No. 04-5928

IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

PETITIONER,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice
Institutional Division,

RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ALLIANCE DEFENSE FUND, AS *AMICUS CURIAE*, SUPPORTING RESPONDENT

BENJAMIN BULL, *Chief Counsel*
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Ste. 165
Scottsdale, AZ 85260

NELSON P. MILLER
WILLIAM WAGNER
Counsel of Record

COOLEY LAW SCHOOL
300 South Capitol
Lansing, MI 48933
(517) 371-5140

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and regulations:

Treaties, Conventions, and Protocols:

Foreign Cases:

Other Authorities:

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Alliance Defense Fund.[1]

The **ALLIANCE DEFENSE FUND** ("ADF") is a not-for-profit public interest organization. ADF provides funding, as well as strategic planning and training, to attorneys and organizations protecting religious civil liberties. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for rights of Americans under the United States Constitution in numerous significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including numerous cases before the United States Supreme Court.

The Alliance Defense Fund works to preserve and protect religious liberty. It has particular knowledge helpful to the Court in this case concerning the social and legal impact of the authoritative use of international law.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record, consented to the filing of this Brief *Amicus Curiae* in support of Respondents. Their confirmations of consent are on file with the Clerk of the Court.

---

[1] In accordance with Supreme Court Rule 37(6), *amicus* certifies that this brief was authored entirely by Counsel of Record for *amicus* and that no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae* or its counsel provided a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A forum state's procedural rules govern treaty implementation. *Breard v. Greene,* 523 U.S. 371, 375-77 (1998).

The Vienna Convention expressly provides that the rights it grants "shall be exercised in conformity with the laws and regulations of the receiving State" so long as those laws "enable full effect to be given" to the Convention's purposes. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 101, 596 U.N.T.S. 261.

This Court held in *Breard* that the procedural default rules developed under the United States Constitution accomplish those purposes. Congress further affirmed and reinforced those procedural default rules with its Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214, a statute Congress enacted subsequent to the ratification of the Treaty at issue.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the procedural default rule adopted under the United States Constitution and by act of Congress, as interpreted by decisions of this Court, is the supreme law of the land, over a contrary decision by the International Court of Justice (ICJ). The ICJ cannot dictate United States domestic criminal procedural laws, in a manner contrary to the United States Constitution and act of the American Congress, especially where the Treaty provision construed by the ICJ precedes the Congressional enactment of statutory terms inconsistent with the ICJ's construction.

To impose the ICJ's interpretation upon the United States subordinates and alters the United States Constitution,

deprives Congress of its constitutional authority to legislate, and deprives the United States of sovereignty. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

Because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and need not be decided. *See generally United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Amicus, therefore, urges this Court to uphold rather than overrule its recent precedent in *Breard* and affirm the Court of Appeals.

ARGUMENT

Preliminarily, your *amicus* takes no position in the instant case on the merits or demerits of capital punishment. This *amicus* brief addresses the authority of decisions of international tribunals construing treaty terms when such a construction is contrary to the United States Constitution and acts of Congress, as interpreted by decisions of this Supreme Court.

THE UNITED STATES CONSTITUTION AND ACTS OF CONGRESS (AS INTERPRETED BY DECISIONS OF THIS SUPREME COURT AND ENACTED SUBSEQUENT TO THE RATIFICATION OF THE VIENNA CONVENTION) HAVE SUPREMACY OVER CONTRARY DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE.

Petitioner claims the rule of decision for U.S. courts in this case is an International Court of Justice holding that: (1) American procedural default rules cannot bar review of

Petitioner's Vienna Convention Claim; (2) the Vienna Convention establishes individual rights for the Petitioner which the government violated; and (3) U.S. courts must review and reconsider the petitioner's conviction and sentence taking account of the violation of Petitioner's rights under the Vienna Convention. *See Avena and Other Mexican Nationals (Mexico v. United States of America)* 2004 I.C.J. 1 (Judgment of March 31); *LaGrand Case (Germany v. United States of America),* 2001 I.C.J. 466 (Judgment of June 27).

Petitioner is wrong.

