No. 04-5928

IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:

CHARLES OWEN VERRILL, JR.
JOHN B. REYNOLDS III
PAUL A. DAME
WILEY REIN & FIELDING LLP
1776 K St., N.W.
Washington, D.C. 20006
(202) 719-7000

LORI FISLER DAMROSCH*
435 West 116th Street
New York, NY 10027
(212) 854-3740

* *Counsel of Record*

Counsel for Amici Curiae

192265

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

International Court of Justice Cases

Cited Authorities

Cited Authorities

Other Cases

Cited Authorities

Page

Cited Authorities

Cited Authorities

CONSTITUTIONAL PROVISIONS

TREATIES

Page

OTHER AUTHORITIES

Cited Authorities

INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of a final judgment of the ICJ interpreting a treaty of the United States in a proceeding in which the United States participated fully, and the respect that should be accorded such an interpretation by courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty involved in the present case. They do not take a position on the death penalty as such; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. They are united in the view that the United States is bound to comply with the ruling of the ICJ on the treaty at issue here, and that the federal judicial power is the organ to ensure such compliance.

SUMMARY OF ARGUMENT

Petitioner is one of 49 Mexican nationals currently on death row in state courts in the United States, who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128. All those covered by *Avena* are similarly situated, in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations to contact the Mexican consular post, and were convicted and sentenced

---

1. In accordance with Supreme Court Rule 37.6, *Amici* state that no party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

to death without benefit of timely consular services. The ICJ has held that petitioner, as one of the subjects of the *Avena* case, is entitled to review and reconsideration of his conviction and sentence as a remedy for violation of his rights under the Convention.

In denying habeas corpus (or even a certificate of appealability of the district court's denial of habeas corpus), the court of appeals believed itself constrained to deny the relief that the ICJ found to be required to redress the treaty violations in *Avena*, because of this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998). However, when this Court considered Vienna Convention claims of which the ICJ had been seized in *Breard* and in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) [*LaGrand*], the ICJ orders in question were provisional remedies of then uncertain legal effect, not final judgments. In contrast, the present case arises from a final judgment, whose binding force is unquestioned.

The ICJ judgment does not require the United States to set petitioner free, or to refrain from carrying out the death penalty, if after full review the courts below were to find that the treaty violation had not affected petitioner's ability to defend himself. What the ICJ judgment requires, and what petitioner requests, is that judicial authorities – state and federal – in the United States provide review and reconsideration of petitioner's conviction and sentence to take account of the treaty violation – a violation that the United States itself does not contest.

The *Avena* case and final judgment resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The ICJ judgment interprets a multilateral treaty which protects U.S. nationals abroad as well as foreign nationals here. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obligated under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties in force for the United States – to carry out the ICJ's judgment in *Avena*. These treaties bind both state and federal authorities; their relevant provisions

and the ICJ's judgment are directed to matters to be carried out in the ordinary course by domestic courts; and state as well as federal courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States.

ARGUMENT

I. THE ICJ JUDGMENT ESTABLISHES A TREATY RIGHT TO REVIEW AND RECONSIDERATION OF PETITIONER'S CONVICTION AND SENTENCE.

Petitioner is one of 49 Mexican nationals currently on state death rows who are covered by the final judgment of the International Court of Justice [ICJ] in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [*Avena*]. All those covered by *Avena* are Mexican nationals who were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention], to contact the Mexican consular post after their arrest. They were all convicted and sentenced to death without benefit of their treaty right to timely consular assistance, and the ICJ has held that as a remedy for this treaty violation, they are entitled to review and reconsideration of their convictions and sentences. The lower courts have held petitioner's treaty claim to be procedurally defaulted for federal habeas purposes, notwithstanding the ICJ's binding ruling that the application of a procedural default rule to foreclose consideration of such treaty claims is itself a violation of the Vienna Convention. This Court should clarify the import of a final and binding judgment of an international court establishing the authoritative interpretation and application of a treaty, in respect of persons protected by the treaty whose rights are directly addressed in the judgment.

On June 29, 1993, José Ernesto Medellin Rojas, aged 18, was arrested in Texas and was subsequently charged with murder. Though he told the arresting officer and detaining officials that he had been born in Mexico and was not a U.S. citizen, the authorities did not inform him of his treaty rights at any time before his trial, conviction, and sentencing. In 1994,

Medellin was convicted of murder and sentenced to death. Mexican consular officials learned of his detention only after he wrote to them from death row in 1997. Medellin thus had no opportunity to secure help from the Mexican consulate before and during trial. The failure to inform Medellin of his consular rights "without delay" constituted a breach of the Vienna Convention.

The violation of the Vienna Convention in Medellin's case, and the refusal of the Texas courts and federal courts to consider any remedy for this breach of treaty, [2] gave rise to a dispute between Mexico and the United States. As it is entitled to do under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No 6820, 596 U.N.T.S. 487 [Optional Protocol], Mexico brought an application against the United States before the ICJ. After full briefing by both Mexico and the United States and an oral hearing held in December 2003, the ICJ entered a final judgment that specifically held in respect of Medellin:

> (1) that the United States committed breaches of the obligation . . . to inform detained Mexican nationals of their rights under [Article 36(1)(*b*)], in the case of the following 51 individuals: . . . Medellin (case No. 38) . . . ;
>
> (2) that the United States committed breaches of the obligation . . . to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above . . . ;
>
> (4) that the United States . . . also violated the obligation . . . to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: . . . Medellin (case No. 38). . . .

