

No. 04-5928

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JOSE ERNESTO MEDELLIN

*Petitioner,*

v.

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

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

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**BRIEF *AMICUS CURIAE* OF  
NAFSA: ASSOCIATION OF  
INTERNATIONAL EDUCATORS AND  
U.S. CATHOLIC MISSION ASSOCIATION, *ET AL.*,  
IN SUPPORT OF PETITIONER**

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STEPHEN F. HANLON\*  
JENNIFER M. MASON  
RACHEL J. NASH  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 955-3000  
*Counsel for Amici Curiae*  
\*Counsel of Record

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are organizations that send U.S. citizens abroad for the purpose of either engaging in study or providing missionary and relief work, groups that provide support for the work of study-abroad and missionary organizations, and U.S. citizens who have served as missionaries abroad.

*Amici* express no opinion in this brief on the validity of imposing a death sentence on Mr. Medellin, or on the propriety of the death penalty in general. It is their shared view, however, that government officials must give full force to the Vienna Convention's promise of access to consular assistance, and that the lower court's refusal to provide meaningful review of the treaty violation in this case will undermine the promise of access to consular assistance, on which missionaries and students rely when traveling overseas for study, volunteer work, and humanitarian projects.

### **Missionary Service Organizations**

The **United States Catholic Mission Association** has served Catholic mission sending groups for over twenty years. The Association promotes and supports missionary activity beyond the boundaries of the United States and assists member groups to understand better the essential and integral role of work for justice in all missionary activity.

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<sup>1</sup> Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief of *amici curiae* and their letters of consent are on file with the Court.

The **Maryknoll Society** of priests and brothers was established in 1911 as the Catholic Foreign Mission Society of America by the Bishops of the United States. Maryknoll's first missionaries left for China in 1918. Today there are over 550 Maryknoll priests and brothers serving in countries around the world, principally in Africa, Asia, and Latin America.

The **Franciscan Mission Service** supports lay people from the United States in overseas mission. Since 1990, approximately 200 missionaries have been trained and sent overseas to serve Franciscan communities in Bolivia, Brazil, Guatemala, Honduras, Jamaica, Kenya, Namibia, Peru, Philippines, Siberia, Thailand, Zambia, and Zimbabwe. Lay Missioners live with the poor and work in clinics, hospitals, schools, parishes, and farmlands. Upon completion of their overseas assignment, Lay Missioners share their stories and seek ways to utilize their experiences in the United States, thereby promoting justice and peace throughout the world.

The **Conference of Christian Brothers** serves the United States/Toronto Region of the Brothers of the Christian Schools, the largest order of religious Brothers in the Roman Catholic Church, who are dedicated exclusively to education, particularly of the poor and disadvantaged. The Christian Brothers in the United States/Toronto Region serve in 30 states in the United States, in Toronto, and in the international missions of Africa, Asia, Latin America, and the University of Bethlehem in the Mideast. They are assisted by more than 5,000 partners in 121 institutions where they work with nearly 80,000 students. The Conference of Christian Brothers provides programs and services to all those involved in the mission of the Christian Brothers.

**Jesuit Volunteers International (JVI)** is a lay Roman Catholic organization. Its mission is to form leaders of tomorrow as it works for the Kingdom of God today. JVI provides volunteers to work as educators, pastoral care givers and social workers as they live in community, grow in faith, seek justice and live simply with people and communities in developing nations. Working alongside Jesuits, volunteers live a call that is rooted in the Gospel and articulated in contemporary Jesuit Theology of mission. Volunteers serve in Latin America, Asia and the Pacific, and Africa. Volunteers do not proselytize.

**Medical Mission Sisters, Alliance for Justice Office** is the Medical Mission Sisters' information center for global justice actions and advocacy. The Medical Mission Sisters are an international community of Catholic Sisters, including U.S. citizens, who serve in 19 countries on five continents, among people made poor, among those who have limited or no access to health care, and among those unjustly treated or oppressed.

The **Marianist Province of the United States** is a part of the Society of Mary (Marianists), an international Catholic religious order of brothers and priests. The U.S. Province has more than 600 members serving in the United States, East Africa, India, Bangladesh, Mexico, and South Korea. They work in universities, primary and secondary schools, parishes, retreat centers and in numerous areas such as social justice, spiritual formation, art, and the environment. The Province also has volunteers who serve for a year or more in some of these same areas.

**Maryknoll Office of Global Concerns** represents Maryknoll priests, brothers, sisters, and lay missionaries in their work for justice and peace in more than thirty countries in Latin America, Asia and the Pacific, Africa, and the

Middle East. The Office provides education and advocacy in consultation with Maryknollers around the world, and brings the voice of Maryknoll into policy discussions in the United Nations, the United States and other governments, international financial institutions, and the corporate world.

