IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

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 FOR PETITIONER

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CERTIORARI GRANTED DECEMBER 10, 2004

QUESTIONS PRESENTED

CAPITAL CASE

1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in *Avena* that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines?
2. In the alternative, in a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the judgments in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?

PARTIES

All parties to the case in the United States Court of Appeals for the Fifth Circuit are named in the caption.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 371 F.3d 270 and reproduced in the Appendix to the Petition ("P.A.") at 119a-135a. Earlier opinions in this proceeding, which are not published, are reproduced at P.A. 1a-135a.

JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. Petitioner filed his petition for certiorari on August 18, 2004, within 90 days after the entry of judgment by the Court of Appeals. This Court granted certiorari on December 10, 2004. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions: (1) the United States Constitution, art. II, § 2, cl. 2; art. III, § 2, cl. 1; art. VI, cl. 2 (P.A. 136a-137a); (2) the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention") (P.A. 137a-138a); (3) the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487 ("Optional Protocol") (P.A. 138a); and (4) the United Nations Charter, art. 94(1), *opened for signature* June 26, 1945, 59 Stat. 1031, and Statute of the International Court of Justice, arts. 36(1), 59, *opened for signature* June 26, 1945, 59 Stat. 1031 ("ICJ Statute") (P.A. 139a-141a).

STATEMENT OF THE CASE

In this case, petitioner José Ernesto Medellín Rojas seeks enforcement of his right, under the Vienna Convention on Consular Relations, and the judgment of the International

Court of Justice ("ICJ") in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31) ("*Avena* Judgment") (P.A. 174a-274a), to review and reconsideration of his conviction and death sentence without regard to the procedural default rules imposed by Texas law. The ICJ entered the *Avena* Judgment pursuant to its jurisdiction under the Optional Protocol, art. I (P.A. 138a).

A. The Vienna Convention and Its Optional Protocol.

1. The Treaties.

The Vienna Convention on Consular Relations "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." U.S. Dep't of State, Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign countries. *See* Vienna Convention, art. 36 (P.A. 137a-138a). Article 36(1)(b) requires the authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Optional Protocol provides that disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I (P.A.

138a). The jurisdiction of the ICJ depends entirely on the consent of the States that are party to the dispute. Parties may consent to the general jurisdiction of the ICJ on questions of treaty interpretation or international law, *see* ICJ Statute, art. 36(2), or they may enter into treaties conferring jurisdiction on the ICJ over specific matters, *id.*, art. 36(1). The Optional Protocol falls in the latter category.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See Report of the United States Delegation to the United Nations Conference on Consular Relations*, *reprinted in* VIENNA CONVENTION ON CONSULAR RELATIONS AND OPTIONAL PROTOCOL, S. EXEC. DOC. E, 91-9, at 59-61 (1969) ("*Report of the United States Delegation*"). The United States proposed the binding dispute-settlement provision that became the Optional Protocol, arguing that "the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand" and that binding dispute resolution is "one of the most important points connected with the convention on consular relations." *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Conference on Consular Relations, 1st Sess., 29th mtg., at 249, U.N. Doc. A/CONF.25/16 (1963).

2. United States Ratification.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for its advice and consent on May 8, 1969. The United States delegation's report to the Senate addressed the importance of the reciprocal obligation to inform a detained foreign national of his right to seek consular assistance under Article 36(1)(b) of the Vienna Convention:

> This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.

Report of the United States Delegation, *supra*, at 60.

On October 22, 1969, the Senate unanimously gave its advice and consent, s*ee* 115 CONG. REC. 30,997 (Oct. 22, 1969), and on December 24, 1969, President Nixon ratified the Vienna Convention and Optional Protocol. *See* 21 U.S.T. 77, 185.

3. Current Status.

To date, 166 states have ratified the Vienna Convention,[1] making it one of the most widely ratified multilateral treaties in force. The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973).

Forty-six states have ratified the Optional Protocol.[2] The United States was the first party to invoke the Optional

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[1] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last visited Jan. 18, 2005).

[2] *See* Multilateral Treaties Deposited with the Secretary-General: Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp (last visited Jan. 18, 2005).

Protocol when it sued Iran in 1979 on claims, among others, of breach of the Vienna Convention. *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

B. The Decisions of the Texas Courts.

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with two murders in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Laredo, Mexico, and informed Harris County Pretrial Services that he was not a United States citizen. Joint Appendix ("J.A.") 15; P.A. 165a. It is uncontested that, nevertheless, Mr. Medellín was not advised of his right under Article 36 of the Vienna Convention to contact the Mexican consul. P.A. 243a-244a, ¶ 106(1) (*Avena* Judgment).