Avena, para. 106. The ICJ has further specifically held that the appropriate reparation for these breaches "consists in the

2. On March 26, 1998, Medellin filed a state application for habeas corpus, arguing that his conviction and sentence should be vacated as a remedy for the treaty violation. The state court denied the application, finding that the treaty claim had been procedurally defaulted.

obligation of the United States of America to provide, by means of its own choosing, review and reconsideration" of his conviction and sentence. *Ibid.*, para. 153(9).

Prior to *Avena*, the U.S. District Court for the Southern District of Texas denied Medellin's federal habeas corpus petition, finding that the Vienna Convention claim was procedurally defaulted under "an adequate and independent state procedural rule," and on the alternative ground that under Fifth Circuit precedent the Vienna Convention does not create individually enforceable rights and that no judicial remedy is available for its violation. These district court conclusions of law are inconsistent with *Avena* and merit correction by this Court. In *Avena*, the ICJ explained that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights. *Avena*, paras. 111-113. The ICJ also held in *Avena* that the Vienna Convention gives rise to individual rights and that a judicial remedy of review and reconsideration of a conviction and sentence is required to redress the violation of such rights. *Avena*, paras. 128-134, 140, 153. *Avena* thus determined Medellin's treaty claim favorably, while his habeas appeal was pending.

After *Avena*, the Fifth Circuit affirmed the district court's denial of relief, finding that notwithstanding *Avena*, it was constrained by this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998), and by Fifth Circuit precedent, unless and until this Court (or the Fifth Circuit en banc) were to decide otherwise. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Meanwhile, in another post-*Avena* case, in a post-conviction posture, the Oklahoma Court of Criminal Appeals vacated a conviction and death sentence and remanded the case for review and reconsideration in implementation of *Avena*. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). The Oklahoma court in *Torres* correctly followed the authoritative treaty interpretation in *Avena*, while the Fifth Circuit in the present case perpetuated and compounded the treaty violation committed by the Texas authorities and added

an independent violation by refusing to give effect to the binding *Avena* Judgment.

This Court should clarify or reconsider its *Breard* per curiam order in the light of the authoritative treaty interpretation established in *Avena* (Section II below), and should confirm the existence of federal judicial power to fulfill the international treaty obligations of the United States – obligations which were voluntarily accepted through proper constitutional processes (Sections III-IV).

II. THIS COURT SHOULD REVISIT ITS PER CURIAM RULING IN *BREARD* IN LIGHT OF THE AUTHORITATIVE INTERPRETATION IN *AVENA* OF THE OBLIGATIONS OF PARTIES TO THE VIENNA CONVENTION ON CONSULAR RELATIONS.

In *Breard*, this Court accepted that it should "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such [a treaty]." 523 U.S. at 375. Nonetheless, in a procedural posture not conducive to plenary consideration of the important issues at stake, the Court went on to interpret Vienna Convention Article 36 in a manner that turned out to be inconsistent with the interpretation that the ICJ would later give in *LaGrand* (Fed. Rep. Germany v. United States), 2001 ICJ 104, and in *Avena*. The Court observed that it was "unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that Court earlier." 523 U.S. at 378. That matter came to this Court only a few days before Breard's scheduled execution date;[3] the treaty issues had not been briefed on the merits at either the ICJ or this Court; and the ICJ order in question was a provisional measures order whose effect was disputed,[4] rather than a final judgment whose binding force is clearly established by the U.N. Charter and the ICJ Statute (*see* Section III.B below).

---

3. The *LaGrand* matter, filed the year after *Breard*, was presented to this Court only two hours before petitioner's scheduled execution. *See* 526 U.S. 111.

4. The ICJ later held that provisional measures orders are binding. *LaGrand*, 2001 ICJ 104.

By contrast, the present matter has had the benefit of full briefing at the ICJ with full U.S. participation, and the final judgment constitutes an authoritative and legally binding interpretation and application of the treaty. This Court should thus reconsider those aspects of *Breard* that may have been based on what has subsequently been determined to be an incorrect interpretation of the treaty, and should settle important questions of treaty compliance that were either not resolved or were addressed insufficiently by *Breard*.

A. Petitioner's Treaty Right to Procedural Protections as Ordered by the ICJ Cannot Be Precluded by a Failure to Follow State Procedural Rules.

