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 *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the International Court of Justice rendered its judgment in *Avena and Other Mexican Nationals*. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that

[1] No person or entity other than the Government of Mexico or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner has not authored this brief in whole or in part. Petitioner and Respondent have each consented in writing to the filing of this amicus brief.

the United States must provide Mr. Medellín with meaningful review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36. Despite the ICJ's judgment, the Court of Appeals below refused even to grant a certificate of appealability to review Mr. Medellín's claims under the Vienna Convention and the Avena judgment, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding.

Mexico has a direct interest in compliance by the United States with the *Avena* judgment. The very purpose of Article 36 is to permit the nations that signed the Vienna Convention – including Mexico, the United States, and 164 other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when a citizen is facing trial in another country for a crime that may lead to his execution.

SUMMARY OF ARGUMENT

When Mexico and the United States agreed to submit to the jurisdiction of the International Court of Justice, both parties recognized that they would be bound by the Court's final judgment. The two countries are both party to over 50 instruments that provide international dispute resolution mechanisms.[2] Indeed, over the last two centuries, Mexico and

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[2] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18,

the United States have settled hundreds of disputes in this manner.[3] While the facts of the cases, the composition of the tribunals, and the rules of procedure have differed, each country has consistently recognized that when it commits itself to resolve a dispute by submitting to the jurisdiction of an international tribunal, it agrees to be bound by the result.

In recent years, Mexico and the United States have disagreed on the scope of the rights established by Article 36. After the two nations failed to resolve their differences through diplomatic channels, Mexico exercised its right to submit the dispute to the International Court of Justice for binding resolution. In doing so, Mexico expressly invoked the rights of its nationals and sought specific remedies on their behalf in its exercise of diplomatic protection. The ICJ weighed the arguments of the parties and the facts of each Mexican national's case, and issued a carefully reasoned judgment

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1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

[3] For a partial list of arbitrations to which each country has submitted, *see* A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 653, 636-37 (1990).

adjudicating the rights of Mr. Medellín and 51 other Mexican nationals, thereby settling the dispute that had, at times, strained relations between the two nations.

Under both international and United States law, the *Avena* judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. Mexico respectfully requests that this Court correct the judgment of the Court of Appeals and instruct the lower courts of the United States to comply with the judgment of the International Court of Justice.

ARGUMENT

I. The United States and Mexico Have Consistently Recognized That When a Dispute Is Submitted by Mutual Consent to an International Tribunal, the Resulting Judgment Is Binding.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably, the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict,[4] resolved boundary disputes,[5] and indemnified private

[4] *See, e.g.,* FREDERICK DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 10-27 (1933).

[5] *See* U.S. Boundary Relations, 3 Whiteman DIGEST §30, at

investors[6] as well as individuals who claimed personal injury[7] or denial of due process.[8] Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

Conflicts over the treatment of United States citizens in Mexico were a recurring theme in early diplomatic relations between the two countries. DUNN, *supra*, at 1-2. In the mid-nineteenth century, United States citizens flocked to Mexico in great numbers. FELLER, *supra,* at 1. Many complained they were subjected to unequal treatment, illegally detained, deprived of due process, or otherwise wronged by Mexican authorities.[9] They sought protection from the United States government, which in turn pressed their claims upon the Government of Mexico. *See, e.g.,* DUNN, *supra,* at 18-19. The frequency with which such claims were brought by the United States against Mexico led one commentator to observe that

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(describing the agreement of the United States to abide by the terms of arbitral judgment regarding disputed tract of land known as "El Chamizal" in El Paso, Texas).

[6] *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 30, 2000) [hereinafter *Metalclad"*].

[7] *See Francisco Quintanilla* (Mexico v. United States), Opinions of the Commissioners 136 (1926).

[8] *See* JOHN BASSETT MOORE, 4 INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3251 (1898).

[9] *See generally id.* at 3235-3252.

"[t]he subject of the claims of foreign nationals plays a more important role in the history of the foreign relations of Mexico than in that of any other country." FELLER, *supra,* at 1.