A. AMERICAN PROCEDURAL DEFAULT RULES BAR REVIEW OF PETITIONER'S VIENNA CONVENTION CLAIM.

The United Nations adopted the Vienna Convention on Consular Relations and Optional Protocols on April 24, 1963. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 596 U.N.T.S. 261. The United States Senate ratified the Vienna Convention and the Optional Protocols to it[2] on October 22, 1969. 115 Cong. Rec. 30,997 (1969). Article 36 of the Convention states the rights pertinent to Petitioner's claims in this case. On their face, those rights appear to have a purpose of facilitating consular activity in receiving states.[3]

[2] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487.

[3] The pertinent part of Article 36 provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform

"[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard v. Greene,* 523 U.S. 371, 375 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987).

Indeed, "the Vienna Convention itself" permits and embodies American law's procedural default principle, by expressly providing that Convention rights "'shall be exercised in conformity with the laws and regulations of the receiving State'" so long as "'said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (citing and quoting Vienna Convention, *supra*, 21 U.S.T. at 101).

---

the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

In *Breard v. Greene,* this Court held that the procedural default rules, developed under the United States Constitution, accomplish those purposes–and that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted. 523 U.S. at 375. The now axiomatic rule developed by this Court under the United States Constitution is that claims of error in criminal proceedings "must first be raised in state court in order to form the basis for relief in habeas," whether in capital or other cases. *Breard*, 532 U.S. at 375 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

Breard further recognized that Congress reinforced those procedural default rules when it, subsequent to the ratification of the Treaty, enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214. *Breard,* 532 U.S. at 376. Under this statute, a habeas petitioner, claiming his incarceration violates "treaties of the United States," generally is not entitled to an evidentiary hearing where he "fail[s] to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2).

Although treaties are the supreme law of the land, so, too, is the Constitution itself, as well as an Act of Congress. *Breard,* 523 U.S. at 376. "We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Id.* at 376 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (citing also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating when treaty and federal statute conflict, "the one last in date will control the other")). Enforcement of treaty provisions does not fall within the purview of international tribunals. Rather, a treaty depends "on the interest and honor of the governments which

are parties to it" for enforcement. *Head Money Cases*, 112 U.S. 580, 598 (1884).

The opposing briefs are wont in their quotation of the Constitution's Supremacy Clause to omit anything other than its reference to treaties–critical and telling omissions. The full Clause provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

While the Vienna Convention was adopted in 1969, Congress subsequently enacted, and the President signed, the AEDPA in 1996. A petitioner's "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard,* 523 U.S. at 376. No substantial, constitutional basis exists on which to alter it. *See* Sandra Day O'Connor, *Federalism of Free Nations, in International Law Decisions in National Courts* 13, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question") (noting "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may

not delegate to another tribunal 'the essential attributes of judicial power. . . .'")).

In his Texas state court trial proceeding, Petitioner never claimed his incarceration violated the Vienna Convention. Petitioner raised the Vienna Convention Claim for the first time in his habeas petition filed in 2001 and amended in 2002. It is undisputed that, under American Constitutional and statutory law, Petitioner therefore procedurally defaulted on this claim. Under the Supremacy Clause of the United States Constitution, this is, therefore, the rule of law United States courts must apply in the instant case. Because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and need not be decided. *See generally United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

B. CONTRARY DECISIONS OF THE ICJ ARE NOT CONTROLLING, AND DEEMING SUCH DECISIONS THE SUPREME LAW OF THE LAND HAS POTENTIAL TO CREATE A CONSTITUTIONAL CRISIS OF EPIC PROPORTIONS.

Notwithstanding the lucid language of the AEDPA, and this Court's holding in *Breard*, Petitioner contends United States courts must apply, as the rule of decision in this case, contrary holdings of the ICJ. Petitioner contends an Optional Protocol to the Treaty provides the ICJ with jurisdiction to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts. The Optional Protocol actually states much less, merely providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a

Party to the present Protocol." Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487.

Nothing credible in the record suggests that the President's negotiation and the Senate's ratification of the Optional Protocol included surrendering the sovereignty of the United States to the ICJ. To be sure, the politically accountable branches of the Republic have agreed to permit the ICJ to hear "[d]isputes arising out of the interpretation or application of the Convention." *Id.* Nothing in this plain language authorizes the ICJ to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts. Not since John Marshal penned *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), has a court of justice attempted to assume so much power in American government as the ICJ has in the instant case–but this time the judges doing so are not even appointed by the President or confirmed by the Senate.