The per curiam ruling in *Breard* summarily concluded that a habeas petitioner alleging a Vienna Convention violation has no remedy on a procedurally defaulted claim. The subsequent ICJ rulings in *LaGrand* and *Avena* have undercut this element of *Breard*. Nor did this Court consider in *Breard*, as it normally does in cases of arguable conflict between international law and otherwise applicable domestic law, whether a harmonizing construction could be found that would enable the United States to comply with its international obligations. By contrast, just last Term this Court reaffirmed the presumption of *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Cf. F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004) (rule of statutory construction applied in *Empagran* reflects principles of international law – "law that (we must assume) Congress ordinarily seeks to follow");[5]

5. Indeed, there is no indication whatsoever that Congress expected to impede U.S. compliance with the Vienna Convention or that it was even made aware of the possibility of conflict with international obligations at the time of any enactment subsequent to the Vienna Convention. *Cf. United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (Palmieri, J.) (court construed antiterrorism statute to avoid placing U.S. in violation of international law, upon finding that Congress did not know that the statute would be incompatible with U.S. obligations). As explained below (p. 22), in approving the Vienna Convention, the Senate understood from the federal Executive that the treaty would prevail over any conflicting federal or state law.

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). Summary denial of the *Breard* petition therefore cut off exploration of alternative constructions or mechanisms that might have enabled fulfillment of U.S. treaty obligations.

The foreshortened time frame for addressing the *Breard* petition left unaddressed the important questions of federal law that would arise if responsibility for redressing violations of an international treaty were left exclusively in state hands, beyond federal judicial power to correct. The per curiam order in *Breard* intimated that the state governor could be the organ of treaty compliance of last resort[6] – a result clearly at odds with the proper understanding of allocation of federal-state competence in treaty cases, and with the Supremacy Clause of Article VI of the Constitution. It is important, *Amici* submit, that any inference that might be drawn from this Court's decision in *Breard* not be extended beyond that case to cases such as the present one, involving a treaty right confirmed by a final and binding judgment of the ICJ. The court below surely adopted a questionable interpretation of *Breard* in concluding that *state* procedural default rules could cut off the exercise of a federal treaty right,[7] when the authoritative international interpreter of the treaty has determined that such applications of procedural default rules are themselves treaty violations. Federal courts do not lack jurisdictional power to correct such state violations.

Further, it is important, in the view of *Amici*, to keep in mind the purpose of Article 36 of the Vienna Convention, which (like the *Miranda* rule in the United States) is not addressed to guilt or innocence or to the appropriateness of a sentence. Rather, Article 36 is addressed to procedural safeguards to inform a defendant of his rights, so that the determination of guilt and of punishment in the event of conviction are carried out under procedures enabling the defendant to have the benefit of all the rights to which he is

---

6. 523 U.S. at 378.

7. As this Court stated in *Baker v. Carr*, 369 U.S. 186, 212 (1962), "Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law."

entitled – including his treaty rights. It cannot be the law that a treaty-based opportunity to secure a treaty-based right, whose very purpose is to protect a foreign defendant, can be snuffed out by failure to assert the right under a state procedural rule when that failure itself arises from a state violation of the treaty.

B. Recent Decisions of This Court Support Respect for the ICJ Judgment.

Since *Breard*, this Court has addressed the considerations that properly inform the allocation of authorities between state and national levels in respect of foreign relations, as well as those affecting federal jurisdictional power in foreign relations cases. These post-*Breard* rulings bear upon the duty of state and federal courts to give effect to the ICJ judgment in *Avena*.

In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court noted, in invalidating a state law, that European states and Japan had lodged complaints at the World Trade Organization against the state measure, which had embroiled the national government for some time in an international dispute settlement procedure.[8] *A fortiori*, in the face of a final and binding judgment from a treaty-based dispute settlement procedure, a state rule must not impede treaty compliance and a federal judicial remedy must be available.

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Federal judicial enforcement of self-executing treaties is to be expected, and the same should follow for implementation of authoritative and binding international interpretations of self-executing treaties. Since the political branches have consistently treated

---

8. There was no final international judgment in *Crosby*, as there is here, since the WTO proceedings had been suspended by consent. *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (invalidating state law because of conflict with federal policy in executive agreement on Holocaust claims). The judgment of an international tribunal authoritatively interpreting a treaty stands on a stronger footing than the executive policy that was held to preempt state law in *Garamendi*.

the Vienna Convention as self-executing (Section III.C below), the logic of *Sosa* favors federal judicial enforcement of the treaty. [9]

The construction of the federal habeas statute in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), suggests that this Court should not leave petitioner without a judicial remedy. In *Rasul*, even the strenuous opposition of the Executive to the availability of habeas relief did not persuade this Court that the federal courthouse door should be closed to foreign petitioners claiming rights under federal law. As in *Rasul*, where international commitments and the reputation of the United States as a law-abiding nation are at stake, this Court should act to preserve and effectuate the availability of a judicial remedy for denial of federally protected rights, including the federal habeas remedy for a petitioner invoking a right guaranteed by an international treaty, as confirmed and mandated by the ICJ.

III. THE ICJ JUDGMENT RESULTED FROM A TREATY-BASED JUDICIAL PROCESS TO WHICH THE UNITED STATES AGREED, IN WHICH THE UNITED STATES PARTICIPATED FULLY, AND WHICH BINDS THE UNITED STATES AS A WHOLE.