Diplomacy proved unable to resolve these disputes, and the unsettled claims of United States citizens in Mexico were cited as justification for war with Mexico in 1846. *See* DUNN, *supra*, at 45-49. After the war, United States citizens continued to allege mistreatment by Mexican authorities. This time, the two nations signed the Claims Convention of 1868, which established a Commission to hear the claims of both Mexican and United States citizens for property damage, personal injury, and wrongful detention.[10] Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, U.S.-Mex., art. II, 115 Stat. 679, 681. After reviewing more than 2,000 claims, the Commission entered judgments against Mexico totaling over $4,000,000.00, a sum far greater than that assessed against the United States. FELLER, *supra,* at 6. Mexico promptly complied with the Commission's judgment. *See Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63, 67 (1884) ("the government of Mexico has promptly and in good faith met its annual payments"); DUNN, *supra*, at 112.

Mexico never disputed its legal obligation to comply with the judgments of the 1868 Claims Commission, even in

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[10] *See, e.g.,* MOORE, *supra,* at 3243-44 (describing the wrongful imprisonment claim of A.H. Halstead, which resulted in an arbitral judgment of $1,600.00); *id.* at 3247 (describing the arbitrary detention claim of William P. Barnes, resulting in arbitral judgment of $5,100.00); *id.* at 3251 (describing the wrongful detention claim of Augustus Jonan, resulting in arbitral judgment of $35,000.00 in Mexican gold).

the face of compelling evidence that some claims were fraudulent.[11] *See La Abra Silver Mining Company v. United States,* 175 U.S. 423, 458 (1899); *Frelinghuysen,* 110 U.S. at 67 (1884). In *Frelinghuysen*, the Court accepted that the judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments." 110 U.S. at 67. The Court further observed that "Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not seek to do." *Id.* at 467-68.

Mexico and the United States have also resorted to international arbitration to resolve economic disputes. In the case of the Pious Fund of California, the Claims Commission awarded the Catholic church of California the sum of $904,070.79, which Mexico paid in full. REPORT OF JACKSON H. RALSTON, IN THE MATTER OF THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS 5 (1902). But the matter did not end there. The United States contended that Mexico owed additional interest on the fund,[12] and in an attempt to resolve the dispute, both nations agreed to submit to the jurisdiction of the

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[11] Article 2 of the Claims Convention provided that "[t]he president of the United States. . . and the president of the Mexican republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever." 15 Stat. 679.

[12] *Reports of International Arbitral Awards*, v. IX at 5, U.N. Sales No. 59.V.5 (1948).

Permanent Court of Arbitration at The Hague.[13] The Pious Fund case was the first judgment issued by the newly-established tribunal. HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 24 (2002). The Permanent Court of Arbitration issued a unanimous judgment against Mexico on October 14, 1902. Mexico was ordered to pay a lump sum of $1,460,682.67, and to make annual payments of $43,050.99 in perpetuity. RALSTON, *supra,* at 15-16. Mexico complied with the judgment, which has now been paid in full. *See* FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 53 (1969).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988).

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[13] *See* Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias," May 22, 1902, U.S.-Mex., 9 Bevans 12, 1902 U.S.T. LEXIS 50. Article XIV of the Protocol provided that "the award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration."

The effects of this decision upon bilateral relations were "significant and lasting," and the United States' refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years.[14] SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States' reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. In addition, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration.[15] *See* LAMBORN AND MUMME, *supra,* at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. *See* LISS, *supra,* at 89. In announcing the decision to comply with the Commission's judgment, President Kennedy acknowledged the United States had been

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[14] In 1925, the United States rejected Mexico's suggestion that the dispute be submitted to the Permanent Court of International Justice (the precursor to the International Court of Justice) for arbitration. Since the United States did not accept the jurisdiction of the international tribunal, the Court had no power to resolve the dispute. *See Convention With Mexico for Solution of the Problem of the Chamizal: Hearings Before the Committee on Foreign Relations, United States Senate*, 88th Cong. 21 (1963) (statement of Ambassador Thomas C. Mann) [hereinafter "Chamizal Hearings'].