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." Counter-Memorial of the United States of America at 186, *Avena* Case (No. 128) ("Counter-Memorial"); *see also* Memorial of Mexico at 11-38, *Avena* Case (No. 128) ("Memorial").[3] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and, most importantly, ensuring that Mexican nationals were

[3] The parties' written and oral pleadings and the judgment, orders and press releases of the ICJ in the *Avena* case are available at http://www.icj-cij.org/idocket/imus/imusframe.htm. Judgments and orders of the ICJ are available both on Westlaw and on the ICJ's website at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

represented by competent and experienced defense counsel.[4] As a result of the Article 36 violation in his case, however, Mr. Medellín had no opportunity to receive the assistance of Mexican consular officers either before or during his trial.

The Texas trial court appointed counsel to represent Mr. Medellín, who was indigent. On September 16, 1994, Mr. Medellín was convicted of capital murder and, upon the jury's recommendation, the trial court sentenced Mr. Medellín to death on October 11, 1994. *State v. Medellin*, Judgment, No. 675430 (Tex. 339th Dist. Ct., Oct. 11, 1994).[5] On March 16, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished opinion. *Ex parte Medellin*, Order, No. 50191-01 (Tex. Crim. App. Mar. 16, 1997) (P.A. 1a-2a).

On April 29, 1997, some six weeks after the affirmance of his death sentence on direct appeal, Mexican consular authorities first learned of Mr. Medellín's arrest, detention, trial, conviction, and sentence. *See* Memorial App. A, ¶ 235. They promptly began rendering assistance. *See id.*

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[4] *See* Memorial at 11-38; *Valdez v. State,* 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

[5] During the course of the preparation for Mr. Medellín's trial, lead counsel was suspended from the practice of law for ethics violations in another case. *See* Memorial App. A, ¶ 232. During jury selection, he failed to strike jurors who indicated they would automatically impose the death penalty. *See*, *e.g.*, 15 Statement of Facts ("S.F.") 112-13; 16 S.F. 205, 286. During the guilt phase of trial, counsel called no witnesses. At the penalty phase, he presented only one expert witness (a psychologist who had never met Mr. Medellín) and Mr. Medellín's parents testified only briefly. 35 S.F. 279-92, 294-349. The entire penalty phase defense lasted less than two hours. Transcript ("Tr.") at 343-441 (Trial Docket at 000281).

On March 26, 1998, Mr. Medellín filed a state application for habeas corpus, alleging the violation of his rights under Article 36 of the Vienna Convention and requesting, among other relief, an evidentiary hearing and vacatur of his conviction and sentence. Application for Writ of Habeas Corpus at 25-31, 45, *Medellin v. State,* No. 675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998). The state did not contest that Mr. Medellín was a citizen of Mexico or that state officials had failed to advise Mr. Medellín of his right under Article 36 of the Vienna Convention to contact the Mexican consulate. *See* P.A. 46a-47a.

On January 22, 2001, adopting verbatim the state's proposed findings and conclusions, the state trial court recommended denial of relief. P.A. 34a-58a. It held that the Texas contemporaneous-objection rule barred the Vienna Convention claim because Mr. Medellín had not raised the claim at trial and that he had no individual right to raise the Article 36 violation. P.A. 55a-56a, ¶¶ 13, 15.[6] The court also denied Mr. Medellín's request for an evidentiary hearing. P.A. 57a. On October 3, 2001, by an unpublished order, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions, providing no reasoning except to state that they were "supported by the record." P.A. 32a-33a.

C. The Decision of the District Court.

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus, and on July 18, 2002, an amended petition, in the United States District Court for the Southern

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[6] While not questioning Mr. Medellín's Mexican citizenship, the state's proposed findings adopted by the state court also stated in the alternative that Mr. Medellín "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. P.A. 46a-47a, ¶¶47-50, 56a, ¶ 14; *see id.* at 56a-57a, ¶¶ 16-17.

District of Texas. Mr. Medellín raised a claim under Article 36 of the Vienna Convention, again requesting an evidentiary hearing and vacatur of his conviction and sentence. *See* Amended Petition for Writ of Habeas Corpus at 46, *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. July 18, 2002).