The American people trust their courts to faithfully interpret the expression of the popular American will, and resolve our disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to a Federal court's power of judicial review. Thus, in a constitutional republic dividing power between an elected executive, an elected legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part upon the unelected judiciary not usurping the power of politically accountable branches of government.

In this regard, the facts of this case create the potential for a constitutional crisis of epic proportions. Here, Petitioner asks an unelected Supreme Court to reject well-

established American constitutional and statutory law as the rule of decision in this case. In its place, Petitioner asks this Court to deem as the Supreme Law of this Land, an unelected foreign court's judicial promulgation. Such a course surrenders the sovereignty of the United States to the International Court of Justice and ignores the right of the people to themselves govern. Because the United States Congress is the most politically accountable branch of government, it will likely notice the impropriety of this course.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution." *The Federalist* No. 37 at 236-238 (J.E. Cooke ed., 1961). Indeed, the Constitution's adoption was the people's acceptance of a moral view of government. The right and natural sovereign authority the Constitution provides for these United States, as a part of that moral view, ought not to be disturbed. It is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality–that certain motives and opportunities of constituent interests ought (in view of the nature of man) to be treated by certain forms of government. The judicial submission of the people of the United States to an international rule of decision to which the people's elected representatives in Congress have not on their own submitted them is no part of those Constitutional principles.

The perils of the judiciary submitting the United States to the authority of international norms which Congress has not adopted or authorized are many and well

documented. World judicial systems are immensely varied, creating "promiscuous opportunity" to cite authority for whatever propositions the courts wish. Richard Posner, *No Thanks, We Already Have Our Own Laws,* Aug. 2004 Legal Affairs 40, 41; John Leo, *Creeping Transnationalism*, U.S. News & World Report, July 21, 2003, at 58 (observing a problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193, 217, 219-220 (2003) (proposing that international comparative analysis overturns American legal culture and constitutionalism).

Citation of foreign decisions becomes "one more form of judicial fig-leafing" of which we have too much already, when the real influences on judicial decision-making have nothing whatever to do with the study of foreign decisions. Posner, *supra,* at 42. Indeed, foreign decisions "emerge from a complex socio-historico-politico-institutional background" of which federal judges "are almost entirely ignorant." *Id.* Courts are not all pursuing the same enterprise. A federal court interpreting the United States Constitution may not be doing anything like that which a foreign court does interpreting different documents. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 73 (2004) (noting that this practice threatens to undermine constitutional law).[4] American constitutional law and international human rights law emerge

---

[4] Professor Ramsey gives the example that the *Dudgeon* European court which this Court cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), was deciding whether an anti-sodomy provision was "necessary" within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas this Court in *Lawrence* was deciding whether Texas's anti-sodomy law was "reasonable" under the Constitution. Ramsey at 73-74.

from distinctly different source material. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 Va. J. Int'l L. 913, 919 (2004).

And so for instance, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories. *Id.* at 925 (citing Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 96 (2003). It further improperly elevates political documents like treaties and executive agreements (when used as interpretive sources) above the Constitution, contrary to the Supremacy clause. Roger P. Alford, *Misusing International Sources to Interpret the Constitution,* 98 Am. J. Int'l L. 57, 61-2 (2004).

Citation of foreign decisions certainly is counter to popular rule by the people and undemocratic. Posner, *supra*, at 42; Alford, *Misusing International Sources*, *supra*, at 57. In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find "a more sympathetic set of interpretive sources than existed domestically." Ramsey, *supra*, at 70 (citing Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1109-1129 (2002)). Because the Court does not have the institutional resources and skills to engage in its own comparative and empirical analysis of international sources, it relies unduly on misshapen advocacy. *See* Alford, *Misusing International Sources*, *supra*, at 64-65. Selection of foreign sources then becomes non-empirical and even arbitrary except in relationship to the desired outcome.[5] Ramsey, *supra*, at 72-

[5] Professor Ramsey queries why the Robinson brief on which this Court relied in *Lawrence* cited the law of Israel rather than India, for instance. *Id.* at 73.