The **Franciscan Friars of Holy Name Province** are the largest province of Franciscan priests and brothers in the United States, with over 400 men serving the poor in the eastern United States and abroad, with missions in three continents. Rooted in the Catholic and Franciscan tradition, the Friars foster Christian discipleship by collaborating with those whom they serve and by standing in solidarity with all people, especially the alienated, the immigrant, and the poor.

**Holy Cross Associates** is a post-graduate service program which offers participants an opportunity to integrate their Christian faith through service, community living, prayer, and simple living. Sponsored by the Congregation of the Holy Cross since 1978, Holy Cross Associates sends participants for both one-year domestic and two-year international placements in Chile.

**Los Embajadores** is an experiential service-learning program for high school and college age youth participants. Since 1988, Los Embajadores participants have been making eleven-day service trips to one of three sites in Northern Mexico to work with and live among local communities. Participants build relationships with the Mexican people and gain a firmer understanding of the social justice issues that underlie poverty.

**Mission Project Service (MPS)** helps Church people in less-industrialized countries obtain assistance from international agencies for their religious and socio-economic projects. At the request of dioceses, religious communities

and others, MPS staff travels to give two or three-day workshops on seeking assistance from international aid organizations. During the past five years alone, they shared their expertise with Church groups in the Dominican Republic, Australia, Papua New Guinea, Fiji, Colombia, Peru, and the United States.

**Medicines for Humanity** is dedicated to saving children's lives in impoverished communities worldwide. Medicines for Humanity partners with religious groups who are serving in impoverished areas and helps local healthcare personnel to implement effective health initiatives for children.

**The Office of the Missions, Roman Catholic Diocese of San Diego**, provides direct support for Catholic missionary activity in a number of ways. The Office organizes trips to foreign missions for Catholic laypeople and clergy. It also provides financial aid for the work of missionary priests, sisters and lay missionaries as well as dioceses in mission lands, and works to raise awareness about the worldwide mission activities of the Catholic Church.

### **Study-Abroad Organizations**

**Boston University's Division of International Programs** is committed to helping students develop the knowledge, skills, and understanding that prepare them for life and work in today's global society. The Division offers a broad range of international study, internship, and fieldwork opportunities to qualified students from Boston University and other colleges and universities alike as an integral part of their education. Currently, Boston University's Division of International Programs offers 45 academic programs abroad that successfully combine

students' intellectual and social development with practical experience in life and work. Program locations include Auckland, Beijing, Belize, Burgos, Dresden, Dublin, Haifa, Geneva, Grenoble, Kyoto, London, Madrid, Menorca, Niger, Oxford, Padova, Paris, Peru, Quito, Sydney, Turkey, and Venice.

**Santa Clara University School of Law and its Institute of International and Comparative Law** has, since 1974, provided unique opportunities for law students and lawyers to study various aspects of international and comparative law around the globe. Each site was selected to provide students with a special emphasis on a particular international law issue, including free trade, hi-technology, and international human rights. Most programs provide internships with law offices, corporations, or groups to afford students an opportunity to participate directly in the legal affairs of the country while learning valuable lessons in legal culture and practice. Summer study abroad programs take place in Munich, Germany; Strasbourg, France; Geneva, Switzerland; Oxford, England; Tokyo, Japan; Hong Kong, Beijing, Shanghai, China; Kuala Lumpur, Malaysia; Ho Chi Minh City, Viet Nam; Singapore; Bangkok, Thailand; Sydney, Australia; Seoul, Korea; and beginning in summer 2005, Phnom Penh, Cambodia.

**Syracuse University, Division of International Programs Abroad** encourages Syracuse students to study abroad to experience diverse cultures and ideas. The Division of International Programs maintains academic centers in England, France, Hong Kong, Italy, Spain, and Zimbabwe. Each center has close ties to local universities, allowing students to design integrated programs of study appropriate to their academic and language abilities. In addition, the Division of International Programs Abroad has links to study abroad programs offered through other

colleges and universities, giving students the opportunity to study in other countries around the world.

**Fordham University's Office of International and Study Abroad Programs** sponsors worldwide study abroad programs for qualifying students. Its roster includes highly competitive academic-year and semester programs in the English-speaking world, Europe, Africa, the Far East, Oceania, the Middle East, and Latin America. These opportunities for study abroad help students prepare for the challenges of international citizenship by enabling them to gain an understanding of other cultures and languages and to incorporate a global dimension in their chosen field of study.