In support of his petition, Mr. Medellín relied on *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in which the ICJ had recently held that Article 36(1) of the Vienna Convention creates individual rights to consular notification and that Article 36(2) of the Convention prevents the application of procedural default rules to bar the challenge to a conviction or sentence on the ground of the Article 36(1) breach. Among other things, Mr. Medellín argued that "*LaGrand* . . . controls the interpretation of the Vienna Convention" and that the District Court was bound by *LaGrand*'s rulings regarding individual rights and procedural default. *See* Petitioner's Response to Respondent's Answer and Motion for Summary Judgment, at 14-17, *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

On June 26, 2003, the District Court denied relief and a certificate of appealability. P.A. 59a-118a. The District Court held that (1) Mr. Medellín had defaulted his Vienna Convention claim under the "adequate and independent state procedural rule" applied by the Texas state courts, and (2) the Vienna Convention did not create individually enforceable rights and, hence, no judicial remedy is available for its violation. P.A. 82a, 84a-85a & n.17.[7] The District Court

[7] The District Court held in the alternative that, if the Vienna Convention created individual rights, Mr. Medellín was barred from asserting them by the nonretroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989), and that he could not demonstrate that the violation affected the constitutional validity of his conviction and sentence. P.A. 83a-85a.

rejected Mr. Medellín's argument that *LaGrand* was controlling, explaining that it was "simply wary of finding that the ICJ overruled entrenched Supreme Court precedent" on the application of state procedural rules to bar consideration of Vienna Convention claims. P.A. 82a.

D. The *Avena* Judgment.

On January 9, 2003, while Mr. Medellín's habeas petition was pending before the District Court, the Government of Mexico initiated proceedings in the ICJ against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellín and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings, *Avena* Judgment (No. 128). Seeking relief on its own behalf and, in the exercise of its right of diplomatic protection, of its nationals, Mexico claimed that the United States had violated Article 36 in each of those cases and requested, among other relief, the annulment of the convictions and sentences of the 54 Mexican nationals and a declaration that procedural default bars may be not be applied to prevent redress of Vienna Convention violations. P.A. 188a-190a, ¶ 12.

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-page Annex of written testimony and documentary evidence in rebuttal. Both parties' submissions addressed the factual predicates for the alleged violations in each of the nationals' cases, including the course of the relevant proceedings to date in the United States courts, and argued all relevant points of law. Memorial at A-50 to -134; Counter-Memorial at A-75 to -358. In Mr. Medellín's case, the parties' submissions included descriptions of his proceedings through the District

Court's denial of his petition for habeas corpus. *See* Memorial at A-103, A-1192 to -1212 (describing and appending Texas trial court's findings of fact and conclusions of law); Counter-Memorial at A-223 (citing and describing District Court's holdings and alternative holdings).

During the week of December 15, 2003, the ICJ held a hearing, P.A. 187a, ¶ 11,[8] and, on March 31, 2004, issued a final judgment, P.A. 174a-274a. The *Avena* Judgment built on the ICJ's earlier holdings in *LaGrand*, which Germany had brought on the basis of the Optional Protocol, and in which the United States had also fully participated. However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed. As a result, in *Avena*, the ICJ expressly adjudicated Mr. Medellín's own rights, as well as those of the other nationals on whose behalf Mexico had sought relief, and entered a final judgment. P.A. 214-215a, 243a-245a, ¶¶ 40, 106.

Addressing liability, the ICJ first held that, in the cases of 51 of the Mexican nationals, the United States had breached its obligation under Article 36(1)(b) "to inform detained Mexican nationals of their rights under that paragraph" and in 49 of those cases "to notify the Mexican consular post of the[ir] detention." P.A. 243a-244a, 271a-272a, ¶¶ 106(1)-(2),

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[8] At the hearing, argument was presented on behalf of the United States: from the State Department, the Legal Adviser, the Principal Deputy Legal Adviser, the Assistant Legal Adviser for Consular Affairs, and the Assistant Legal Adviser for United Nations Affairs; from the Justice Department, by an Associate Deputy Attorney General; and distinguished professors of international law and comparative criminal procedure. P.A. 181a-183a, 188a. The Principal Deputy Chief of the Criminal Appellate Section and the Deputy Assistant Attorney General, Office of Legal Counsel, of the Department of Justice, also participated as members of the United States delegation. P.A. 181a-183a.

153(4)-(5).[9] In 49 of those cases, the ICJ also held that the United States had breached its obligation under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." P.A. 244a, 272a, ¶¶ 106(3), 153(6). And in 34 of those cases, the ICJ also held that the United States had breached its obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." P.A. 244a-245a, 272a, ¶¶ 106(4), 153(7). Mr. Medellín was expressly included in each of those holdings of breach.

