of the senators present. On the other hand, it can easily be demonstrated that the word "treaties," as used in the constitutional law of the United States, does not embrace any and every kind of international agreement.

John Bassett Moore 20 POL.SC.Q. 385, 388 (1905).

But the importance of filling the gap by protecting the requirement that treaties should be sent to the Senate for ratification has likewise been defended by important and knowledgeable voices for many decades. Edwin Borchard, the longtime Sterling Professor of International Law at Yale Law School, (quoting another professor) concluded a seminal law review article on Executive Agreements by declaring:

> the Senate's treaty power is probably the last remaining bulwark of our national safety—even more, perhaps, than our armed forces—and it should be fought for and maintained at all costs.

Edwin Borchard, "Shall the Executive Agreement Replace the Treaty?", 53 YALE L.J. 664, 683 (1944).

In a handful of cases, the Supreme Court has sanctioned the idea that although Executive Agreements are treaties under international law, they are valid and peremptory even without Senate ratification.

This line of cases began with *United States v. Belmont*, 301 U.S. 324 (1937). Justice Ginsburg, in her dissent in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 396–97 (2003) summarizes the factual context and the rationale of that case.

> In *United States v. Belmont*, 301 U.S. 324 (1937), the Court addressed the Litvinov Assignment, an executive agreement incidental to the United States' recognition of the Soviet Union. Under the terms of the agreement, the Soviet Union assigned to the United States all its claims against American nationals, including claims against New York banks holding accounts of Russian nationals that the Soviet Government had earlier nationalized. The Federal Government sued to recover the accounts thus assigned to it. Applying New York law, the lower courts refused to enforce the assignment; those courts held that the account-nationalization upon which the assignment rested contravened public policy. *Id.*, at 325–327. This Court reversed, concluding that "no state policy can prevail against the international compact here involved." *Id.*, at 327. The Litvinov Assignment clearly assigned to the United States the claims in issue; the enforceability of that assignment, the Court stressed, "is not and cannot be subject to any curtailment or interference on the part of the several states." *Id.*, at 331.

The Litvinov Agreement was subsequently challenged in *United States v. Pink*, 315 U.S. 203 (1942). This agreement, which settled reparations claims between the two nations and their respective citizens, was again upheld. New York courts had held that the Soviet decree of nationalization of private property held in New York was violative of its public policy. The Supreme Court swiftly rejected that state's involvement in foreign policy and scuttled the argument that the Litvinov Agreement was invalid without Senate ratification.

> The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.

Id., 315 U.S. at 229.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court again was confronted with a challenge to an Executive Agreement which had settled international financial claims between the United States and Iran, and our citizens. The essence of the agreement, which was sustained by the Court, was that all claims by American nationals would be determined through binding arbitration before an Iran-United States Tribunal.

The Court cautioned that its decision in *Dames & Moore* should not be read too broadly. "We attempt to lay down no general 'guidelines' covering other

situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." 453 U.S. at 661.

The Court described the scope of its approval of Executive Agreements as having been, heretofore, confined to agreements settling international financial claims.

> Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.
>
> Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.

Id., 453 U.S. at 679.

There is only one case in which the Supreme Court has upheld an Executive Agreement outside the context of the settlement of international financial claims. It followed one year after *Dames & Moore.*

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court faced a challenge to a 1968 executive agreement that the President had entered into with the Philippines giving preference to Filipino citizens for civilian jobs on American military bases located in that country. This Agreement clashed with a 1971 act of Congress (§ 106 of Pub.L. 92–129) which prohibited discrimination against American citizens for such jobs except when permitted by *treaty.* The issue was whether an executive agreement should be construed to constitute a "treaty" within the meaning of that statute. As quoted-above, the Court held that there were two classes of international treaties for constitutional purposes. While the executive agreement before the Court (which was clearly a treaty under international law) should be construed to be a "treaty" within this statute, it was not within the class of treaties requiring Senate confirmation. 456 U.S. at 30.

The Court noted that prior to the enactment of the statute in question, there were 12 similar agreements with other nations hosting our military bases. In addition, subsequent to its enactment there were four more such agreements

in place. In none of these 16 instances, were the agreements sent to the Senate for ratification. The Court reasoned, as a matter of statutory interpretation, that Congress intended to include executive agreements—which are treaties under international law—within the scope of the statute governing employment preferences on military bases. *Id.* at 32.