73. Moreover, the choice of issues on which to employ comparativism is itself unprincipled and therefore seems directed to the Court's ends. *See* Alford, *Misusing International Sources*, *supra*, at 67-68 (citing Mary Ann Glendon, *Abortion and Divorce in Western Law* 24-25, 145-54 (1987) (noting that, comparatively speaking, the United States' abortion policy is singular among all of the world's countries)). "Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court's own conception of liberty."[6] Alford, *Federal Courts, supra*, at 925. Enumeration of rights created by international tribunals not only abandons the Constitution's text and history but also the experience and history of the Nation. Alford, *Federal Courts, supra,* at 926.

Hamilton and Madison in *The Federalist* more than adequately expressed the root of these concerns: that human passion and interest tend to corrupt the virtue of imperial rulers–even, we add, when they wear the robes of the judiciary. Hamilton wrote in *The Federalist* No. 6, at 31 (J.E. Cooke ed., 1961), that momentary passion is a stronger influence over human conduct than remote justice and in *The Federalist* No. 22, at 142 (J.E. Cooke ed., 1961), that those elevated to power may be compensated to betray their trust. Similarly, Madison wrote in *The Federalist* No. 49, at 340 (J.E. Cooke ed., 1961), that a nation of philosophers is "as little to be expected as the philosophical race of kings wished for by Plato" and in *The Federalist* No. 55, at 374 (J.E. Cooke ed., 1961), that "passion never fails to wrest the scepter from reason" in bodies "of whatever character composed."

---

[6] Professor Alford also mentions Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence "where judges . . . felt free to roam where unguided speculation might take them." Alford, *Federal Courts, supra*, at 925 n.78.

The Constitution's delicate balance reflected the Founders' views that there is both "a degree of depravity in mankind which requires a certain degree of circumspection and distrust" but also other qualities "which justify a certain portion of esteem and confidence." *The Federalist* No. 55, at 378 (James Madison) (J.E. Cooke ed., 1961). The Constitution gives no indication that the people intended under these truths to grant ultimate power to those who would divine law from the statements and resolutions of non-representative international bodies. The people ceded only those natural rights which any people must cede so as to vest a necessary government with adequate powers, *The Federalist* No. 2, at 8 (John Jay) (J.E. Cooke ed., 1961), with those powers yet limited by "the transcendent law of nature and of nature's God . . . to which all such institutions must be sacrificed," *The Federalist* No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

C. THIS COURT SHOULD NOT CRAFT JUDICIAL REMEDIES FOR THE VIOLATION OF INTERNATIONAL NORMS.

Several federal circuits and state courts have acknowledged that the Vienna Convention does not create individual rights. *See, e.g., United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir.), *cert. denied*, 537 U.S. 1038 (2002); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956 (2000); *see also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *State v.*

Martinez-Rodriguez, 33 P.3d 267, 274 (N.M. 2001), *cert. denied*, 535 U.S. 937 (2002).

These courts properly relied, and relied heavily, on *Breard* to require (as a prerequisite to obtaining review) a showing of prejudice, such as proof that the violations impacted trial or deprived a defendant of a constitutional right. *See, e.g.*, *United States v. Ortiz*, 315 F.3d 873, 878 (8th Cir. 2002); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied sub nom., Arnulfo Zuniga v. United States*, 531 U.S. 1131 (2001); *United States v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999), *cert. denied*, 530 U.S. 1283 (2000); *United States v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999). This Court has clearly, and repeatedly, held that treaties cannot supersede individual rights protected under the United States Constitution. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312 (1988) (upholding First Amendment freedoms); *Reid v. Covert*, 354 U.S. 1 (1957) (upholding Sixth Amendment rights). If this Court cedes part of the Constitution in the instant case, it might expect new petitioners before this Court citing international norms to stifle free expression of religious views, and the free exercise of religion in general.