The ICJ then turned to remedies, or "what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States" by violation of Article 36. P.A. 256a, ¶ 128; *see* P.A. 250a-268a, ¶¶ 115-150. The ICJ rejected Mexico's request for annulment of the convictions and sentences. P.A. 254a, ¶ 123. Instead, in response to Mexico's request for alternative relief, the ICJ held that as a remedy for the violations of Article 36(1), the United States must provide "review and reconsideration" of the convictions and sentences of Mr. Medellín and the other Mexican nationals in whose cases it found violations. P.A. 195a, 253a, 274a, ¶¶ 14, 121-122, 153(9).

The ICJ then specified the nature of the review and reconsideration that would need to be provided to Mr.

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[9] Because Mexico withdrew its claims in the cases of two of the nationals initially included in its application, the ICJ adjudicated the claims of 52 Mexican nationals. P.A. 186a, ¶ 7. The ICJ denied Mexico's application to amend its claim to include two additional Mexican nationals, upholding an objection by the United States that the late amendment would deprive the United States of an adequate opportunity to defend. P.A. 185a-186a, ¶ 7.

Medellín. The ICJ explained that, *first*, the required review and reconsideration must take place "within the overall judicial proceedings relating to the individual defendant concerned;" *second*, that procedural default doctrines could not bar the required review and reconsideration when the competent authorities of the detaining State had themselves failed in their obligation of notification; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurs must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." P.A. 247a-249a, 252a-253a, 258a-259a, 261a-262a, ¶¶ 111-113, 120-122, 133-134, 138-141. In concluding, the ICJ emphasized that the review and reconsideration it had granted as a remedy to Mr. Medellín and the other nationals was one of additional process, not prescribed result:

> 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.

P.A. 262a, ¶ 139.

The ICJ reached each of its holdings on liability by a vote of fourteen to one and its holding on remedies unanimously. P.A. 271a-274a, ¶ 153(4)-(7), (9), (11). Both the United States judge and the Mexican judge voted with the majority on each of these holdings. *Id.*

E. The Decision of the Court of Appeals.

On October 24, 2003, while *Avena* was pending before the ICJ, Mr. Medellín sought a certificate of appealability from the Court of Appeals on several grounds, including his Vienna Convention claim. J.A. 11. On May 20, 2004, after the ICJ had rendered its judgment, the Court of Appeals denied Mr. Medellín's application. P.A. 135a.

In its discussion of the Vienna Convention claim, the Court of Appeals recognized that Mr. Medellín was among the Mexican nationals whose claims had been adjudicated in the *Avena* Judgment. P.A. 131a-132a. It also recognized that the ICJ had held in *LaGrand* and reiterated in *Avena* that, *first*, "procedural default rules cannot bar review of a petitioner's claim," and *second*, Article 36 conferred individually enforceable rights. P.A. 131a-133a. It held, however, that the first holding "contradict[ed]" this Court's per curiam order in *Breard v. Greene,* 523 U.S. 371 (1998), and that the second holding contradicted the holding of a prior Fifth Circuit panel in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). P.A. 132a-133a. It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in the case of the individual right holding, the Court of Appeals en banc, decided otherwise. P.A. 131a-133a. The Court of Appeals did not otherwise address the individual right or procedural default issues or consider any other aspect of the Vienna Convention claim.

Mr. Medellín filed a timely petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

This case is about the willingness of the United States to keep its word. This Court must ensure that the courts of the State of Texas and other state and federal courts throughout the land comply with the legally binding international

commitments that, by the constitutionally prescribed processes, the United States has made.

I. Rights created by treaty are binding and judicially enforceable as a matter of United States law. Under international law, a nation's treaty obligations are binding on all of the branches of government, including the judiciary; and where the nation is organized as a federation, as is the United States, its treaty obligations are binding on all of its constituent states. To ensure the nation's ability to comply with its international obligations, the United States Constitution gives treatymaking power to the President and Senate exclusive of the states; it gives treaty-enforcing power to the federal judiciary; it provides that judges are bound to enforce the treaties that the President and Senate have made; and it provides that treaties, like federal statutes and the Constitution itself, are the "supreme Law of the Land" and preempt inconsistent state law.

Whenever a treaty creates rules of law that are susceptible to judicial enforcement without implementing legislation—in other words, whenever a treaty is self-executing—the Supremacy Clause requires the courts to enforce it. Thus, this Court has routinely enforced treaties providing rights to foreign nationals in this country, including treaties that limit criminal prosecutions of foreign nationals. Indeed, by its terms, the habeas corpus statute provides a federal judicial remedy to individuals who are in custody in violation of a treaty.