The Court returned to the context of the settlement of international financial claims for its fifth and final decision upholding the use of executive agreements. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court dealt with a challenge to a California law which sought to deal with the failure of German insurance companies to settle claims with the descendants of Jewish policyholders whose policies were confiscated or voided during the reign of the Third Reich. As a condition of doing business in California, the State required extensive public disclosures by these insurance companies in a manner that attempted to strong-arm the companies into settlements satisfactory to the State.

President Clinton had entered into an executive agreement that provided a framework for the settlement of such claims, but the process was slow-moving and had, as of the date of the decision, provided scant relief.

The Court held that California's law was preempted by the federal action providing a method of settling these German insurance claims.

A fair reading of the case suggests that the Court did not give talisman-like effect to an executive agreement. Instead, taking the situation as a whole, the Court found that California was inserting itself into an international dispute where the nation needed to speak with one voice.

Standing in contrast to these five cases where the Court approved of the use of executive agreements, there are two decisions of the Supreme Court which declined to give effect to unilateral actions of the President by executive agreement or by executive action.

In *Reid v. Covert*, 354 U.S. 1 (1957), the Court invalidated, as applied to the Appellee, an executive agreement between the United States and the United Kingdom. That agreement provided that all criminal charges against American citizens committed in the U.K. would be tried by U.S. military tribunals. The Court held that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. A jury trial in a civilian court was deemed constitutionally necessary.

Importantly, the Court expressed strong limitations on the power of the federal government even when the Senate acts in cooperation with the President. Accordingly *Reid* established the rule that treaties may not be used to result in

de facto constitutional changes. Removing the right to a jury trial in a criminal case was held to be such a prohibited change.

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. **The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.**

354 U.S. at 17. (Emphasis added).

At a minimum, *Reid* stands for the proposition that treaties cannot be used to bargain the constitutional rights of citizens. However, it is possible to read its sweeping language to suggest that changes in the structures of federalism are also impermissible. If so, *Reid* may be read to undermine *Missouri v. Holland.* But, such a conclusion is probably premature. Moreover, reversing *Missouri v. Holland* is not necessary in this situation. The Senate is not being asked to ratify the WHO agreement. If it was ratified, and, a state challenged the power of the President and Senate to effect this kind of constitutional-level change, revisiting that case on migratory birds would be unavoidable.

The power of the President to unilaterally change our law was again rejected by the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008).

In order to comply with a decision of the International Court of Justice, President Bush issued a Memorandum directing the State of Texas to put aside our domestic law concerning a procedural bar to successive habeas corpus petitions. Describing *Dames & Moore, Pink, and Belmont* as "our claims settlement cases,"[17] the Court held:

> The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.

Id., at 532.

Thus, the most recent decision of the Supreme Court on executive agreements clearly holds that the power of the President to act in foreign policy is not so broad as to grant him the authority to make sweeping changes to our domestic

[17] 552 U.S. at 531.

law via his sole act in fashioning international agreements. Outside of the area of settlements of claims and employment agreements for military bases, there is no Supreme Court precedent approving the use of executive agreements for the adoption of documents that are treaties under international law.

B. Fashioning A Standard for Determining Which Treaties Must Be Ratified

The Supreme Court has repeatedly noted that executive agreements have been used since the earliest days of the Republic.[18] In the first fifty years of governance under the Constitution, 68.9% of our international agreements were sent to the Senate for ratification.[19] However, as we previously demonstrated, the percentage of international agreements which have avoided Senate ratification has escalated to the point where, since 2011, over 97% of our international treaties (using the VCLT definition) are finalized by a single signature.[20]

Given the Supreme Court's reliance on the early practice of our nation for permitting exceptions to the textual rule requiring Senate ratification, it seems abundantly self-evident that the standard used by the founding generation should be the starting point for fashioning a constitutionally-compliant rule.

Given the importance of this history, we quote at length the scholarship of Professor Edwin Borchard of Yale in one of the leading articles on this topic, "Shall the Executive Agreement Replace the Treaty?", 53 YALE L.J. 664, 667-670 (1944) (footnotes omitted):

> The Constitution refers only to treaties, giving to them legal effect as the supreme law of the land, and says nothing about Presidential executive agreements. Yet it is apparent that, in dealing with the powers of the states, the Founders were cognizant of the distinction between treaties—which states were prohibited from making—and mere "agreements" or "compacts" with other states or foreign powers, which they were permitted to conclude, provided they obtained the consent of Congress.
>
> That the Founders were well aware of this distinction has been further demonstrated by Mr. A. C. Weinfeld, who has convincingly shown that the framers of both the Articles of Confederation of 1777 and the Constitution of 1787 were under the influence of the great Swiss natural-

---

[18] CITES

[19] See fn. 13 and accompanying text.