Amici respectfully draw the attention of this Court to the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the rules of consular law in the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes thereunder. The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses in treaties; but once having given consent to a treaty and to a treaty-based dispute settlement provision, the United States is bound to comply with the obligations to which it has agreed.

---

9. *Sosa* did not decide whether availability of international tribunals might affect enforceability of an international law claim in U.S. courts, but this Court said it "would certainly consider" the potential relevance of international remedies "in an appropriate case." 124 S.Ct. 2766 n. 21.

A. The Vienna Convention Protects U.S. Nationals Abroad and Foreign Nationals in the United States.

The Vienna Convention codifies and transforms into multilateral treaty law a body of rules that evolved over centuries. Until the 1960s, consular practice was governed by customary law and bilateral treaties. While the core customary law of consular relations was generally well-understood, uncertainties persisted and disputes frequently arose. Disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – led to diplomatic protests and international arbitration. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970) [Whiteman].

In the 1920s, a U.S.-Mexican Claims Commission (established by treaty to resolve disputes involving treatment of nationals) considered claims of several U.S. nationals for having been arrested in Mexico and detained without access to a U.S. consular office. Regarding the opportunity to communicate with the consulate, the Commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 Hackworth 830. Conversely, in an incident where Mexico complained that California officials had not given the Mexican consulate access to a Mexican citizen detained in a California jail, the Department of State stressed the importance of California's compliance with the standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there

> will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

By the middle of the 20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law not only produce greater certainty in rules governing state behavior, but also enjoy a clearer status than uncodified custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance with consular law and avoid or mitigate the kinds of problems that the examples from U.S.-Mexican practice illustrate; it would also obviate the need for special arbitration agreements in consular disputes.

Codification of the rules of consular law was undertaken by the U.N. International Law Commission [ILC]. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. A diplomatic conference on the ILC draft resulted in the Vienna Convention, which was opened for signature on April 24, 1963, and entered into force on March 19, 1967. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States played a leading role in the Vienna conference and in the negotiations over the specific wording of Article 36 of the Vienna Convention and the Optional Protocol. *See* Report of U.S. Delegation at 41, 59-61. Indeed, the United States proposed the provision on dispute settlement that became the Optional Protocol. Not only did the United States initiate and actively advocate the proposal for binding dispute settlement, but it resisted others' efforts to eliminate or weaken the dispute settlement provisions. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol on compulsory dispute settlement that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid*. As discussed below, the United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969. As of 2005,

the Vienna Convention has 166 parties, of which 46 have also become parties to the Optional Protocol. *See* STATUS OF MULTILATERAL TREATIES MAINTAINED BY THE U.N. SECRETARY-GENERAL, *available at* http://untreaty.un.org.

The Vienna Convention dispute settlement system promotes a uniform and high level of compliance among the treaty parties. *Avena*, para. 47. Of course, no state can unilaterally determine the meaning of an international treaty. *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (decision of British court could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,[10] or establish the measure of its own treaty compliance. For the same reason, disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach of the Convention, cannot be determined by the United States as one party to the dispute. For authoritative resolution of such disputes, the Optional Protocol confers jurisdiction on the ICJ.

Refusal to grant review and reconsideration of Medellin's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform Medellin of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 164 parties to the Convention. In view of the immense number of nationals of the United States who

10. For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by other courts – foreign or international – on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660 (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its judgment is not just advisable but required.

travel or work abroad, the United States has a special stake in the worldwide, faithful performance of the Convention.

B. The United States Fully Consented to ICJ Jurisdiction to Decide Disputes Under the Vienna Convention, Within the Framework of the U.N. Charter and ICJ Statute, and Is Therefore Bound to Comply.

Amici respectfully emphasize that the United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted a binding obligation to carry out the resulting judgment. The basis for the compulsory jurisdiction of the ICJ over this dispute is Article I of the Optional Protocol.[11] The United States has consented through the proper processes under domestic and international law both to submit Vienna Convention disputes to ICJ jurisdiction, and to comply with the ICJ's judgment in a matter interpreting a treaty with an agreed dispute settlement protocol.

Under Article 94(1) of the Charter of the United Nations, 59 Stat. 1031, T.S. 993 (1945) [U.N. Charter], "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which is annexed to the U.N. Charter and is an integral part thereof,[12] decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added); thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellin matter), the decision of the ICJ is indeed binding. By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the duty

---

11. Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

12. According to Article 93 of the U.N. Charter, all U.N. Members are *ipso facto* parties to the ICJ Statute.

to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol is a treaty in force under Article 36(1) of the ICJ Statute. Proceedings under Article 36(1) produce binding judgments under Article 59 of the Statute.[13]

It is critical for the United States to uphold the obligatory character of compulsory jurisdiction under the Optional Protocol and the binding nature of ICJ judgments thereunder, not only in order to uphold the integrity of commitments of international law but also because this treaty and treaty-based jurisdictional mechanism protect important U.S. interests. The United States was the first state to invoke the Optional Protocol, when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol to submit to compulsory jurisdiction when disputes arise and to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152. The availability of the Optional Protocol to the United States in that case marked a major advance over the situation prior to the Vienna Convention, when the United States was unable because of the lack of preexisting jurisdictional consent to bring disputes

13. The treaty-based compulsory jurisdiction between states under Article 36(1) of the ICJ Statute is entirely separate from the procedure under Articles 65-68 of the ICJ Statute according to which the ICJ may render advisory opinions to international organizations in certain matters. The *Avena* ruling in respect of Medellin is not an advisory opinion but rather a binding judgment under Article 59 of the ICJ Statute and Article I of the Optional Protocol.

about denial of consular access to the ICJ.[14] When the ICJ indicated provisional measures against Iran in 1979 and entered a final judgment in favor of the United States in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 other U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[15] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[16] in total, the United States has been party

---

14. In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access in respect of four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Optional Protocol.

15. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ compromissory clauses came into force for the United States after the completion of the Morrison study: the Convention on the Physical Protection of Nuclear Material, T.I.A.S. No. 11080 (in force as of Feb. 8, 1987), and the International Convention against the Taking of Hostages, T.I.A.S. No. 11081 (in force as of Jan. 6, 1985).

In 1985 the United States gave notice of termination of its acceptance of compulsory jurisdiction under the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute and of its treaty of friendship, commerce and navigation with Nicaragua, the two bases of jurisdiction on which the ICJ had relied in the *Nicaragua* case, note 20 below. No other bases of jurisdiction have been terminated since that time. Indeed, it is striking that even in the aftermath of Paraguay's suit on behalf of Breard and Germany's suit on behalf of the LaGrand brothers at the ICJ, the United States has taken no steps to terminate acceptance of the Vienna Convention's Optional Protocol.

16. For a listing of all ICJ cases from 1946 to the present grouped by state, *see* the ICJ website at www.icj-cij.org [ICJ Website].

to 21 cases at the ICJ,[17] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[18] Since each of the 70 treaties with an ICJ dispute settlement clause entails binding obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals, and it is therefore the responsibility of the judiciary in this case to ensure compliance.

The United States has a crucial stake in maintaining a record of compliance with ICJ judgments, since we continue to be an active litigant in that forum. Compliance with ICJ final judgments has generally been quite high, including in the cases in which the United States has been a party: recent articles find overall compliance with approximately two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period.[19]

---

17. The United States has also taken part in almost all of the two dozen proceedings involving requests for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions*, *in* CROSSROADS at 423; for a current listing, *see* ICJ Website.

18. The cases initiated by the United States include seven involving Soviet-bloc aerial incidents. More recently, the United States invoked the ICJ in the *Tehran Hostages* case against Iran (1979-81), the *Gulf of Maine Boundary* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). *See* pp. 18-19 below.

19. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (finding compliance rate of 60% with final judgments issued over last 15 years, with likelihood that rate would go up to 80% rate for previous periods in light of states' efforts to achieve compliance over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004)

(Cont'd)

States have exceptionally disregarded the ICJ's rulings when they considered that the Court lacked a proper consensual foundation to decide the case, notably where respondents insisted that the Court had been granted no competence to decide a matter involving a state's vital national security interests.[20] In the present case, of course, jurisdiction was by consent and no U.S. security interest would be prejudiced by compliance.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (France v. United States), 1952 ICJ 176.[21] In *Delimitation of the*

(Cont'd)

(finding an overall compliance rate of 68%, counting disregard of provisional measures orders as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (finding only 5 cases of noncompliance with final judgments 1946-1986).

20. *See* especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 ICJ 14, discussed further at note 28 below. For similar reasons, France denied the existence of proper ICJ jurisdiction in the *Nuclear Tests* cases (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing their acceptances under the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

21. The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all pending cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive of legal issues. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– . . . –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199 (1981) (noting that the French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary").

Maritime Boundary in the Gulf of Maine Area (Canada/United States), 1984 ICJ 246, the final judgment drew a boundary in the Gulf of Maine. Both sides accepted the judgment and promptly complied.[22] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as part of its diplomacy and accepted the final judgment as dispositive of the claims it had raised with Italy on behalf of U.S. investors.[23] Thus, apart from *Nicaragua* (addressed in note 28 below) and such continuing compliance problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.[24]

---

22. Compliance having been assumed and therefore not challenged, only a few cases in the two countries refer to the ICJ judgment. *See, e.g., Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned, with reference to vessel operator's apprehension of possibility of detection by Canadian patrol boat on Canadian side of the line); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54, [1992] F.C.J. No. 410, *reversed*, [1995] 2 F.C. 467, 1995 F.C. LEXIS 146, *affirmed*, [1997] 1 S.C.R. 12, [1997] S.C.J. No. 5 (plaintiff sought lobster fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485, 1985 CarswellNat 439 (Tax Court of Canada 1985), paras. 142-147 (taxpayer claimed that offshore fish processing occurred "in Canada"; Tax Court noted that ICJ decision had become available after arguments had concluded).

23. *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 Am. J. Int'l L. 249, 257 (1990).

24. In addition to the cases discussed in the text, the disposition of the remainder of the cases to which the United States has been party follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed because of the absence of an indispensable party.