**NAFSA: Association of International Educators** is an association of individuals worldwide advancing international education and exchange. NAFSA has nearly 9,000 members at 3,500 institutions worldwide, representing 84 countries. Members of NAFSA share a belief that international educational exchange advances learning and scholarship, builds respect among different peoples, and encourages constructive leadership in a global community. NAFSA serves its members, their institutions and organizations, and others engaged in international education and exchange and global workforce development by setting and upholding standards of good practice; providing training, professional development, and networking opportunities; and advocating for international education.

**The Council on Standards for International Educational Travel (CSIET)** is a private, not-for-profit organization whose mission is to identify reputable international youth exchange programs, to provide leadership and support to the exchange and educational communities so that youth are provided with meaningful and safe international exchange experiences, and to promote the

importance and educational value of international youth exchange.

**LASPAU: Academic and Professional Programs for the Americas, Inc.** is a nonprofit organization affiliated with Harvard University that designs, develops, and implements academic and professional exchange programs on behalf of individuals and institutions in the United States, Canada, Latin America, and the Caribbean. LASPAU designs and administers degree-granting international exchange programs, professional development workshops, symposia, and related activities that address the social, technological, economic, and environmental challenges facing the Americas. Since 1964, LASPAU has administered graduate degree academic programs of over 16,000 exchange students in U.S., Canadian, European, Latin American, and Caribbean universities and regularly assists and advises U.S. students studying in Latin America.

**The Institute of Current World Affairs** awards Fellowships for overseas study to young women and men under 36 years of age in order to provide them with an opportunity to develop a deep understanding of an issue, country, or region outside the United States and to share that understanding with a wider public. The Institute purposefully awards its fellowships to young people, so that they may contribute what they learn through their international experience for years to come.

**Youth For Understanding USA (YFU)** is a non-profit educational organization partnered with a worldwide network of interdependent, yet autonomous YFU organizations in more than 50 countries, exchanging more than 4000 students annually. YFU and its organizations are committed to preparing young people for their responsibilities and opportunities in a changing,



interdependent world. As a full immersion exchange program, the primary cross-cultural activity is daily living with a host family. Membership in a family, a family's community, and a local school concurrently provide an invaluable opportunity for self-learning about U.S. and other cultures. YFU USA administers competitive scholarship programs for U.S. high school students sponsored by the Finnish and Japanese governments, and also administers a sizable corporate scholarship program.

**Break Away, Alternative Break Connection** places teams of college or high school students in communities to engage in community service and experiential learning during their summer, fall, winter, or spring breaks. Students perform short term projects for community agencies and learn about issues such as literacy, poverty, racism, hunger, homelessness, and the environment. Break Away currently has a network of over 120 chapter schools, more than 450 nonprofit partners, and hundreds of individual members worldwide. About 139 colleges and universities in the United States are members of Break Away.

**American Intercultural Student Exchange (AISE)** serves over 4,000 students and host families, through various exchange programs. AISE student exchange programs are based on the belief that international student exchanges contribute to respect for other people and cultures, foster human understanding, and permit students to experience global community. AISE provides opportunities for foreign students ages 15-18 to live with host families in the U.S. and provides the same opportunities for U.S. students seeking an experience abroad. AISE has representatives in Sweden, Norway, Denmark, Finland, United Kingdom, Germany, Austria, Netherlands, Switzerland, France, Italy, Spain, Hungary, Slovakia, Argentina, Brazil, Colombia, Ecuador,

Peru, Australia, New Zealand, Thailand, China, Korea, Vietnam, Japan, Mongolia, Kazakhstan, and Serbia.

### **Former Missionaries**

**Fr. Francis T. McGourn, M.M.** is the Vicar General of the Maryknoll Fathers & Brothers. He has served and taught in Peru and Bolivia. He also has served as the director of the Maryknoll Center for Mission Studies.

**Fr. John C. Sivalon, M.M.** is the Superior General of the Maryknoll Fathers & Brothers. Father Sivalon ministered to the people of Tanzania, East Africa for 26 years (1975-01), until his election as Superior General.

**William R. Burrows, Ph.D.** served as a Catholic missionary in Papua New Guinea. He is now the managing editor of Orbis Books in Maryknoll, New York.

**Charlotte Cook** served as a Maryknoll Catholic Lay Missioner in Kenya from September 1993 to December 2002. She is now the Associate Director of the U.S. Catholic Mission Association, doing education-related work with a focus on Africa and Latin America.

**Noel Dunne and Marianne Dunne** served as missionaries in Peru from 1977-1986.

**Sr. Janet Korn, RSM** works in Mission Education for the Diocese of Rochester. She served in Chile for 16 years.

**Alice P. Rieckelman, M.D.** is a psychiatrist and a Maryknoll Sister. She has worked for many years in Asia, Africa, and Latin America. Much of her professional

practice has focused on helping missionaries who have suffered violence, typically in foreign countries.