[15] *See* Weber, *supra,* at 42. Mexico suspended payments on the Pious Fund in 1915. In 1966, it resumed payments, *id.* at 51, and fully satisfied its obligations in 1967. *Id.* at 53.

wrong in rejecting the award. *See* President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); *Transcript of the President's News Conference on Foreign and Domestic Matters,* N.Y. TIMES, July 6, 1962, at A8. And notwithstanding the request of Texas Senator John Tower that the matter be submitted to the Texas legislature for approval,[16] the United States ratified a new treaty giving effect to the judgment. Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors. Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad,* supra n. 6. Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." *Eye on Investors, Mexico Pays U.S. Company,* N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is

[16] *See Chamizal Hearings* at 26 (statement of Senator John G. Tower).

submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding.

II. The Protection of Nationals Abroad Has Long Been a Priority of Both Mexico and the United States.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. In 1943, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., art. 6, 57 Stat. 800. Among other things, the bilateral consular convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." *Id.* The bilateral convention did not contain any provision for arbitration of disputes; instead, article 6 provides that grievances may be addressed through diplomatic channels. *Id.*

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the Bilateral Convention and elaborated on the types of services consular officers could provide. Vienna Convention, arts. 5, 36. For example, article 5(i) of the Vienna Convention states that "Consular functions consist in: … representing or arranging appropriate

representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Article 36(1)(c) reinforces this provision, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention. The United States was the leading proponent of this instrument,[17] which provides:

> Disputes 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, art. 1.

Within the framework of these two conventions, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

A. Mexico Has an Active and Longstanding Tradition of Providing Extensive Consular Services to Its Nationals.

Mexican consular officers have provided services to detained Mexican nationals in the United States for nearly two

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[17] *See Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees,* U.N. Conference on Consular Relations, at 249, U.N. Doc. A/CONF.25/16 (1963).

hundred years. And as the population of Mexican nationals in the United States has expanded, Mexico's consular assistance program has become increasingly sophisticated. With 45 consulates, Mexico now has the most extensive consular network of any foreign nation in the United States.[18]

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. *See* Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) A39, App. 7 (June 20, 2003) (Declaration of Roberto Rodríguez Hernández).[19] Many Mexican nationals have little formal education and are desperately impoverished. 2A, para. 6. They have trouble grasping abstract legal concepts, and often fail to understand their rights – even after their lawyers have attempted to explain them. *See id.* at para. 5. Significant cultural and linguistic barriers impede their ability to communicate effectively with their attorneys and to participate fully in their defense. *Id.*

Mexican consular officers have observed that even

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[18] Japan has the second largest consular network, with 19 consulates. Canada has only 15 consulates in the United States. U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, FOREIGN EMBASSIES AND CONSULATES IN THE UNITED STATES (available at http://www.travel.state.gov/law/consular/consular_745.html) (last visited Jan. 17, 2005).

[19] The declaration of Ambassador Rodríguez Hernández was provided to the International Court of Justice in *Avena,* and is appended to this brief. For ease of reference, citations will refer to the appropriate paragraph and page number of the appendix.

nationals who have resided in the United States for many years retain a strong connection with Mexican culture. Some never learn to speak English fluently. *See id.* They face problems assimilating to a foreign culture in which they are not fully accepted. As one commentator has observed,

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.

J. Palerm, B.R. Vincent, and K. Vincent, *Mexican Immigrants in Courts, in* IMMIGRANTS IN COURTS 96 (Joanne Moore, ed., 1999). Consular assistance can often help overcome these unique disadvantages.

Cultural misunderstandings and linguistic barriers pervade many cases involving Mexican nationals, but these factors take on added significance when the national is facing capital punishment. Given the gravity of the penalty at stake, the Government of Mexico has instructed consular officers to monitor capital cases with particular care. 2A, para. 4. Consular staff receive specialized training so that they can evaluate the quality of the legal representation in each case. 6A at para. 16. The archives of the Foreign Ministry contain files reflecting the involvement of consular officers in death penalty cases in the United States dating back to at least 1920.[20]

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[20] *See also Torres v. State,* No. PCD-04-442 (Okla. Crim. App. May 13, 2004), Petition for Writ of Certiorari at 155A (Chapel, J., concurring) (noting that Mexico has had a tradition of active consular assistance in capital cases since the 1920s); *Two Mexicans Die in Electric Chair,* N.Y. TIMES, Jan. 28, 1921, at A3 (discussing unsuccessful battle of Mexican consular officers to prevent executions in New York); William Aceves, *The*

Consular officers provide crucial services to Mexican nationals who are facing the death penalty. In accordance with their training, their principal concern is to ensure the defendant receives qualified and effective legal counsel. 4A, para. 10. Over time, Mexico has concluded that the attorneys assigned to represent Mexican nationals often lack the experience and the resources necessary to provide a vigorous defense. In addition, most of the assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining mitigating evidence from relatives. And invariably, birth records and other critical documents can only be obtained in Mexico.