(Cont'd)

In view of the U.S. interest in maintaining this compliance record,[25] this Court should enter the appropriate orders to

(Cont'd)

Interhandel (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugoslavia v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment in settlement. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued in connection with an overall settlement. *Vienna Convention on Consular Relations* (Paraguay v. U.S.), 1998 ICJ 426, was discontinued after the entry of provisional measures and before proceedings on the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

25. On the rare occasions when the United States has failed to abide by consensually-assumed dispute settlement obligations, there is no doubt that U.S. interests have suffered as a result. Many authors have documented the detriments to U.S. economic, commercial, political and other interests in Mexico from the prolonged failure of the United States to comply with the arbitral award in Mexico's favor in the *Chamizal Tract* arbitration. *See*, *e.g.*, SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (on U.S. difficulties in negotiating with Mexico over expropriation of American-owned agrarian and petroleum properties, in view of U.S. noncompliance with *Chamizal* award); *see also* FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (on linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President John F. Kennedy said in a news conference in 1962 that because the United States had not carried out the award, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* Liss at 95-97; 3 Whiteman at 680, 696-699.

ensure that the courts below uphold the U.S. obligations of compliance in the present case.

This Court has long recognized that when the United States undertakes to participate in an international dispute settlement procedure, the good faith of the United States is implicated in carrying out the resulting award. *See*, *e.g.*, *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that international dispute settlement procedures embraced by the U.S. political branches are a traditional and proper method for resolving such grievances. This Court has likewise repeatedly referred to the ICJ as an authoritative tribunal for settling disputed points of international law.[26] Implementation of the *Avena* judgment here is thus consistent with this Court's established jurisprudence in respect of international dispute settlement.

C. The Vienna Convention, Optional Protocol, and *Avena* Bind the State and Federal Courts and May Be Implemented Through Federal Judicial Action.

The ICJ judgment in Medellin's case implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all state and federal courts. Hence, on Medellin's federal habeas petition, *Avena* should be followed as the rule of decision.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[27] The

26. *See*, *e.g.*, *United States v. Maine*, 475 U.S. 89, 99 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985); *United States v. Louisiana*, 394 U.S. 11, 69-71 (1969) (all referring to the *Fisheries* case (U.K. v. Norway), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

27. The Vienna Convention and Optional Protocol entered into force for the United States on December 24, 1969. *See* RESTATEMENT (Third) (Cont'd)

Vienna Convention has been understood at all times to be a self-executing treaty. As the Department of State witness informed the Senate in the hearings on the Vienna Convention, "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law not only is required by the Supremacy Clause but was spelled out explicitly in the State Department's responses to the Senate's questions, as follows:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of self-executing treaty obligations.[28]

(Cont'd)

of the Foreign Relations Law of the United States (1987) [Restatement], Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (preceding § 464) and § 465. The Restatement also confirms that the Vienna Convention is self-executing. Intro. note before § 464.

28. The decision in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), which includes (Cont'd)

Just as no legislation was required to implement the treaty obligation to inform Mexican nationals of their consular rights, no legislative action is needed to afford Medellin the treaty-based remedy that the ICJ has concluded is necessary to redress the failure to inform Medellin of this right. *Avena* declares the obligations that existed when Medellin was arrested (the obligation to inform him of his treaty rights) and subsequently when he was tried, convicted, and sentenced in ignorance of his treaty rights (the treaty-based obligation to remedy the violation from failure to inform); makes findings of breach; and determines a remedy. The remedy prescribed is well within the competence of state and federal courts to review and correct illegal acts in connection with judicial proceedings.

In failing to give to petitioner the consular notification and opportunity of consular assistance required by the Vienna Convention, the United States violated its obligation to Mexico, as the ICJ has held. The ICJ did not order the United States to pay monetary compensation (which Mexico did not request), but it held that an apology was not enough. The reparation ordered by the Court was for the United States to grant review and reconsideration of the conviction and sentence of petitioner and the other similarly situated Mexican nationals. The Fifth Circuit mistakenly held that an individual in petitioner's position had no private right that a federal court could enforce. That court misunderstood the nature of the remedy requested here: what petitioner seeks is vindication

(Cont'd)

dicta suggesting that an ICJ judgment might not be self-executing, is distinguishable. In *Nicaragua*, the ICJ judgment did not involve a self-executing treaty, but rather entailed aspects of international law (the use of military force) that would be considered non-self-executing in U.S. law. The plaintiffs who sought to enforce the ICJ's *Nicaragua* judgment lacked any relationship to the ICJ case, *see* 859 F.2d 938, while *Avena* explicitly deals with Medellin and specifies the remedial dimension of his claim under a self-executing treaty. Finally, Congress and the President had repudiated the ICJ judgment in *Nicaragua* by enacting a subsequent statute in conflict with it, which the court of appeals found determinative, *see* 859 F.2d 936-937. Here, there is no statute rejecting *Avena*, nor any hint that the Executive rejects compliance.