**Fr. Adolph Menendez** is a Xaverian priest. He has served in Japan and Mexico.

## SUMMARY OF ARGUMENT

Thousands of students and missionaries travel overseas each year. These U.S. citizens not only improve their own skills for living and working in a globally interdependent world, they also serve vital U.S. interests. They bring a better understanding of diverse cultures to the United States and engage in a variety of crucial humanitarian efforts around the world.

The United States repeatedly instructs its officials and its citizens on the importance of consular assistance to citizens traveling overseas, a right guaranteed in Article 36 of the Vienna Convention on Consular Relations (VCCR). In turn, the *amici* inform their participants about the availability and importance of consular assistance in the event of an emergency. For U.S. citizens who study and serve abroad, the promise of consular assistance must not be an empty one. However, the ability of the United States and its citizens to enforce the VCCR depends on the extent to which the VCCR rights of foreign nationals are protected in the United States. The willingness of other nations to facilitate Americans' access to U.S. consular officials will be determined by the extent to which federal, state, and local government officials in the U.S. ensure that foreign nationals have access to their own consular officials. Indeed, the U.S. Department of State recognizes that adherence to the VCCR "will ensure that the U.S. can insist upon rigorous

compliance by foreign governments with respect to U.S. citizens abroad.”<sup>2</sup>

The failure by the lower court to provide meaningful review and reconsideration to the denial of Mr. Medellin’s right to contact the Mexican consulate is contrary to our government’s obligations under the VCCR and, if it is upheld, could lead to grave consequences for our citizens abroad. Because U.S. citizens are likely to receive the same treatment as we provide foreign nationals in the United States, a refusal by the United States to give full force to the right to consular assistance will provide other countries with a basis for denying the same right to our citizens abroad.

## ARGUMENT

### **1. Reciprocal Compliance with the Vienna Convention on Consular Relations Assures U.S. Consular Access Worldwide**

The thousands of Americans who leave their homeland each year for extended study or service abroad do so with the assurance that their State Department “has no more vital responsibility than the protection of American citizens.”<sup>3</sup> Without question, the global assistance that the United States extends to its expatriate citizens “from the cradle to the grave”<sup>4</sup> is largely dependent on universal compliance with the rights and privileges conferred under the Vienna Convention on Consular Relations (VCCR).<sup>5</sup>

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<sup>2</sup> U.S. Department of State, *Consular Notification and Access*, at [http://travel.state.gov/law/consular/consular\\_753.html](http://travel.state.gov/law/consular/consular_753.html).

<sup>3</sup> U.S. Department of State, Bureau of Resource Management, *FY 2004 Performance and Accountability Report* 163 (2004).

<sup>4</sup> *Id.*

<sup>5</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

Indeed, the adoption of the VCCR in 1963 has been aptly described as “undoubtedly the most important event in the entire history of the consular institution.”<sup>6</sup>

Article 36 of the VCCR enshrines and codifies the time-honored consular task of rendering assistance to foreign nationals who are under any form of detention while abroad. As the United States Government emphasized before the International Court of Justice, Article 36 “establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.”<sup>7</sup> Paragraph (1)(a) of the Article guarantees that U.S. citizens abroad are free to communicate with and have access to their consular representatives. By obliging local authorities to advise all detained American nationals of their right to consular contact without delay, paragraph (1)(b) ensures that U.S. consular officers can protect the rights of their fellow citizens in the most timely and effective manner possible. Article 36(1)(c) confers the right on U.S. consular officials to visit, converse, and correspond with American detainees and to arrange for their legal representation. Finally, Article 36(2) categorically requires that local laws and regulations “must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”

The State Department has instructed its diplomatic and consular personnel that:

In order for the consular officer to perform  
the protective function in an efficient and

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<sup>6</sup> Luke T. Lee, *Consular Law and Practice* 27 (2d ed. 1991).

<sup>7</sup> Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, I.C.J. 1980 Pleadings 174 (Jan. 15).

timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse, to provide a list of lawyers and a legal system fact sheet to prisoners, to obtain a Privacy Act waiver, and to acquire certain information to enable the post and the Department to respond promptly and accurately to inquiries about the case.<sup>8</sup>

So important is this obligatory mechanism to the performance of essential consular functions that “protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.”<sup>9</sup>

In the 35 years since its ratification, the United States has relied consistently on the terms of the VCCR and its judicial enforcement mechanism to safeguard the consular rights of its citizens in other countries. The reciprocal nature of those rights and obligations has been emphasized by U.S. officials on every such occasion. As then-Secretary of State Albright declared in 1998,

we are part of an international system in which it is important to respect the various rules and conventions and laws that have been

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<sup>8</sup> U.S. Department of State, Foreign Affairs Manual, *Notification*, 7 FAM 411 (1984).