As relevant here, the United States bound itself by treaties to give effect to Mr. Medellín's rights under the *Avena* Judgment. *First*, by acceding to the Vienna Convention on Consular Relations, the United States committed itself to inform nationals of its treaty partners who are arrested or otherwise detained in the United States of their right to contact and seek assistance from their consulates. It also committed itself to follow procedures that are adequate to

give full effect to the purposes for which those rights were created. *Second*, by the Optional Protocol to the Vienna Convention, the United States committed itself to submit disputes arising from the interpretation or application of that Convention to binding adjudication by the ICJ, in cases brought by other parties to the Optional Protocol. *Third*, by the Optional Protocol as well as the United Nations Charter and the Statute of the ICJ, the United States committed itself to abide by ICJ judgments to which it is a party.

Those treaty obligations require the United States to enforce the *Avena* Judgment in this case. A nation's consent to the jurisdiction of the ICJ constitutes a binding agreement to abide by the result. That is clear not only from this Court's precedents, from international law, and from the consistent position of the Executive Branch, but also from the terms of the treaties.

The rights interpreted and applied in the *Avena* Judgment, which arise under the Vienna Convention, are unquestionably self-executing and hence judicially enforceable in any case in which they are at issue. At the time of ratification, the Executive Branch declared that the Vienna Convention was wholly self-executing and that no implementing legislation was required. It continues to espouse that position today. Furthermore, by their terms, the relevant provisions of the Vienna Convention call for action by law enforcement officials and by the courts, not for the enactment of legislation by Congress.

As a binding interpretation and application of a self-executing treaty obligation, the *Avena* Judgment must itself be judicially enforceable. Any other result would contravene the agreement of the United States, in the Optional Protocol, that disputes as to the meaning and application of the provisions of the Convention be resolved by ICJ adjudication. Moreover, as the *Avena* Judgment makes clear, the relevant treaty rights can receive effective enforcement

only through the judicial process. In view of the constitutional requirement that the courts enforce treaties ratified by the authority of the political branches of the federal government, the ICJ's interpretation and application of the self-executing terms of the Vienna Convention must be given effect.

II. By the *Avena* Judgment, the ICJ adjudicated Mexico's claim that Mr. Medellín's individual rights under the Vienna Convention had been violated. The ICJ held that the Convention confers individual rights on detained foreign nationals and that the United States had violated Mr. Medellín's rights of consular notice and access under Article 36(1) of the Vienna Convention. The ICJ also held that Article 36(2) of the Vienna Convention requires courts in the United States, as a remedy for the Article 36(1) violation, to give "review and reconsideration" to Mr. Medellín's conviction and sentence, for the purpose of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." The ICJ further held that the Convention requires that this review and reconsideration not be thwarted by application of a domestic-law procedural bar arising from Mr. Medellín's failure to raise his Vienna Convention claim before he had received actual consular notification.

The Court of Appeals recognized that the *Avena* Judgment prohibited application of the Texas contemporaneous-objection rule to Mr. Medellín's Vienna Convention claim, but nonetheless held that claim procedurally defaulted under the Texas rule. The binding obligation of the United States to adhere to the Vienna Convention and to the *Avena* Judgment in Mr. Medellín's case, however, preempts any contrary Texas state-law procedural bar by operation of the Supremacy Clause. As a result, the Texas procedural bar is neither "adequate" nor "independent" of federal law. Therefore, this Court's

prudential procedural default doctrine does not apply by its own terms—and if it did, it would itself be preempted by binding treaty obligations.

The Court of Appeals found it was bound to apply the Texas contemporaneous-objection rule by this Court's per curiam decision in *Breard v. Greene*, 523 U.S. 371 (1998). The Court of Appeals failed to recognize, however, that *Breard* arose in a fundamentally different posture than the present case. The ICJ had not made any determination on the merits of the *Breard* petitioner's Vienna Convention claim. Nor, at the time of *Breard*, had the ICJ ever considered the effect of Article 36(2) of the Vienna Convention on the application of procedural default rules prescribed by domestic law. Mr. Medellín, by contrast, is the subject of a final ICJ judgment, which is binding in his case and determines that Article 36 of the Vienna Convention entitles him to "review and reconsideration" without regard to procedural default. For these reasons, *Breard* does not control. But if the Court determines that it is necessary to revisit its holdings, the *Breard* decision should be overruled based on the ICJ's interpretation of the Vienna Convention in the *Avena* Judgment.