[20] See fn. 14 and accompanying text.

law jurist and positivist, Emmerich de Vattel. In his classic work, Le Droit des Gens, Vattel made the following distinctions:

> "Section 152. Treaties of Alliance and other public treaties A treaty, in Latin foedus, is a pact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time.
>
> Section 153. Compacts, agreements or conventions. Pacts which have for their object matters of temporary interest are called agreements, conventions, compacts. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these pacts are executed once for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty exists.
>
> Section 192. Treaties executed by an act done once for all. Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless indeed we prefer to give them another name (see Sec. 153), those conventions, those pacts which are executed by an act done once for all and not by successive acts, are, when once carried out, fully and definitely consummated. If valid, they naturally bring about a permanent and irrevocable state of things."

Vattel thus distinguished between agreements embracing continuous executory obligations of projected future duration, which he considered the proper subject of treaties, and pacts having for their object matters of temporary interest or a single act. The latter he considered, though somewhat ambiguously, the appropriate subject of "compacts, agreements or conventions." It is further apparent that Vattel believed that many permanent transactions— such as a cession of territory or peace agreement—should be accomplished by treaty even though consummated by a single act. Mr. Levitan agrees with Mr. Weinfeld that the term "agreement or compact" referred to in the Constitution of the United States is derived from the "agreement, convention, compact", or the original French "accords, conventions, pactions," discussed by Vattel.

The "Founding Fathers" formulated this distinction in terms of "important" matters, which were to be the subject only of formal federal treaties—known to the Founders as "treaties of peace, of amity and commerce, consular conventions, treaties of navigation"—and "routine" or unimportant questions, which the States were left free to conclude between themselves by mere agreements.

Thus, there are two rules which can be derived from this analysis. First, all agreements which "embrac[e] continuous executory obligations of projected future duration" should be considered to be "treaties" within the meaning of Article II requiring Senate ratification.

Some, perhaps most, "pacts having for their object matters of temporary interest or a single act" are the proper subject for international agreements that do not rise to the level of requiring Senate ratification. However, some agreements within this category are so intrinsically important that they also require Senate ratification.

These standards (transitory vs. continuous executory obligations) reveal that the very structure of the WHO Treaty places it within the category requiring Senate ratification. Of particular import is the presence of the creation of a Conference of the Parties which provides an ongoing governance structure that clearly evidences "continuous executory obligations of projected future duration." This is in addition to the ongoing requirements of the United States to comply with the treaty, submit regular reports for review, and much more.

The powers of the Conference of Parties are of particular relevance. The Conference is given a great number of particular powers. Reference to five items are sufficient to demonstrate that the treaty contemplates continuous executory obligations. The Conference has the power to:

- Adopt a budget. Art. 21(6).
- Regularly review the implementation of the treaty and "take the decisions necessary to promote its effective implementation." Art. 21(7)
- Consider reports of the parties designed to ensure their compliance with the treaty. Art. 21(7)(a).
- Oversee subsidiary bodies. Art. 21(7)(b).
- Adopt amendments to the treaty by a three-fourths majority vote. Article 28(3).

This last article is of particular note. The normal rules of the law of treaties are to the contrary. Article 39 of the VCLT provides: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

The rules of Part II are the rules for making treaties in the first place. Article 9(1) is the most pertinent. "The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2."

While paragraph 2 of the VCLT allows a treaty to be adopted at an international conference by a two-thirds majority vote, no State is bound by the treaty until it explicitly consents. See Articles 11-15.

But under the WHO Treaty, amendments can be adopted without the consent of each State. An Amendment adopted by a two-thirds majority is adopted.[21]

Thus, if President Biden purports to unilaterally ratify the WHO Treaty, he will not only bind our nation to the Treaty as written at the time he signs it, but will bind us to unknown future amendments of the text, which may grant the WHO greater and greater power to ensure compliance by all State parties.

This treaty contemplates far more than an agreement to a text. By his single act, President Biden proposes committing the United States to a governance structure with the authority to augment its power over our objection.

The unconstitutionality of such an agreement approved only by the unilateral action of any President is beyond debate.