Consular officers are therefore instructed to support the defense by providing funds for investigators and experts; acting as a "cultural bridge" between the defendant and his lawyer; communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense; tracking down records and other

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Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies, 31 VAND. J. TRANSNAT'L L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire,* N.Y. TIMES, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing).

documents; and identifying and transporting family members and other witnesses to the United States. 4A-5A, paras. 11-13. If consular officers conclude that the defense attorney is not able to provide high quality representation, they attempt to secure more effective legal counsel, a function that is entirely consistent with the rights of consular officers under article 36(c) of the Vienna Convention:

> Sometimes this is accomplished by providing funds so that experienced counsel may be retained. On other occasions, Mexican consular officers assist in locating experienced defense counsel who are able to represent nationals on a *pro bono* basis. Sometimes, consular officers can persuade judges to remove an unqualified lawyer and appoint more qualified counsel to replace him.

6A, para. 15.

Experience has taught the Government of Mexico that consular intervention is most effective prior to trial. Early consular intervention often persuades prosecutors to refrain from seeking the death penalty. 5A at para. 14. Consular officers commonly search all archives and databases in Mexico to determine whether a defendant has a criminal record, and provide documentation of such searches to the prosecution. Consular officers can also obtain birth, school and medical records that provide proof of a defendant's physical or mental condition. *Id.* at para. 12. This sort of evidence has influenced the outcome of dozens of cases. Statistics maintained by the Mexican Foreign Ministry demonstrate that in at least 59 cases since September 2000 where consular officers were informed of the Mexican national's detention prior to trial, prosecutors

waived the death penalty.

Finally, early intervention enables consular officers to advise Mexican nationals and their counsel of the importance of challenging at the trial level violations of the Vienna Convention. Criminal attorneys in the United States are often unaware of the obligations imposed by Article 36. As a result, they often fail to assert Vienna Convention claims or preserve them for appeal. Consular officers seek to educate defense attorneys about the significance of the treaty and the vital role of consular assistance. Through these efforts, they can increase the likelihood that Mexican nationals will not be prejudiced by any violation of their Article 36 rights, and that Vienna Convention claims will not be waived. 4A, para. 10.

In light of the services described above, it is not surprising that the United States government has acknowledged that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

B. The United States Has Been a Forceful Advocate for the Consular Rights of American Citizens Detained in Mexico.

United States consular officers have been no less assiduous in seeking to protect the rights of detained United States nationals in Mexico. As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. As described above, the United States' inability to resolve complaints by its

nationals in Mexico was one of the factors that led to war in 1846. Even after Mexico settled the claims of United States nationals under the Claims Commission of 1868, the United States continued to advocate at the turn of the century for its citizens who claimed that they had been subjected to wrongful detention and denial of due process. *See* DUNN, *supra,* at 308-11, 401.

To resolve these claims, the United States and Mexico ratified a General Claims Convention in 1923. General Claims Convention, Sept. 8, 1923, U.S.-Mex., 43 Stat. 1730. Several of the cases addressed by the Commissioners made reference to the efforts of United States consular officers to protect the rights of their detained nationals. *See, e.g., Harry Roberts* (United States v. Mexico), Opinions of the Commissioners 100, 101, 104 (1926); *B.E. Chattin* (United States v. Mexico), Opinions of the Commissioners 422, 446-47 (1926) (Nielsen, Commissioner, concurring). Among the claims adjudicated by the Commission was that of Walter H. Faulkner, who claimed that Mexican authorities had prevented him from communicating with the United States consul for a period of several days. Although the Commission ultimately concluded that the claimant had failed to prove he was deprived of consular access, it held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." *Walter H. Faulkner* (United States v. Mexico), Opinions of the Commissioners 86, 90 (1926).