III. In the alternative, even if the *Avena* Judgment were held not to reflect a binding and enforceable treaty obligation, it should be recognized and enforced as a matter of comity. This Court has long acknowledged that the decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on comity grounds, regardless of whether domestic courts would have reached the same result as an original matter. No less respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes. Moreover, the interest of Mr. Medellín, as an individual whose very life is at stake, in enforcing his procedural rights and the public interest in preserving the

commitment of the United States to the rule of law in a sensitive matter involving relations with one of our closest neighbors, provide compelling reasons to extend comity to the *Avena* Judgment, particularly in view of the minimal burden that "review and reconsideration" would place on Texas.

The rule that treaties should be interpreted to achieve international uniformity provides an additional reason that the Court should follow the *Avena* Judgment. One of the purposes of the Vienna Convention was to establish a uniform law of consular relations. The parties to a treaty are presumed to have intended a uniform interpretation, and great weight should be given to interpretations rendered by the courts of other countries that are parties to a treaty. This presumption should be even stronger in the case of an interpretation of the Vienna Convention by the ICJ, which the parties to the Optional Protocol—including the United States and Mexico—have designated as the forum for binding resolution of disputes concerning its interpretation and application.

In the end, this case is about the rule of law. To give effect to the treaty commitments made by the democratically elected representatives of the American people, this Court should hold that the *Avena* Judgment supplies the rule of decision in Mr. Medellín's case.

ARGUMENT

I.

THE *AVENA* JUDGMENT SUPPLIES THE RULE OF DECISION IN MR. MEDELLÍN'S CASE.

A. The United States Agreed by Treaty to Comply with the Interpretation and Application of the Vienna Convention in the *Avena* Judgment.

1. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Constitute Binding International Law.

"[A] treaty is only another name for a bargain." THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). Consistent with basic legal principles underlying all contracts, the parties' consent invests the treaty with binding force. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(1) (1987). Also consistent with those basic principles, a nation that has validly entered into a treaty must perform its obligations under that treaty and may demand that other parties to the treaty do so as well. *Id.* § 321 cmt. a.

The obligation of parties to perform their agreements (the rule of *pacta sunt servanda*) "lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* The reason is obvious:

> [I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.

THE FEDERALIST No. 64, *supra*, at 394 (emphasis in original).

When a nation enters into a treaty, it undertakes an international obligation that binds all of its organs and

constituent jurisdictions.[10] Accordingly, the obligations imposed by a treaty apply to all branches of government, including the judiciary and all its constituent organs.[11] In the case of a federated nation such as the United States, the obligation applies to all branches of the government of its constituent states.[12]

Here, the United States agreed with Mexico and other parties to the Vienna Convention that it would comply with the obligations imposed by the Convention, including Article 36. The United States also agreed with Mexico and the other parties to the Optional Protocol that it would submit to the "compulsory" jurisdiction of the ICJ over any "[d]ispute[] arising out of the interpretation or application" of the Vienna Convention. Optional Protocol, art. I (P.A. 138a). The two nations thereby conferred jurisdiction on the ICJ over such disputes in the only manner by which the ICJ may obtain jurisdiction—by the express consent of the nations that are

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[10] *See*, *e.g.*, Counter-Memorial of the United States of America at 127, *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 ("The United States accepts the Tribunal's ruling that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.") (internal quotation omitted) (*available at* http://www.state.gov/documents/organization/7387.pdf); ARTICLES ON STATE RESPONSIBILITY, art. 4 (International Law Commission, Draft Adopted 2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the State.").

[11] *E.g., Iran v. United States*, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, ¶ 71 (Iran-U.S. Cl. Trib. June 5, 1998) ("It is a well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state."); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 434 (6th ed. 2003).

[12] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. b.

parties to the dispute.[13] By consenting to the jurisdiction of the ICJ, the United States undertook an obligation on behalf of the nation as a whole, including all its constituent organs and political subdivisions, to comply with its judgments.

2. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Constitute Binding Federal Law.

The United States Constitution allocates authority in a manner that mirrors the obligations of the United States under international law. To empower the United States to negotiate treaties with foreign powers as a single nation, the Constitution places the treatymaking power squarely in the hands of the Federal Government, by including it among the Article II powers of the Executive Branch. U.S. CONST. art. II, § 2, cl. 2. The Constitution makes this power exclusive to the federal government by expressly withdrawing from the states the power independently to make treaties or otherwise conduct foreign affairs. U.S. CONST. art. I, § 10.