<sup>9</sup> Telegram from U.S. Department of State to all U.S. diplomatic and consular posts abroad, at <http://www.state.gov/s/l/16139.htm> (Jan. 1, 2001) (concerning consular assistance for American nationals abroad).

created to make that system work....[T]he reason that there are rules, and we have been the creators of many of them, is because we benefit from them....[W]e respect the International Court of Justice as a part of the system that I described and because it is very important from a perspective of Secretary of State to assure ourselves that our citizens, were they to find themselves in any trouble whatsoever abroad, that they also would be afforded their rights.<sup>10</sup>

Few other multilateral treaties impact so directly on the well-being and safety of American citizens abroad, and none are more dependent on mutual compliance for their continued viability. In the words of American jurist Stephen Schwebel, the former President of the International Court of Justice (I.C.J.), “[t]he mutuality of interest of States in the effective observance of the Vienna Convention on Consular Relations is greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States).”<sup>11</sup>

## **2. The United States Recognizes the Binding Force of the Treaty and of Its International Enforcement Mechanism**

The domestic legal stature that the United States has conferred on the VCCR is of the highest order. When the

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<sup>10</sup> Madeleine Albright, Secretary of State, Remarks at Howard University, USIS Washington File, at <http://usembassy-australia.state.gov/hyper/WF980415/epf302.htm> (Apr. 14, 1998).

<sup>11</sup> Declaration of President Schwebel, Order of April 9, *Vienna Convention on Consular Relations (Paraguay v. U.S.)*, 1998 I.C.J. Reports.

Senate gave its unqualified consent to ratification of the VCCR in 1969, it did so in the knowledge that the Executive branch considered the treaty to be “entirely self-executive” and one which “does not require any implementing or complementing legislation.”<sup>12</sup> The VCCR thus falls within the select body of U.S. treaties that achieve full domestic legal effect immediately upon ratification and the terms of which may confer a private cause of action in the United States courts.<sup>13</sup>

The Senate was also informed by the Executive that “[t]o the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention, after ratification, would govern” as the supreme law of the land.<sup>14</sup>

Moreover, the Senate simultaneously consented to ratification of the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, the binding international enforcement mechanism for the treaty proper.<sup>15</sup> Article 1 of the Optional Protocol declares that disputes arising out of the interpretation or application of the VCCR “shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be

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<sup>12</sup> J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, *Statement Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (May 8, 1969).

<sup>13</sup> *Foster & Elmar v. Neilson*, 27 U.S. 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

<sup>14</sup> *Id.* at 24. See also *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (holding that, under the Supremacy Clause of the U.S. Constitution, no state can add to or take from the force and effect of a ratified U.S. treaty establishing the rights of aliens).

<sup>15</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963; *entered into force* March 19, 1967; *for the United States*, Dec. 24, 1969, 21 U.S.T. 325, 596 U.N.T.S. 487.



brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”<sup>16</sup>

The clear meaning of this provision and the reciprocal nature of its terms could not have been lost on either the executive or the legislative branches. In any event, it is a general principle of construction long observed by this Court that treaties “shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”<sup>17</sup> Where a treaty invests a body with the authority to adjudicate claims arising under its terms, the decision of that body is “conclusive and final....The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction.”<sup>18</sup>

### **3. To Ensure the Safety of Our Students and Missionaries Abroad, the United States Must Comply with the Vienna Convention on Consular Relations**

Thousands of students, at the high school, college, and graduate level travel overseas for volunteer and work experience each year. In higher education alone, 174,629 students received credit for study abroad in the 2002-2003 academic year, a number that increased by 8.5% from the previous year.<sup>19</sup> One of the fundamental responsibilities of American embassies and consulates is to serve these

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<sup>16</sup> Optional Protocol, *supra*, at 15.

<sup>17</sup> *DeGeoffrey v. Riggs*, 133 U.S. 258, 271 (1890).

<sup>18</sup> *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828).

<sup>19</sup> Open Door, *Study Abroad Surging Among American Students*, at <http://www.opendoors.iienetwork.org> (Nov. 15, 2004).

American citizens abroad in various emergencies and times of need.<sup>20</sup>

This assistance is especially critical when U.S. citizens become entangled in foreign criminal justice systems. The vast majority of Americans who study or serve abroad do so without any mishaps or misconduct. However, the State Department estimates that over 2,500 Americans are arrested in foreign countries every year.<sup>21</sup> The causes of these arrests range from serious criminal activity, to foolhardy behavior, to accidental mishaps such as car accidents, to the innocent taking of photographs. More than half of these arrests are made on illegal drug charges, including possession of very small quantities of narcotics like marijuana and cocaine.<sup>22</sup> Ignorance of foreign laws also accounts for a significant number of arrests.<sup>23</sup> In some countries, the risk of being detained at the scene of a car accident is high; drivers and passengers alike can “wind up in a hellhole of a prison cell.”<sup>24</sup> According to the State

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<sup>20</sup> R. Nicholas Burns, Spokesperson, U.S. Department of State, Press Statement, at <http://www.hri.org/docs/statedep/1995/95-09-29.std.html> (Sept. 29, 1995).