in concrete terms of a treaty-based right that the ICJ has awarded to the state of petitioner's nationality that exercised the right of diplomatic protection on his behalf and for his benefit. In failing to accord this treaty-based remedy, the court below closed its eyes to the obligation of the United States to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the manner in which state criminal jurisdiction would ordinarily be exercised.[29] Treaties may and often do require states to modify the exercise of their judicial jurisdiction, and even to refrain from exercising criminal jurisdiction. For example, the Vienna Convention codifies rules of international law granting immunities from judicial jurisdiction to consular officers, including in criminal matters. *See* Vienna Convention, arts. 41-45. Where a treaty provides for the immunity of a foreign official from judicial jurisdiction, state and federal courts alike are required to recognize the immunity accorded by international law, notwithstanding any impact on state law enforcement interests. *See Commonwealth*

29. Since both Mexico and the United States are federal states, there is a strong national interest in ensuring compliance with international obligations at both state and federal levels, in both the United States and Mexico. If U.S. states were free to violate and then fail to remedy treaty violations, with no federal judicial remedy available, the consequences in U.S.-Mexican relations would be severe. The United States as a whole is responsible for state violations of international law. Where U.S. courts can avoid such violations by carrying out the judgment of an authoritative international tribunal, they are required to do so.

In the early 20th century, in preparation for an arbitration with Mexico involving protection of nationals of one country in the territory of the other, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of considerations of U.S. federalism that would apply on a mirror-image basis. The Department of State replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth at 593, 597.

Indeed, the United States has even accepted an obligation to make monetary reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. *See* RESTATEMENT § 207, Reporters' Note 3.

v. Jerez, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul had to be dismissed because of immunity under Vienna Convention). *Cf. In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The *Arrest Warrant* case illustrates compliance by domestic judicial authorities with a final ICJ judgment affecting the implementation of domestic criminal law. The ICJ judgment in that case required Belgium to cancel an arrest warrant issued by a Belgian court against Congo's foreign minister, because of the immunities accorded to a sitting foreign minister under international law. *See Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belgium), 2002 ICJ 3. Belgian judges promptly complied with the ICJ judgment. *See War Crimes Case Against Former Foreign Minister "Inadmissible,"* AFRICA NEWS, Apr. 17, 2002, *available in* LEXIS, News Library, Allnws File.

The obligation of all U.S. judges, state or federal, to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:[30]

> A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States,

---

30. *See also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law).

Treaties providing inheritance rights for aliens have been held to prevail over state laws disqualifying aliens from inheriting. *See Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties giving aliens such rights. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

> shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. — If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole. . . .
>
> Four things are apparent on a view of this 6th article of the National Constitution. . . . 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

In *Asakura v. Seattle*, 265 U.S. 332 (1924), a treaty providing for rights of Japanese nationals to carry on trade on a nondiscriminatory basis was invoked to invalidate a city ordinance excluding foreigners from certain occupations. This Court said:

> The treaty is binding within the State of Washington. . . . It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

265 U.S. at 341.

State and federal courts have frequently upheld treaty rights in cases coming within their jurisdiction, without awaiting any instruction from the federal Executive or the legislature. The Court of Appeals of Kentucky, in an opinion that the Supreme Court later called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded

> by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878). Indeed, courts have regularly applied consular treaties as the supreme law of the land on a self-executing basis. *See*, *e.g.*, *In re Zalewski*, 292 N.Y. 322 (1944) (holding a U.S.-Polish consular treaty to be the supreme law of the land and giving it a liberal construction to allow the Polish Consul-General to act as the personal agent for a Polish national and to exercise her right of election under a will).

This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. *See*, *e.g.*, *Japan Line*, *Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). Where, as here, the Senate unanimously approved a treaty designed to secure the rights of Americans around the world and the ICJ has entered a judgment requiring review and reconsideration of a state conviction and sentence as the remedy for U.S. violation of that same treaty, no court in the United States is free to ignore the treaty-based judgment in favor of the foreigner. To allow the state of Texas to defeat the national interest in treaty compliance here would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and gives federal courts judicial power to enforce them.

In *Hines v. Davidowitz*, 312 U.S. 52 (1941), which invalidated a Pennsylvania alien registration law as incompatible with the federal scheme for regulation of the treatment of aliens, this Court emphasized:

> One of the most important and delicate of all international relationships, recognized

> immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . . [A]part from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65. This Court found it of importance that the state measure "is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . ." *Ibid*.

IV. THIS COURT SHOULD INSTRUCT THE COURTS BELOW TO GIVE EFFECT TO *AVENA* AS THE RULE OF DECISION.

The Executive Branch took no position in this case at the petition stage, and *Amici* are not aware of what position, if any, it will take at the merits phase.[31] In any event, *Amici* submit that this case calls for a national solution to be settled by this Court as a matter of law, both because the obligation in question is a national treaty obligation for judicial implementation, and because it would be unacceptable for treaties to be interpreted differently in different states of the

---

31. In the *Torres* matter in Oklahoma (p. 5 above), the Department of State urged "careful consideration" to the ICJ ruling, which Oklahoma authorities correctly treated as binding. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 579, 581-84 (2004).