III

Executive Agreements Cannot Be Used to Fundamentally Restructure Our Federal System

Notwithstanding *Missouri v. Holland's* holding that Senate-ratified treaties override reserved 10th Amendment powers, the power to restructure our constitutional system's allocation of powers between the federal and state governments has not and should not be approved through the mechanism of a mere executive agreement.

The recent experience of this nation's effort to respond to the Covid-19 pandemic is so well known that nearly every America understands that states,

---

[21] This same approach to amendments of a treaty is also found in the Law of the Sea Treaty. It is one of the reasons President Reagan cited for refusing to support the adoption of the treaty.

"President Reagan rejected the Law of the Sea Convention in 1982 and cited several major deficiencies, none of which have been remedied. Reagan was concerned that the U.S., though a major naval power, would have little influence at the International Seabed Authority that the convention created. Although the Authority is supposed to make decisions by consensus, nothing prevents the rest of the "international community" from consistently voting against the United States, as regularly occurs in similar U.N. bodies, such as the General Assembly. In addition, President Reagan was troubled by the fact that the International Seabed Authority has the power to amend the convention without U.S. consent. That concern has also not been remedied in the intervening years." *The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea,* Heritage Foundation (2007) https://www.heritage.org/report/the-top-five-reasons-why-conservatives-should-oppose-the-unconvention-the-law-the-sea

and not the Federal Government, have primary jurisdiction over public health matters, including pandemics. This general knowledge is strongly reinforced by the Supreme Court's jurisprudence.

The seminal case on this point is Jacobsen v. Massachusetts, 197 U.S. 11 (1905). In rejecting a constitutional challenge to a compulsory vaccination law, the Court explained:

> The authority of the State to enact this statute is to be referred to what is commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[22]

The Court went on to find, "The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take…"[23]

Recent court pronouncements in litigation surrounding COVID-19 have affirmed this principle. The Supreme Court has recognized the state's interest in stemming the COVID-19 pandemic as "unquestionably a compelling interest."[24] In his concurring opinion in the denial of an application for injunctive relief against Governor Newsom's pandemic-related restrictions Chief Justice Roberts cited Jacobsen v. Massachusetts for the proposition that "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[25]

Three of the Supreme Court's cases which approved the use of executive agreements involved a determination that state laws to the contrary had to give

---

[22] 197 U.S. at 24-25.

[23] *Id.* at 38.

[24] *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

[25] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

way to the international commitments of the President. But in every one of these cases, the state's efforts were aimed at issues that were obviously international in character.

In both *Belmont* and *Pink,* the New York legislature and state courts took aim at the legitimacy of the nationalization decrees of the Soviet Union. In both cases, it was argued that it was contrary to the public policy of New York to give recognition to such confiscations of public property. The Supreme Court expressly rejected this contention.

> [T]he power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.

United States v. Pink, 315 U.S. at 231. See also, *United States v. Belmont*, 301 U.S. at 327.

Likewise in *Garamendi*, California's legislature inserted itself into an international issue aimed at applying pressure on German insurance companies to resolve claims arising from participation with the Nazi regime in denial of rights to Jewish policyholders.

The WHO Treaty presents the exact opposite of such cases—international actors are seeking to expand their jurisdiction into an area historically reserved for local governance. As previously established, our law has been clear since the beginning of the Republic. The principal authority for protecting public health and regulating the treatment of communicable diseases has always fallen within the police power of the states. COVID-19 was far from the first global pandemic. Some examples include:

- Spanish Flu 1918-1919 - 675,000 American fatalities[26]
- HIV 1981-present - ~700,000 American fatalities[27]
- 1968 Pandemic (Hong Kong Flu) - 100,000 American fatalities[28]

None of these global pandemics were deemed to justify a structural change in our governance of communicable diseases. Moreover, there is reason to doubt

---

[26] https://web.archive.org/web/20160927210422/http://www.flu.gov/pandemic/history/1918/the_pandemic/index.html

[27] https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/

[28] https://archive.cdc.gov/#/details?url=https://www.cdc.gov/flu/pandemic-resources/1968-pandemic.html

that the Founders would have believed that the treaty power in Article II would authorize such action even with ratification by the Senate.

Jefferson's Manual, created for the U.S. Senate, enumerates four limitations on the treaty making ability for that body.