Indeed given this state of affairs, this Court in *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004), just recently recognized appropriate limitations on the domestic use of international norms Congress has not expressly adopted. *See* Nelson Miller, William Wagner, & Steven Fitschen, *Federal Courts Enforcing International Norms: The Salubrious Effect of* Sosa v. Alvarez-Machain, 2 Regents J. Int'l L. 71 (2005).

Contrary to Petitioner's implications concerning *Sosa*, *see* Pet. Brief at 24, this Court in *Sosa* rejected an invitation to construe broadly the international norms under which aliens could bring cases in the federal district courts. This Court did so by adopting the standard that international norms (those cognizable under the Alien Tort Claims Act) must be "defined with a specificity comparable to the features of the 18th-century paradigms" at the time of the Act's 18th century adoption. 124 S. Ct. at 2761-62. In deciding *Sosa,* this Court pointed to the 1820 case of *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163-180, n.a (1820), noting that it illustrated the specificity with which the law of nations defined piracy. 124 S. Ct. at 2765. The majority in *Sosa* further cited recent Alien Tort Claims Act cases limiting jurisdiction to claims based on only a "handful of heinous actions" of "specific, universal, and obligatory" character. 124 S. Ct. at 2765 (citing and quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (stating "the torturer has become – like the pirate and slave trader before him – *hostis humani generis,* an enemy of all mankind")); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (stating section 1350 should reach only "a handful of heinous actions – each of which violates definable, universal and obligatory norms"); *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (9th Cir. 1994) (holding cognizable "violations of international law must be of a norm that is specific, universal, and obligatory"). Based on these authorities, this Court in *Sosa* concluded that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when" the Act was enacted. 124 S. Ct. at 2765.

The Court's reasons in *Sosa* for limiting the domestic uses of international law parallel some of those recognized by the above commentators. They included that given today's materialist jurisprudence, "a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision." 124 S. Ct. at 2762; *see also id.* at 2764 ("As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice."). Judges, in other words, no longer find themselves constrained by the natural law principles inherited from Aristotle, Cicero, and Locke, and followed by the Founding Fathers. Institutional legitimacy is the issue, especially where the Court's "general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* at 2762.

This Court also recognized in *Sosa* that when federal courts "craft remedies for the violation of new norms of international law," they "raise risks of adverse foreign policy consequences" and thus must act, "if at all, with great caution." *Id.* at 2763 (citing *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (expressing doubt that "our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens")). This Court in *Sosa* acknowledged that it has "no congressional mandate to seek out and define new and debatable violations of the law of nations," adding that recent "indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." 124 S. Ct. at 2763. *Sosa* continued: "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law," giving as an example "when its ratification of the International Covenant on Civil and Political Rights declared

that the substantive provisions of the document were not self-executing." *Id.* (citing 138 Cong. Rec. 8071 (1992)).[7]

Indeed, in *Sosa* the Court expressly rejected the plaintiff's reliance on the International Covenant on Civil and Political Rights, because it was not self-executing: "although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." 124 S. Ct. at 2767. The Court further rejected the plaintiff's claim that the UN's 1948 Universal Declaration on Human Rights established an international norm on which he was entitled to rely: "But the Declaration does not of its own force impose obligations as a matter of international law." 124 S. Ct. at 2767.[8] The Court further rejected the plaintiff's argument that the Declaration and Covenant, together with a survey of national constitutions,[9] a decision of the ICJ,[10] and decisions of the federal courts[11]

---

[7] The Covenant's citation is International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171.

[8] The Declaration's full citation is the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[9] The Court noted that the plaintiff had cited "Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 260-261 (1993)[,]" which the Court noted showed a consensus only "at a high level of generality." 124 S. Ct. at 2768 n.27.

[10] The Court noted that the plaintiff had cited "a case from the International Court of Justice, *United States v. Iran*, 1980 I.C.J. 3, 42," which the Court determined "involved a different set of international norms and mentioned the problem of arbitrary detention only in passing[,]" and moreover, involved a far longer and harsher detention. 124 S. Ct. at 2768 n.27.

[11] The Court noted that the plaintiff had cited a collection of cases in his brief at page 49, note 50, 124 S. Ct. at 2768 n.27, which the brief shows included: "*See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d at 717;

"attained the status of binding customary international law" on the right he claimed. 124 S. Ct. at 2767-68. The Court concluded that the plaintiff "certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking." *Id.* at 2768.