United States or between the United States and its treaty partners. Under this Court's jurisprudence, Executive views on treaty interpretation are entitled to much weight but are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights." *See*, *e.g.*, *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939). Accordingly, this Court has not only the authority but the responsibility to conclude that the correct interpretation of an international treaty is the one settled through an authoritative and binding process of dispute settlement, even if the Executive Branch previously advanced a different position unsuccessfully in the international litigation.

This Court should ensure that the Texas authorities comply with the *Avena* Judgment, whether or not there is an indication from the federal Executive Branch as to its position on the pending matter. The Executive Branch does not always take a position on particular foreign relations cases; even so, this Court has instructed the lower courts, including state courts, to follow federal rules with constitutional underpinnings in the field of foreign relations. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420, 436 (1964), the Executive Branch, through the Department of State, had made a communication which the Supreme Court understood as "intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation." As the Court explained,

> Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret.

Rather than follow an approach under which the outcome of domestic litigation would turn on articulation of the State Department's position, the Court decided upon a federal rule of judicial decision, binding on federal and state courts alike.

376 U.S. at 437. In *Zschernig v. Miller*, 389 U.S. 429, 434 (1968), this Court struck down an Oregon law affecting inheritance of an East German national, even though the Executive Branch brief *amicus curiae* before the Court "[did] not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." The import of these cases is that the Executive need not make a specific statement as a predicate for judicial action to avoid injury on the international plane. In the present matter, it is for this Court, as the ultimate authority on domestic implementation of our international obligations, to instruct the lower courts to give effect to *Avena* as the rule of decision.

CONCLUSION

Amici urge this Court to ensure that actions of the authorities in Texas do not cause irreparable damage on the international plane. Review and reconsideration of Medellin's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with this treaty obligation. Such consequences could include refusal of other parties to the Vienna Convention to ensure the treaty-based rights of U.S. nationals abroad, as well as prejudice in connection with dispute settlement under this and other treaties.

This Court should reconsider its per curiam ruling in *Breard* in order to ensure compliance with the treaty obligations of the United States. At the end of the day, this Court's decision will make it possible to know with certainty where the responsibility for treaty compliance lies. By instructing the courts below to afford the remedy of review and reconsideration required to redress the treaty violation, this Court will fulfill its responsibility within our constitutional system and will maintain the standard for compliance with international obligations that is critical to protect U.S. interests abroad.

Respectfully submitted,

LORI FISLER DAMROSCH*
435 West 116th Street
New York, NY 10027
(212) 854-3740

* *Counsel of Record*

Of Counsel:

CHARLES OWEN VERRILL, JR.
JOHN B. REYNOLDS III
PAUL A. DAME
WILEY REIN & FIELDING LLP
1776 K St., N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae

APPENDIX

APPENDIX — LIST OF *AMICI*

Lori Fisler Damrosch is the Henry L. Moses Professor of Law and International Organization at Columbia University and editor of *The International Court of Justice at a Crossroads* (1987). As an attorney in the U.S. Department of State between 1977 and 1981, she was one of the counsel for the United States in *United States Diplomatic and Consular Staff in Tehran*, (United States v. Iran) 1979 ICJ 7, 1980 ICJ 3, and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

Thomas M. Franck is Murry and Ida Becker Professor of Law Emeritus at New York University. He served as judge ad hoc of the International Court of Justice in *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 2001 ICJ 575, and as counsel for Chad in *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), 1994 ICJ 6, and for Bosnia-Herzegovina in the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), 1993 ICJ 3, 325, 1996 ICJ 595, and *Application for Revision of the Judgment of 11 July 1996* (Yugoslavia v. Bosnia and Herzegovina), 2003 ICJ 7.

Richard N. Gardner is Professor of Law and International Organization at Columbia University and was previously U.S. ambassador to Italy and Spain. As Deputy Assistant Secretary of State for International Organization Affairs, he was involved in the U.S. position in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163. He served as counsel for the United States in *Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy), 1989 ICJ 15.

Appendix

Louis Henkin is University Professor Emeritus at Columbia University and a past president of the American Society of International Law. He served as Chief Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* and is the author of *Foreign Affairs and the United States Constitution* (2d ed. 1996).

Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law at New York University School of Law. He served in the Office of the Legal Adviser of the U.S. Department of State between 1961 and 1966 and was Deputy Legal Adviser from 1964 to 1966. He was Associate Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* and acted as counsel for the United States in *Oil Platforms* (Iran v. United States), 1996 ICJ 803, 2003 ICJ 161.

Bernard H. Oxman is Professor of Law at the University of Miami School of Law and a former Assistant Legal Adviser of the U.S. Department of State. He was a legal consultant for the United States in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States), 1984 ICJ 246.

W. Michael Reisman is the Myres S. McDougal Professor of International Law at Yale University and a former member and president of the Inter-American Commission on Human Rights. He has served as counsel in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), 2001 ICJ 40, and for the Philippines in *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 2001 ICJ 575.

Appendix

Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

Anne-Marie Slaughter is the Dean of the Woodrow Wilson School at Princeton University and the immediate past president of the American Society of International Law. She was formerly the J. Sinclair Armstrong Professor of Comparative and International Law at Harvard University.