The Constitution also places the treatymaking power squarely in the hands of the political branches, by providing that the President "shall have Power, with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. The requirement of senatorial consent by supermajority vote ensures that the United States will enter into treaties only with the strong support of the elected representatives of the American people.

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[13] *See* David J. Bederman, et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77 (2003) ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not—and cannot—exercise a mandatory form of jurisdiction over states.").

Once a treaty is ratified in accordance with the Constitution, the Supremacy Clause gives it the status of federal law, preempting the laws of the individual States in the same manner as acts of Congress and the Constitution itself:

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

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

In other words, the Constitution makes explicit that treaties bind the nation as a whole and are not left to the possibly inconsistent policies of the individual States. "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (opinion of Chase, J.). "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST NO. 42, at 279 (James Madison) (Clinton Rossiter ed., 1961).[14]

The Framers thereby ensured that the legal effect of

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[14] *See*, *e.g.*, *United States v. Pink*, 315 U.S. 203, 230-31, 233 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policies or provisions, of a treaty or an international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.").

treaties under United States law would correspond to their legal effect under international law. The obligation of the constituent organs and political subdivisions of the United States to comply with the interpretation and application of the Vienna Convention in the *Avena* Judgment therefore follows as fully from United States law as from international law.

B. The *Avena* Judgment Is Judicially Enforceable.

1. The Constitution Makes Treaty Rights Judicially Enforceable.

Under the Articles of Confederation, enforcement of treaties had largely depended on the voluntary cooperation of state officials. This arrangement harmed the international interests of the United States; as Madison observed:

> The tendency of the States to . . . violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand ed., rev. ed. 1966).[15]

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[15] *See also, e.g.,* THE FEDERALIST No. 22, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?").

The Framers repaired that situation. By the Supremacy Clause, they provided that "the Judges in every State shall be bound" by "all Treaties made, or which shall be made, under the Authority of the United States," just as they are bound by "[t]his Constitution, and the Laws of the United States." U.S. CONST. art. VI, cl. 2. By parallel language in Article III, they placed cases arising under treaties within the federal judicial power: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority." U.S. CONST. art. III, § 2, cl. 1.

The Framers considered judicial enforcement of treaties essential to the maintenance of our international commitments. As James Wilson stated in the course of the Virginia debates over ratification of the Constitution,

> the provision for judicial power over cases arising under treaties, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881). Hamilton also underscored the importance of the role of the courts, and in particular of this Court, in interpreting and enforcing treaties:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Consistent with the constitutional design, this Court has long held that a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).[16] Where a treaty is "self-executing"—that is, susceptible to implementation without legislation—the rights conferred by the treaty are directly enforceable in United States courts. *See, e.g., Cook v. United States*, 288 U.S. 102, 119 (1933) (applying self-executing treaty to bar enforcement of federal statute); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress"); *see also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (treaty declared non-self-executing at time of ratification "did not itself create obligations enforceable in the federal courts" though it "bind[s] the United States as a matter of international law").

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[16] *See*, *e.g., Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1854).

2. This Court and Other Courts in the United States Have Routinely Enforced Rights Conferred by Treaty Upon Foreign Nationals.

The power of the President and the Senate to make treaties under Article II "extends to all proper subjects of negotiation between our government and the governments of other nations." *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890).[17] "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). As a result, the reciprocal protection of the person and property of nationals abroad has been a frequent subject of treatymaking by the United States and its treaty partners from this nation's founding through the present day.[18]

Accordingly, this Court has routinely given effect to treaties conferring rights on foreign nationals.[19] Judicial

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[17] The scope of the treaty power is therefore not confined to the legislative powers of Congress under Article I. *See United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 1633-34 (2004) ("treaties made pursuant to [Article II] can authorize Congress to deal with matters with which otherwise Congress could not deal") (quotation marks omitted; quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

[18] *See, e.g.,* U.S. Dep't of State, Updated U.S. Model Bilateral Investment Treaty 2004, *at* http://www.state.gov/e/eb/rls/othr/38602.htm; U.S. Dep't of State, U.S. Bilateral Investment Treaty Program, Sept. 15, 2004, *at* http://www.state.gov/e/eb/rls/fs/22422.htm (United States is currently party to 46 bilateral investment treaties and numerous treaties of friendship, commerce, and navigation). For early examples, *see, e.g.,* Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Br., 12 Bevans 13, T.S. No. 105 (the Jay Treaty); Treaty of Amity and Commerce, Feb. 6-Sept. 1, 1778, U.S.-Fr., 7 Bevans 763, T.S. No. 83.