Thus, this Court's holding in *Sosa* certainly contradicts Petitioner's argument that the United States is bound by an ICJ decision which is not based in the literal terms of the Vienna Convention, and which Congress has, in essence, rejected by enacting the Anti-Terrorism and Effective Death Penalty Act. If *Sosa* is properly read in this limiting manner (and the opinion gave other indications that it should be[12]), then it does much to restore the federal courts' legitimacy in the customary international law arena.

D. ADOPTING PETITIONER'S POSITION FUNDAMENTALLY ALTERS THE CONSTITUTION.

When in *Sosa* this Court showed its historical understanding of the law of nations, it acknowledged and embraced other important limiting distinctions. "In the years of the early Republic, this law of nations comprised two principal elements" including only:

Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)." Brief for Respondent Alvarez-Machain 49n.50 (2004 WL 419421).

[12] For instance, the Court stated expressly, "And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), that federal courts have no authority to derive 'general' common law." 124 S. Ct. at 2764.

> (1) "the general norms governing the behavior of national states with each other" as demonstrated by executive and legislative agreements, plus
>
> (2) "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."

124 S. Ct. at 2755-56.

As to the latter judge-made laws, *Sosa* held that it was international law in this limited sense that the Court had intended in *The Paquete Habana*, when it ruled that the status of offshore fishing vessels in wartime arose from "'ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law . . . .'" 124 S. Ct. at 2756 (citing and quoting *The Paquete Habana,* 175 U.S. 677, 686 (1900)). In short, *Sosa* put *The Paquete Habana's* statements regarding international law, which some federal courts and commentators had over-used to promote international law, back in their proper historical and legal context.

The *Sosa* Court then further moored the domestic use of customary international law to its proper context, by citing Blackstone's *Commentaries* and de Vattel's *The Law of Nations* for their clear limiting definitions given the law of nations.[13] 124 S. Ct. at 2756. The Court concluded in *Sosa* that the overlap of these international rules governing individuals outside domestic boundaries, with the norms of state relationships, constituted the final sphere within which customary international law operated. To illustrate, the Court drew the examples (from Blackstone and de Vattel) of

---

[13] Citations here to Emmerich de Vattel's *The Law of Nations* are to the Joseph Chitty edition published in 1883, though the first edition of de Vattel's work appeared in 1758.

piracy, the violation of safe conduct, and an assault on an ambassador, concluding from these sources that it "was this narrow set of violations of the law of nations" which "was probably on [the] minds of the men" who drafted the Act, 124 S. Ct. at 2756 – and not incidentally, the Constitution.

The Court was correct in its reading of de Vattel's *The Law of Nations*–the seminal work read and largely followed by the Founders. To de Vattel (as well as the writers of the United States Constitution), there "certainly exists a natural law of nations," but that law of nations is one that binds nation-states in their relations, rather than defining the rights of individuals within each nation. De Vattel, *supra* note 13, at vii (noting "the natural law of nations is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns"). "The moderns are generally agreed in restricting the appellation 'the law of nations' to that system of right and justice which ought to prevail between nations or sovereign states." *Id.* at viii. The law of nations is not intended to mean a world community of one law, governing the rights and duties of individuals within their individual nations. Rather, the law of nations operates by consent between nation-states, governing not individual rights but the international conduct of nations. "The celebrated Grotius understands it to be a system established by the common consent of nations. . . ." *Id.*

Again in de Vattel's terminology, the law of nations defines not the "*internal* law" but the "*external* obligation" of a nation, "reserving the *internal* law for the direction of their own consciences." *Id.* at ix; *see also id.* at lxii. True, "It is essential to every civil society (*civiati*) that each member have resigned a part of his right to the body of the society and that there exist in it an authority capable of commanding all the members, of giving them laws, and of

compelling those who should refuse to obey." *Id.* at xiii. But on the other hand (de Vattel immediately continued), "Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses an absolute independence on all the others." *Id.* "To this we may add, that independence is even necessary to each state, in order to enable her properly to discharge the duties she owes to herself and to her citizens, and to govern herself in the manner best suited to her circumstances." *Id.* at xiv.