> By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. 1. It is admitted that it must concern the foreign nation party to the contract, or it would be a mere nullity, *res inter alias acta*. 2. **By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and can not be otherwise regulated.** 3. It must have meant to except out of these the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation to the House.[29]

Consistent with Jefferson's approach, for the vast majority of human history treaties were never employed for the purpose of dictating how a nation would govern itself internally. "International law is a law between sovereign states: municipal law applies within a state and regulates the relationship of its citizens with each other and with the executive." Ian Brownlie, *Principles of International Law (Seventh Edition),* Oxford University Press, Oxford, England (2008) p. 32.

While the advent of human rights treaties in the post-World War II era has dramatically changed that practice, nothing in the Supreme Court's jurisprudence suggests that Executive Agreements should be permitted to have the same power over domestic policy as properly ratified treaties. In other words, the controversial, but controlling, rule of *Missouri v. Holland*, *supra,* should not be extended to Executive Agreements. Moreover, a better reading of the Court's cases strongly suggests that Court's proclamation in *Reid v.*

[29] Jefferson's Manual at 310 (emphasis added).

Covert[30] together with the Court's decision in *Bond v. United States,*[31] represents a limitation on *Missouri v. Holland.* But the question of whether Senate-ratified treaties may effect a fundamental restructuring of federalism need not be decided for now. The WHO Treaty seeks to accomplish that objective without bothering to seek Senate ratification.

Like all treaties, the WHO Treaty is legally binding and imposes upon any party that accedes to it the duty to comply with its provisions.[32] International law dictates that the federal government would have the duty to comply with the legal obligations it imposes.[33] And *Missouri v. Holland, supra,* arguably holds that the Necessary and Proper Clause gives the federal government the constitutional authority to do so. Moreover, those obligations can be increased by a two-thirds majority vote of the Conference of State Parties over our objection and without our consent.[34]

All of this amounts to a dramatic restructuring of our Constitution's allocation of the primary authority to regulate communicable diseases—transferring power from the states to the federal government operating under the broad supervision of the World Health Organization.

Our Constitution does not permit the President to unilaterally effect such a dramatic restructuring of our law.

IV

United States Senators Have Standing to Challenge

The WHO Treaty's Adoption by Executive Agreement

---

[30]"It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." 354 U.S. 1 at 17.

[31] "The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government…" 564 U.S. at 225.

[32]See pages 4-5 discussing the legal rules for treaties from the Vienna Convention on the Law of Treaties.

[33] See, fn. 11-12 and accompanying text.

[34] WHO Treaty (third draft) Article 28(3).

If the United States House of Representatives passed a budget bill that was amenable to the President, but it faced a certain defeat in the Senate, what would happen if the President simply signed the House measure and declared it to be law?

To refine this example a bit more, assume that the Senate had brought the budget bill to the floor but it was subjected to a filibuster. If a motion for cloture received 55 votes, but failed by five votes, the budget bill would fail.

Even if the President, citing the cloture vote, claimed that a majority of the Senate favored the budget, and thus he was justified in doing an end run, the result should be the same. A President cannot unilaterally decide that a bill may become law without actually obtaining the approval of the Senate.

Even though it is obvious that such an action would be unconstitutional, the question is: Who would have standing to challenge such an action?

It is submitted that any member of the Senate or any number of the members of the Senate would have standing to sue in such a situation. The Constitution demands that the Senate vote before such measures become law, and the President simply ignored their right and duty under the Constitution. Each Senator was denied the right to vote on the measure in question.

An early leading case on legislative standing is *Coleman v. Miller* 307 U.S. 433 (1939). It arose from questions arising out of the attempt of the Kansas legislature to ratify the Child Labor Amendment. The case was brought by twenty-one members of the Kansas Senate, and three members of the House of Representatives. The Senate had split 20-20 on the question of passage, but the measure was deemed to have passed because the Lieutenant Governor broke the tie by voting in favor of it. The Kansas House subsequently voted in favor of ratification by a simple majority. Their standing to bring the action was challenged, but the Court held in favor of plaintiffs' standing:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.

Coleman, supra at 438.

Accordingly, there is little doubt that if 34 Senators bring an action to challenge the constitutionality of adopting the WHO Treaty without the consent of the Senate, they would clearly have standing. Their votes would be sufficient to defeat its ratification if it had been properly submitted.

However, the D.C. Circuit held that nine U.S. Senators who challenged the constitutionality of the revocation of the Mutual Defense Treaty with China (Taiwan) without approval of the Senate, had standing to sue. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (*en banc*) (*vacated on other grounds*, 444 U.S. 996 (1979).