<sup>21</sup> U.S. Department of State, *International Travel Safety Information for Students*, at [http://travel.state.gov/travel/living/spring/spring\\_1239.html](http://travel.state.gov/travel/living/spring/spring_1239.html). See also David Koepfel, *In Some Countries Dangerous Legal Pitfalls Await the Unwary Visitor*, N.Y. Times, Jan. 28, 2003 (“The State Department estimates that about 3,000 Americans are arrested in foreign countries every year, and most experts say the true figure is probably higher. In many cases, guilt or innocence is irrelevant.”), available at <http://travel2nytimes.com/mem/travel/article-page.html?res=9502E4d61239F93BA15752C0A9659C8B63>.

<sup>22</sup> Michael A. De Yoanna, *U-Colorado: Student Travelers Cautioned*, Univ. Wire, Mar. 18, 2002.

<sup>23</sup> Ananta Medury, *U. Arkansas: Powell Advises Student Travelers to be Cautious During Spring Break*, Ark. Traveler, Feb. 26, 2003.

<sup>24</sup> Koepfel, *supra* (quoting Richard Atkins, Vice President of International Recoveries, a Philadelphia organization that works with Americans arrested abroad).

Department, Americans abroad may find themselves ill or in prison “because they didn’t understand the legal system or they came crosswise with the system.”<sup>25</sup> Even the most well-meaning student or volunteer can face serious legal consequences through a misunderstanding of foreign laws and customs.

Foreign exchange programs and fellowships rely on the availability of consular assistance as basic protection for their participants. Indeed, they are careful to refer students to the State Department website and to inform students of the protections that the U.S. consulate can provide in a variety of emergencies.<sup>26</sup> Although participants are aware that there are limits to the actions that consular officials can take, they also understand the value of the assistance that the consulate can provide. The ability of consular officials to insist on proper treatment, notify the citizen’s family, bring food, medication, and reading material, provide information on legal rights and local attorneys, and protest improper confinement conditions provides those who volunteer to study or work abroad with a basic level of security.<sup>27</sup>

These most basic protections are imperiled if the United States cannot insist that foreign governments conscientiously and rigorously comply with the right to consular assistance. Access to consular assistance is required during all stages of possible involvement with a foreign criminal justice system. Consular assistance ranges from diplomatic efforts to assist detained Americans to actual involvement in the trial process. The entire range of available assistance is at risk if federal, state, and local

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<sup>25</sup> R. Nicholas Burns, Press Statement, *supra*, at 17.

<sup>26</sup> See, e.g., <http://www.ciee.org>; <http://www.studiesabroad.com/resources/document/stateDepartment>; <http://www.iesabroad.org/parents/Resources/do>.

<sup>27</sup> Koeppel, *supra*, at 18.

government officials in the United States do not treat foreign citizens in the same way that we hope American citizens will be treated abroad.<sup>28</sup>

A wide variety of circumstances may give rise to the need for U.S. consular assistance. For instance, naïve teenagers are sometimes enticed abroad to commit drug offenses without comprehending the serious consequences that await them. In 1996, two American students were arrested in Lima, Peru after they were offered \$5,000 and an all expense paid trip in exchange for carrying suitcases containing cocaine across the border. Professor Ralph Ruebner of the John Marshall Law School, one of the lawyers who eventually secured their release after three years imprisonment, told the Congressional Human Rights Caucus that their confinement conditions were “absolutely shocking,” with no running water, minimal health care and rampant disease.<sup>29</sup> While most students are sufficiently savvy and responsible to avoid such difficulties, the availability of consular assistance assures that vulnerable young people who become entangled in a foreign legal system receive fundamental assistance, including the basic necessities of life.

Even entirely innocent behavior might cause trouble for a student or missionary abroad. In Venezuela, an American man was arrested after his car was rear-ended by another driver, who sustained serious injuries.<sup>30</sup> In 1977 in El Salvador, American missionaries were detained for taking a photograph of a police station, which was deemed a “national security installation,” during a “state of siege.”

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<sup>28</sup> U.S. Department of State, *Consular Notification and Access*, Part II, at [http://travel.state.gov/law/consular/consular\\_747.html](http://travel.state.gov/law/consular/consular_747.html).