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At those hearings, State Department representatives testified at length regarding the rights of United States citizens to seek consular

assistance:

> All of us regard consular protection as an inherent right of every citizen. That right is not affected by evidence or findings of guilt. . . . Providing consular protection to American citizens abroad is a basic historic responsibility of this Department and its consular officers.

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part I, 94th Cong. 16 (1975) (Statement of Leonard F. Walentynowicz). Mr. Walentynowicz observed that in order to fully protect the rights of prisoners and prevent abuses, immediate consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that immediate consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

Id., Part II, at 6. Finally, in keeping with the United States' long tradition of protecting the rights of its citizens in Mexico, the State Department emphasized the need to actively intervene in individual cases to ensure that justice is done:

> [W]e are persuaded that to make progress in protecting the rights of U.S. citizens in Mexico, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

Id. at 63.

III. The International Court of Justice Issued a Binding Judgment that Adjudicated the Rights of Individual Mexican Nationals.

As the preceding overview makes clear, disputes over the treatment of Mexican and United States nationals have permeated bilateral relations for the last two centuries. This is hardly surprising, in light of this Court's observation that

> [o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of a government, has to do with the protection of the rights of a country's own nationals when those nationals are in another country.

Hines v. Davidowitz, 312 U.S. 52, 64 (1941). In recent years, Mexico's efforts to protect its nationals have repeatedly been compromised by non-compliance with Article 36 of the Vienna Convention on Consular Relations. 17A-18A, paras. 43-45. Violations of consular rights have been especially troublesome in capital cases. As described above, Mexican consular officers have provided critical resources to aid in the defense of their

nationals facing the death penalty since long before the trial of Mr. Medellín. Yet because of widespread noncompliance with Article 36, Mexico has been unable to come to its nationals' aid prior to trial, at the time when consular assistance would be most useful.

Mr. Medellín's case is illustrative. Mexico learned of his detention only after the Texas Court of Criminal Appeals had already denied his direct appeal. Memorial of Mexico, Annex 7, App. A, para. 235. Texas authorities had made no attempt to comply with their Article 36 obligations, even though Mr. Medellín informed them that he was born in Mexico and had not obtained U.S. citizenship. Joint App. at 15; Petition for Writ of Certiorari, App. 165A. Had Mexico learned of Mr. Medellin's detention in a timely manner, it would have been able to provide the range of consular services it routinely makes available to Mexican nationals facing capital charges. These services would have been of particular use to Mr. Medellín, given the several and substantial ways in which his trial attorney's performance, particularly at the sentencing phase of his trial, fell below the high standards of representation that consular officers routinely insist upon. Indeed, trial counsel was suspended from the practice of law for ethics violations during the pre-trial proceedings in Mr. Medellín's case, when he should have been preparing for trial. Memorial of Mexico, Annex 7, App. A, para. 232. The core of counsel's meager, two-hour penalty phase defense was the testimony of a psychologist, Dr. Wendell Dickerson, whom counsel had not asked or enabled to interview Mr. Medellín. S. F. vol. 35 at 294-348. The assigned defense lawyer made no inquiry into Mr. Medellín's life history in order to provide a mitigating explanation for his role in the crime – the most elemental

component of effective capital case advocacy. *See Williams v. Taylor*, 529 U.S. 362, 395-97 (2000) (finding counsel ineffective for failing to investigate defendant's background); AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (2003).

At the first possible opportunity, Mexican consular officers assisted Mr. Medellín's post-conviction lawyers in raising the violation of the Vienna Convention in state court. Even though Mr. Medellín had not been informed of his article 36 rights at the trial level, and had no reason to know that he should invoke those rights, the state court found that the Vienna Convention claim was procedurally defaulted. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, No. 675430-A, at 19 (339th Dist. Ct., Tex. Jan. 22, 2001) (Petition for Writ of Certiorari, App. 34A).