Thus, the law of nations arising by the consent of nation-states "cannot impose any obligation except on those particular nations who have, by long use, given their sanction to its maxim. . . ." *Id.* at xv. "The law of nations is the law of sovereigns." *Id.* at xvi. "[T]he body of the nation, the State, remains absolutely free and independent with respect to all other men, and all *other* Nations, as long as it has not voluntarily submitted to them." *Id.* at lvi. De Vattel continued:

> As a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her, – of what she can or cannot do, – of what it is proper or improper for her to do: and of course it rests solely with her to examine and determine *whether she can perform any office for another nation without neglecting the duty which she owes to herself.* In all cases, therefore, in which a nation has the *right* of judging what her duty requires, no other nation can compel her to act in such or such particular manner: for any attempt at such compulsion would be an infringement on the liberty of nations.

Id. at lxi-lxii.

As a sovereign republic, then, the United States "derives all its powers directly or indirectly from the great body of people" with those powers "administered by persons holding" representative offices. *The Federalist* No. 39 at 251 (James Madison) (J.E. Cooke ed., 1961). The Founders appreciated that though the Republic ought to be sufficiently large to minimize the prospect of majority factions developing around unjust causes, yet the Republic must be of such a size that the people's representatives could gather to govern–large but not too large, and certainly not a single world community. Madison wrote Jefferson on October 24, 1787, "As in too small a sphere oppressive combinations may be too easily formed agst. The weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration." *Papers of James Madison,* Volume 10, p. 214, *quoted in*, Morton White, *Philosophy, The Federalist, and the Constitution* 140 (1987). Madison reiterated in *The Federalist* No. 14, at 85 (J.E. Cooke ed., 1961), that the natural limit of a republic was "that distance from the center, which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs." The purpose in limiting that distance was to not deny the people's representatives from defending the people against a tyrannical administration.

Thus there was in the minds and understanding of those who drafted and advocated the adoption of the Constitution (such as Hamilton, Jay, and Madison), and those (such as Blackstone, de Vattel, and Grotius) who informed them, the clear conception that the United States would stand sovereign in the world, with the people's representatives determining both its internal laws as well as the circumstances under which it would accede in its international relations to the interests of other nations. Under this understanding, the laws of this United States are

subject to the norms, treaties, and conventions of other nations only when Congress expressly so provides by authorizing legislation, and certainly not when rules developed under the United States Constitution and acts of Congress (not to mention the treaty language itself) contradict international interpretations.

CONCLUSION

The Convention ratified by the United States expressly provides that the rights it grants must "be exercised in conformity with the laws and regulations of the receiving State." Such laws and regulations are a well established part of this nation's Constitutional and statutory law–and are therefore, the only proper law to apply as the rule of decision in this case. Thus, the American procedural default rule bars review of Petitioner's claim.

By the adoption of the Constitution the American people ceded certain of their inviolable natural rights to the government. The people did not, however, cede those rights to foreign judges exercising authority inconsistent with that authorized by the people's representatives and the Constitution itself. The President negotiated and the Senate ratified an Optional Protocol which, on its face, agrees to limit jurisdiction of the ICJ to hearing "[d]isputes arising out of the interpretation or application of the Convention." In doing so, these representatives of the American people did not agree to authorize the ICJ to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts–which is exactly what the ICJ did in this case. This Court should, therefore, reject Petitioner's invitation to anoint the ICJ's judicial promulgation as the Supreme Law of this Land. Failure to do so does nothing less than surrender the sovereignty of the

United States to an international tribunal and ignores the right of the people to govern.

Finally, because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and should not be decided. *See generally United States Parole Commn. v. Geraghty*, 445 U.S. 388, 397 (1980).

For these reasons, your *amicus* urges this Court to uphold its precedent in *Breard*, and affirm the Court of Appeals.

Respectfully submitted,

BENJAMIN BULL, *Chief Counsel*
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Ste. 165
Scottsdale, AZ 85260

NELSON MILLER
WILLIAM WAGNER
Counsel of Record

COOLEY LAW SCHOOL
300 South Capitol
Lansing, MI 48933
(517) 371-5140

February 18, 2005