<sup>29</sup> Phil Helsel, *State Dept: Students Must Be Wary of Travel Dangers* (Apr. 6, 2001), at <http://www.thelantern.com>.

<sup>30</sup> Koepfel, *supra*, at 18.

The State Department vigorously objected that the citizens were not immediately informed of their right to consular notification. Four hours after the U.S. Consulate was officially notified, the missionaries were released.<sup>31</sup>

For Americans who serve in places with hostile regimes, performing even relief and missionary work can be perilous. In August 2001, two American relief workers in Afghanistan, Heather Mercer and Dayna Curry, were arrested by the Taliban and charged with the capital offense of preaching Christianity. The State Department repeatedly insisted on consular access -- despite the fact that the U.S. did not recognize the Taliban as a legitimate government -- stating that "it is an accepted and appropriate practice for states such as the United States to request, and for those holding detained people, to permit consular visits."<sup>32</sup> Mercer and Curry's trial was suspended after the September 11 attacks, and they were released after the Taliban fled Kabul in November 2001.<sup>33</sup>

Although consular assistance is never intended to trump the legal system in a foreign country, it can ensure that students and missionaries receive humane treatment and crucial legal support. The experiences of Josie Beecher, an Episcopal Church worker in El Salvador, and John Tobin, a Fulbright scholar in Russia, highlight the importance of timely and ongoing consular involvement.

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<sup>31</sup> U.S. Department of State, *Digest of United States Practices in International Law* 290 (1977).

<sup>32</sup> Phillip T. Reeker, Deputy Spokesperson, U.S. Department of State, Press Statement, at [http:// www.state.gov/r/pa/prs/dpb/2001/4546.htm](http://www.state.gov/r/pa/prs/dpb/2001/4546.htm) (Aug. 14, 2001).

<sup>33</sup> CNN, *Afghan prison ordeal ends happily for U.S. aid workers*, at <http://www.cnn.com/CNN/Programs/people/shows/curry.mercer/profile.html>.

Beecher, an American citizen working at a church in San Salvador in 1989, was arrested after guerillas launched a bomb attack from the church grounds. Ms. Beecher's church colleagues reported her arrest to the State Department, which in turn notified the American embassy.<sup>34</sup> A consular officer immediately went to the police, negotiated Beecher's release throughout the day while the police headquarters were under gunfire, and escorted her safely to her hotel. Other local members of the same church group were detained for more than a month and were allegedly beaten while in custody.<sup>35</sup>

Tobin was conducting political research at a university in Voronezh. Arrested in January 2001 for marijuana possession, he was later briefly accused of being a drug trafficker and a spy. There were widespread allegations that the charges against him were fabricated by the Russian security services. Throughout his incarceration, consular officials maintained contact with Tobin as well as his attorney and his family, monitored his treatment, and attended court hearings. He was released six months into his sentence, following high-level pressure applied by the U.S. government.<sup>36</sup>

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<sup>34</sup> See Letter from U.S. Department of State, Central American Affairs Bureau, at <http://www.foia.state.gov/documents/elsalvad/5e0a.PDF> (Mar. 29, 1990) (Salvadoran National Guard also notified the American embassy).

<sup>35</sup> *Id.*

<sup>36</sup> "Tobin's family has said he was framed on the drug possession charges because he wouldn't work as a spy for the Russian government. Russian authorities accused Tobin of training to be a spy, although they never charged him with espionage." CNN, *Freed U.S. Student Home From Russia*, <http://www.cnn.com/2001/WORLD/europe/08/08/russia.tobin/index.html> (Aug. 8, 2001). Discussing the Tobin case, a State Department representative indicated in a press briefing that "we have been working with him throughout, from the very first days of his incarceration, and have been working with his family, and we continue to work with him and keep in touch with Russian authorities." U.S.

The experience of Elizabeth Coleman-Gray, an American attorney who traveled to Peru to represent two American citizens, demonstrates that access to timely consular intervention can sometimes be a matter of life or death. After being taken into custody, she was assaulted and raped. Alerted by other police officers, consular officials from the U.S. Embassy in Lima came to her assistance and secured her release. She believes that if Peruvian officials had not contacted the embassy, she “would not be alive today.”<sup>37</sup>

Thus, U.S. citizens who pursue studies or perform humanitarian work overseas will occasionally encounter unfamiliar and potentially hostile legal systems. Organizations that send them or sponsor their work must be able to assure participants that the U.S. consulate can intervene not only to help them navigate unfamiliar legal procedures, but also to ensure their well-being and safety.