The state court's treatment of Mr. Medellín's claim has been replicated in numerous other cases. *See* Memorial of Mexico at 94-95, paras. 227-253. Mexico has repeatedly sought to obtain redress for these nationals in the United States. It has filed *amicus curiae* briefs in state and federal courts, both at the trial and appellate levels. It has filed suit against local authorities. *United Mexican States v. Woods,* 126 F.3d 1220 (9th Cir. 1997). It has obtained an advisory opinion from the Inter-American Court on Human Rights. OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1999). And it has repeatedly lodged diplomatic protests with the United States. 12A-15A, paras. 34-39. None of these efforts have succeeded in vindicating the rights of Mexico or its nationals.

By the end of 2002, Mexico concluded that it had

reached an impasse. At that point, Mexico decided to assert its rights under the Optional Protocol to seek resolution of the dispute in the International Court of Justice. On January 9, 2003, Mexico invoked the Optional Protocol and brought suit in the ICJ on behalf of Mr. Medellín and other Mexican nationals. *See* Mexico's Application Instituting Proceedings (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (Jan. 9, 2003).

In reviewing the claims of Mr. Medellín and the other Mexican nationals, the International Court of Justice was called upon to ascertain the underlying facts of each case and to undertake a legal analysis of the treaty's provisions. Mexico accordingly presented the facts surrounding the violation of the Vienna Convention in each case. Mexico provided, *inter alia,* copies of state and federal court decisions, affidavits, and transcripts relating to violations of Article 36 where available. *See* Memorial of Mexico, Annexes 35-65. In the case of Mr. Medellín, Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[21] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. For its part, the United States presented its own rendition of the facts of each case, made extensive legal arguments, and submitted over 2,500 pages of diplomatic correspondence, judicial opinions, law review articles, affidavits, and transcripts. Regarding Mr. Medellín, the United States submitted an account of state and federal post-conviction proceedings, including a description of how each

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[21] Memorial of Mexico, Annex 55.

court had resolved Mr. Medellín's Vienna Convention claim.[22] Counter-Memorial at A-223, Annex 2, App. 38, para. 7.

The ICJ's final judgment reflects its careful consideration of these materials. The Court analyzed the procedural posture[23] and the facts of each case in determining whether the United States had violated its obligations under Article 36. In particular, where the facts were contested, the Court made detailed findings based on the extensive documentary evidence submitted by the parties. *See, e.g., Avena* Judgment at para. 57 (addressing United States' claim that certain Mexican nationals could have dual citizenship); *id.* at paras. 66-74 (evaluating United States' assertions that certain Mexican nationals had claimed to be U.S. citizens upon arrest); *id.* at para. 89 (reviewing facts of one case in response to United States' contention that the authorities had complied with their Article 36 obligations). The Court also distinguished between those cases in which the United States had violated *all* of its obligations under Article 36 – such as the case of Mr. Medellín – and those in which the United States violated only *some* of its provisions.[24] This is most apparent in the Court's discussion of

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[22] This account included a graphic description of the crime for which Mr. Medellín had been convicted, facts regarding Mr. Medellín's schooling in the United States and prior arrest record, an account of his confession, and an explanation of how state and federal courts had concluded (in the alternative) that he had not been harmed by the Vienna Convention violation. Counter-Memorial at A-222-23.

[23] *See, e.g.,* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, para. 20 (Mar. 31) [hereinafter "*Avena* Judgment"] (referring to the different stages of direct appeal and post-conviction review).

[24] For example, in the case of Ramiro Hernández Llanas, the Court concluded that the United States had violated its obligation to inform the

Article 36(1)(c), which provides that consular officers may "arrange for [the] legal representation" of their nationals.

The Court observed that in 16 cases, Mexican consular officers had learned of their nationals' detention before trial, either through notification by United States authorities or by other means, with sufficient time to arrange for their legal representation. *Avena* Judgment, para. 104. In these cases, the Court concluded that the United States had not violated Article 36(1)(c). It recognized that even though the United States had failed to comply with its obligations to notify the 16 nationals of their consular rights "without delay," consular officers had nonetheless been able to provide meaningful assistance to their nationals prior to trial. In the remaining 34 cases, however, including the case of Mr. Medellín, the Court found that the authorities' noncompliance with Article 36, coupled with Mexico's lack of knowledge of the detentions, had effectively prevented consular officers from arranging for legal representation or providing other resources to improve the quality of the defense. *Id.* at para. 106(4).