The D.C. Circuit Court, sitting *en banc*, held that under the Senators' theory that they had a constitutional right to vote on termination, the Senators had standing. They had suffered an injury in fact in being denied the opportunity to prevent termination of the treaty. The court stated, "By excluding the Senate from the treaty termination process, the President has **deprived each individual Senator of his alleged right to cast a vote** that will have binding effect on whether the Treaty can be terminated. The President has thus nullified the right that each appellee Senator claims under the Constitution to be able to block the termination of this treaty by voting, in conjunction with one-third of his colleagues, against it." 617 F.2d at 702 (emphasis added).

Both *Coleman* and *Goldwater* addressed the constitutionality of the measure directly before the court because their votes *on that very measure* were not dealt with in a constitutional manner. Such a situation stands in clear contrast with *Raines v. Byrd,* 521 U.S. 811 (1997).

In *Raines*, six members of Congress filed suit against the Director of the Office of Management and Budget (Raines), challenging the constitutionality of the Line Item Veto Act. They claimed standing based on their loss of political power. The essence of this claim that their power and meaning of their votes on future legislation would be diminished by the prospect that these future measures would be modified by the use of the line item veto. The U.S. District Court for the District of Columbia found that they had standing,[35] but the Supreme Court reversed.

The Court in *Raines* distinguished the asserted injury from that recognized as sufficient in *Coleman v. Miller*. The Court summarized *Coleman* as standing for the proposition that legislators whose votes would have been sufficient to defeat legislation have standing to sue if it goes into effect anyway, on the ground that their votes have been completely nullified. In *Raines,* on the other hand, the legislators' votes on the Line Item Veto Act had been given full effect;

---

[35] *Byrd v. Raines,* 956 F.Supp. 25 (D.D.C. 1997).

they just lost the vote. The Court also noted that the lack of standing did not deprive these legislators of an adequate remedy, since they could simply repeal the law. In summary, the Court characterized the institutional injury alleged by the legislators as "wholly abstract and widely dispersed."

But the Court described an alternative scenario where individual legislators *would* have standing:

> Thus, they were seeking to overturn a law that they voted against. *They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated*. In the vote on the Act, their votes were given full effect. They simply lost that vote.

Raines, supra at 824. (Emphasis added).

This passage from *Raines* identifies a general principle. The hypothetical proffered by the Court is the reverse of *Coleman.* Whether the vote should have resulted in passage or defeat, a legislator has standing to claim that his or her vote was not properly counted with regard to the measure before the Court. This is consistent with the D.C. Circuit's holding on standing in *Goldwater.* The failure to count votes correctly or the failure to take a vote when one is required gives individual legislators standing to challenge an improper process that denies their right to have their votes treated properly on that very measure.

Conclusion

The Supreme Court has addressed the power of the President to unilaterally commit our nation to legally binding treaties only in limited circumstances, mostly with regard to the settlement of financial disputes. The Constitution requires that the Senate ratify treaties by a two-thirds majority vote. Senate confirmation should be understood to be the general rule and not the exception.

International law both classes of documents are treaties. However, the time has come for the Supreme Court to clarify the constitutional line between "executive agreements" that may proceed by the unilateral action of the President and treaties which must be sent to the Senate for ratification. Whatever line the Court draws, the WHO Treaty clearly falls on the side requiring ratification.

Senators have standing to challenge this action. Ideally, 34 or more Senators would agree to do so. But, the best reading of the case law clearly suggests that individual Senators have standing to challenge the constitutionality of denying them the right to vote on a treaty of such consequence.

Respectfully submitted,

Michael Farris, JD, LLM.

In the year of our Lord Two Thousand Twenty-Four, 08 March

MODEL RESOLUTION REGARDING THE WORLD HEALTH ORGANIZATION

A Resolution on Combatting Chinese Influence – World Health Organization

IN THE [LEGISLATIVE BODY] FOR THE STATE OF [STATE]:

A RESOLUTION, Urging the United States Government to Oppose Further Enabling the World Health Organization, asserting state sovereignty over health care freedom and choice; and for other purposes.