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Department of State Daily Press Briefing, at <http://www.usembassy-israel.org.il/publish/peace/archives/2001/august/0803c.html> (Aug. 2, 2001). In another briefing describing a visit paid to Tobin by his father and Representative Maloney, the State Department explained that “Secretary Powell did raise this case with Foreign Minister Ivanov at their meeting in Washington a few weeks ago. He raised it again at the meeting they had in Budapest yesterday. So helping the family and looking after the welfare of Mr. Tobin and seeing what can be done remain important to us, and we will continue to work on those things.” U.S. State Department Briefing, at <http://www.state.gov/r/pa/prs/dpb/2001/3188.htm> (May 31, 2001); Valdimir Isachenkov, *Detained Scholar May Seek Pardon*, Wash. Post (May 31, 2001), at [http://www.washingtonpost.com/wp-srv/aponline/20010531/aponline163859\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20010531/aponline163859_000.htm).

<sup>37</sup> Christopher E. van der Waerden, Note, *Death and Diplomacy, Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 Wayne L. Rev. 1631, 1651-1652 (1999).

Unless it upholds its reciprocal obligations, the United States cannot effectively assert its authority to provide U.S. citizens with continued access to consular assistance. The danger in a one-sided approach to treaty enforcement is that the United States may become unable to insist on full compliance when other countries shirk their responsibilities, as occurred when Professor Fei-Ling Wang was arrested in China. Professor Wang, a naturalized U.S. citizen, visited China for a study abroad program run by the Georgia Institute of Technology. At the end of the program, he remained in China in order to perform research and visit family and colleagues. He was arrested on July 25, 2004, and accused of spying. Mr. Wang was placed in solitary confinement for four days, and the U.S. consulate was not notified until his tenth day of detention. During that time, he was deprived of sleep, food, and water.<sup>38</sup> After the U.S. Embassy protested the violation of consular treaty rights, Mr. Wang was released from custody and deported.<sup>39</sup> The United States could lose the international leverage it needs to argue against such failures by foreign governments, if it too fails to give full effect to the consular rights of foreign nationals.

Reciprocity in the application and protection of Vienna Convention rights is both a moral imperative and a pragmatic necessity. Non-compliance with essential treaty obligations may engender serious consequences for the violating party. Indeed, it has been universally recognized from the earliest days of treaty-making that “the breach of a material provision of the treaty by one party releases the other party or parties from their obligations under the treaty....[T]he penalty for breach of treaty is to take away the

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<sup>38</sup> Shelia M. Poole, *Tech Prof. Contests China's Spy Charges*, Atlanta J. Const., Aug. 19, 2004.

<sup>39</sup> Daniel Amick, *China releases Tech professor*, Technique News (Aug. 20, 2004), at <http://new.nique.net/issues/2004-08-20/news/2>.



treaty rights of the breaching party.”<sup>40</sup> As codified under Article 60(2) of the Vienna Convention on the Law of International Treaties, a material breach of a multilateral convention by one of the parties entitles any affected party to take sanctioning actions in response, including suspending the operation of the treaty provision “between itself and the defaulting State.”<sup>41</sup> Conversely, full domestic compliance “ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens.”<sup>42</sup>

President Bush said in his Second Inaugural Address that “[t]he survival of liberty in our land increasingly depends on the success of liberty in other lands.”<sup>43</sup> This allusion to the reciprocal aspect of international dynamics has great relevance in the context of this case. Compliance with the VCCR will benefit U.S. citizens while noncompliance puts them at risk. Therefore, the United States must take seriously the ruling issued by the I.C.J., requiring violations of Article 36 rights to be fully examined and taken into account.<sup>44</sup> Simply put, it is “in our own self-interest to uphold the principle of international comity,

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<sup>40</sup> Anthony D’Amato, *International Law as an Autopoietic System* 57 (Nov. 15, 2003), at <http://www.anthonydamato.law.northwestern.edu/auto/PLANCK-1.pdf> (draft paper subject to revisions, to be read at the Max Planck Institute for Comparative Public Law and International Law).

<sup>41</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980, art. 60(2)(b).

<sup>42</sup> *Boos v. Barry*, 485 U.S. 312, 323-24 (1988).

<sup>43</sup> President George W. Bush, Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>.

<sup>44</sup> *Avena and Other Mexican Nationals* (Mex. v. U.S.) 2004 I.C.J. 128 (Mar. 31) ¶ 128.

acknowledge the notification violation that occurred in the case at bar, and provide a remedy.”<sup>45</sup>

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

STEPHEN F. HANLON\*  
JENNIFER M. MASON  
RACHEL J. NASH  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 955-3000

*Counsel for Amici Curiae*

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\* Counsel of Record

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<sup>45</sup> *People v. Madej*, 739 N.E.2d 423, 431 (Ill. 2000) (McMorrow J., concurring in part and dissenting in part).