With regard to Mr. Medellín, the International Court of Justice held that the United States had violated its obligation under Article 36(1) to inform him of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment at para. 153(4)-(7). To remedy these violations, the ICJ held that the United

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defendant, without delay, of his consular rights. *Avena* Judgment, para. 76. Nevertheless, the Court held that the United States *had* advised the consular post of Mr. Hernández Llanas' detention without delay, in accordance with its obligations under Article 36(1)(b). *Id.* at para. 97.

States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States' argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The *Avena* Court set forth specific requirements for effective review and reconsideration. *First,* the *Avena* Court held that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13. This holding reflects the Court's recognition that when detained nationals are unaware of their treaty rights, and consular officers are effectively precluded from advising them of these rights prior to trial, the defendants may not be blamed for inadvertently waiving Vienna Convention claims.

Second, the ICJ emphasized that review and reconsideration had to be "effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account:"[25]

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process

[25] *Avena* Judgment at para. 138; *see also id.* at para. 131.

> rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added).

Third, the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122. The ICJ clearly contemplated that the United States courts would scrutinize the nature of Mexico's consular assistance and the difference that such assistance could have made in the context of each individual case. *See id.* at para. 104. Although it would be appropriate for the lower courts to consider the issue of prejudice in Mr. Medellín's case in the first instance, Mexico believes that there will not be far to look before prejudice is found.

In short, the Court's final judgment was both cautious

and balanced. Although the Court vindicated Mexico's claims that the United States had violated its international legal obligations in the case of Mr. Medellín and 50 other Mexican nationals, the Court rejected several arguments advanced by Mexico. In doing so, it took pains to respect ongoing capital proceedings in the United States. The Court rejected Mexico's request for a remedy that would have obligated the United States to vacate each national's conviction and sentence without inquiring whether the Article 36 violation affected the fairness of the underlying proceedings. Instead, the Court called upon the United States judiciary to provide a fair process by which the Vienna Convention violations could be fully considered and remedied, on a case-by-case basis.

IV. The United States Is Obligated to Fully Implement the *Avena* Judgment.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. U.N. Charter, *opened for signature* Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993. By ratifying Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94, para. 1. And by ratifying Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the

International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993.

In keeping with those promises, the United States must now fulfill its obligations to Mr. Medellín, the Government of Mexico, and the International Court of Justice. Without the United States' express consent, the International Court of Justice could not have heard the *Avena* case or rendered its judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

The modest scope of the judgment reflects the Court's respect for the United States judicial system. The ICJ did not mandate the reversal of convictions and death sentences.[26] Indeed, it did not order substantive remedies in any of the 51 cases. Rather, the International Court of Justice called upon the United States to implement the judgment within its existing judicial framework. To satisfy the United States' obligations to comply with the judgment, the courts need only provide full and fair review of the violations in each national's case, in accordance with the criteria set forth by the ICJ.

With respect to the ICJ's judgment regarding the operation of procedural default rules, Mexico fully appreciates this Court's need to consider its earlier decision in *Breard v. Greene*, 523 U.S. 371 (1998). But the petitioner in *Breard*, unlike Mr. Medellín, did not have the benefit of a binding adjudication of his rights by the International Court of Justice at the time he sought review of his Vienna Convention claim.

[26] While the ICJ did not mandate a particular outcome in any case, it left open the possibility that United States courts could order new trials or sentencing hearings after reviewing the violations.

Mexico initiated proceedings before the ICJ at a time when no Mexican national was facing imminent execution to avoid the situation created by Paraguay's tardy filing before that Court. *See Breard*, 523 U.S. at 378. The binding nature of the *Avena* Judgment is undisputed, unlike the provisional measures order whose legal status was uncertain at the time this Court decided *Breard. See* Brief of International Law Experts and Former Diplomats in Support of Petitioner at 6. This difference is crucial, and compels reconsideration of the *Breard dictum* regarding procedural default.

The United States leads by example. Just as it has invoked the rule of law to protect its own nationals abroad, it should abide by the rule of law when the interests of foreign nationals in the United States are at stake. Mexico respectfully requests that this Court uphold the promises the United States made to Mexico and the world community by ordering the review and reconsideration mandated by the International Court of Justice in *Avena*.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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