WHEREAS, the World Health Organization ("WHO") has proven itself to be a corrupt organization that has hampered worldwide public health efforts; and

WHEREAS, WHO has a history of mismanagement and scandals, including the coverup of severe sexual abuse by its staff in the Democratic Republic of the Congo following an Ebola viral outbreak there; and

WHEREAS, WHO is an opaque organization unaccountable to the United States government despite receiving between $200 and $600 million annually in US taxpayer subsidies over the past decade; and

WHEREAS, WHO as an organization has chosen to place in positions of leadership on its Executive Board representatives of such extreme authoritarian regimes as the People's Republic of China, the Democratic People's Republic of Korea, the Syrian Arab Republic, and Belarus, in complete disregard of the human rights abuses regularly committed by these regimes; and

WHEREAS, at the beginning of the 2019 Covid (SARS-CoV-2) outbreak and throughout the pandemic, WHO officials were complicit with the government of the People's Republic of China in preventing international understanding of the virus and its effects and in covering up its origins, thereby increasing the severity of the pandemic and its death toll; and

WHEREAS, WHO is currently in the process of drafting new International Health Regulations and a proposed Pandemic Preparedness Treaty that will further expand the organization's authority and empower unelected international bureaucrats through a "One Health" mandate to override national sovereignty in areas including energy, agriculture, climate, and public health; and

WHEREAS, granting WHO such authority would empower authoritarian regimes, contribute to the theft of intellectual property, and erode the sovereignty of western democratic nations in favor of an international technocracy that would have the power to dictate to sovereign and free nations policies ranging from pandemic response to climate control, threatening western liberal democracy; and

WHEREAS, the United States has its own Centers for Disease Control and Prevention to address issues of domestic and international public health and disease preparedness, which organization is accountable to the people of the United States and their elected representatives;

THEREFORE, **BE IT RESOLVED** by the [LEGISLATIVE BODY] of the State of [STATE] that the members of this body urge the Representatives and Senators elected by the people of [STATE] to take all steps necessary and reasonable to permanently end taxpayer funding of the World Health Organization; and

BE IT FURTHER RESOLVED that the members of this body encourage the President of the United States and his foreign policy officials to reject the creation of any policy, law, convention, or regulation, whether through amendments to the International Health Regulations ("IHR") or through the drafting of an international agreement regarding Pandemic Preparedness, that would in any way further empower this ineffective and corrupt World Health Organization; and

BE IT FURTHER RESOLVED that the members of this body encourage the United States Government and its representatives to take measures ensuring the fundamental freedoms of the American people against the corrupting influence of international organizations such as World Health Organization that, all too often, are under the influence of authoritarian foreign regimes that do not act in the best interest of the United States; and

BE IT FURTHER RESOLVED that this body thoroughly and fully rejects any claim of authority by the World Health Organization or any other multinational entity to impose mandates, instructions, communications or guidance applicable to this State or its residents, and any such efforts shall be considered in violation of the Constitution of [STATE] and of the United States and shall be opposed by the government of [STATE]; and

BE IT FURTHER RESOLVED, that any mandates, recommendations, instructions, or guidance issued by the World Health Organization shall not be used in this State to direct, order or otherwise impose, contrary to the constitution and laws of the state of [STATE] any requirements whatsoever, including those for masks, vaccines or medical testing, or gather any public or private information about the State's citizens or residents and shall have no force or effect in [STATE]; and

BE IT FURTHER RESOLVED, to ensure that the State of [STATE], and all states within our Union, maintain full sovereignty over the management of our healthcare systems, that the [BODY] of [STATE] requests the United States Congress to withdraw the United States from membership in the World Health Organization prior to the next meeting convened to vote on the Pandemic Treaty and related instruments, which meeting is currently scheduled for May 24-30, 2024; and

BE IT FURTHER RESOLVED, that neither the World Health Organization nor any related entity shall have any jurisdiction in [STATE]; and

BE IT FURTHER RESOLVED, that [STATE], acknowledging Article Ten of the Bill of Rights of the United States Constitution, hereby reasserts its claim to state sovereignty over its rights and responsibilities to ensure the health and safety of its residents, and that the Federal Government, whether acting on its own behalf or at the behest of the World Health Organization or related international bodies, does not have the right to deprive [STATE] of such authority; and

BE IT FURTHER RESOLVED that the [Appropriate State Official] is hereby authorized and directed to make appropriate copies of this resolution available to the public and the press and to send appropriate copies of this Resolution to the US House of Representatives, Senate, and Executive Branch.

SO RESOLVED THIS THE _____ DAY OF _____, 2024.

State Shield