[19] *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslavian citizens' right under U.S.-Serbia treaty to inherit personal

(footnote continued)

enforcement of those treaties has frequently limited the authority of the state and federal governments to prosecute crimes.[20] And United States courts have regularly applied the consular-immunity provisions of the Vienna Convention to decide consular officials' and employees' claims of immunity from criminal prosecution.[21]

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property located in Oregon); *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (holding that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924); *Asakura v. Seattle*, 265 U.S. 332 (1924) (restraining city from applying law that noncitizens could not work as pawnbrokers to Japanese citizens because it would violate U.S.-Japan treaty); *Hauenstein v. Lyndham*, 100 U.S. 483 (1880) (enforcing treaties assuring alien's right to inherit); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaties granting French citizens right to hold real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (enforcing treaty protecting British property owners against Virginia forfeiture); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia).

[20] *See, e.g., United States v. Rauscher*, 119 U.S. 407 (1886) (ordering dismissal of indictment where prosecution was barred by extradition treaty with Great Britain); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (reversing Georgia state conviction that violated treaty with Cherokee Nation); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (noting that state courts were obligated to dismiss criminal cases under treaty with Great Britain); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992) (discussing application of *Rauscher*). Indeed, one of our earliest treaties, the 1783 Treaty of Paris that ended the Revolutionary War, barred criminal prosecutions on charges of aiding the British in the war; and that provision was judicially enforced even prior to the adoption of the Constitution. *See Respublica v. Gordon*, 1 Dall. 233, 233 (Pa. 1788) (dismissing treason prosecution because "any proceedings against . . . the Defendant, would contravene an express article in the treaty of peace and amity, entered into, between the United States of America and Great Britain") (cited in *Ware*, 3 U.S. (3 Dall.) at 244).

[21] *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (affirming dismissal of a state criminal complaint against foreign consular officer pursuant to Article 43 of the Vienna Convention, which

(footnote continued)

Finally, this Court has expressly recognized that rights of detained foreign nationals under consular conventions may be enforced under the federal habeas corpus statute, which allows an individual to challenge "custody in violation of the . . . treaties of the United States." 28 U.S.C. § 2241(c)(3) (2004). In *Wildenhus's Case*, 120 U.S. 1 (1887), the Court considered a Belgium-U.S. bilateral consular-relations convention that allocated criminal jurisdiction between the Belgian consul and the local courts with respect to sailors on Belgian ships in American ports. New Jersey sought to prosecute a Belgian crewmember for a homicide committed in the port of Jersey City. Asserting a right under the convention to try the crewmember, the Belgian consul sought a writ of habeas corpus.

The Court observed that the bilateral consular convention was "part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere." *Id.* at 17. It therefore held that if the convention "gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." *Id.*[22] The Court then

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provides consular officers and employees with limited immunity from judicial jurisdiction); *see also United States v. Cole*, 717 F. Supp. 309, 321-25 (E.D. Pa. 1989) (Vienna Convention controls claim of consular immunity from criminal prosecution); *State v. Doering-Sachs*, 652 So. 2d 420, 422-24 (Fla. Dist. Ct. App. 1995) (same); *Illinois Commerce Comm'n v. Salamie*, 54 Ill. App. 3d 465, 469-475, 369 N.E.2d 235, 238-242 (1977) (same); *Silva v. Superior Court*, 52 Cal. App. 3d 269, 280, 125 Cal. Rptr. 78, 85-87 (1975) (same).

[22] *See also Johnson v. Browne*, 205 U.S. 309 (1907) (affirming grant of habeas corpus discharging prisoner who had been tried and convicted in federal court in violation of extradition treaty with Canada); *Chew Heong v. United States*, 112 U.S. 536 (1884) (reversing denial of habeas

(footnote continued)

applied the provisions of the convention to determine whether the individual should be tried before a New Jersey state court or a Belgian consul. *Id.*[23]

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corpus to Chinese laborer detained by federal officials in violation of immigration treaty with China). Common-law courts in England long recognized the availability of the writ of habeas corpus to challenge the detention of an alien in violation of international law. *See, e.g., The Three Spanish Sailors' Cas*e, 96 Eng. Rep. 775 (C.P. 1779); *The King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (cited in *Rasul v. Bush*, 124 S. Ct. 2686, 2696 n.11 (2004), and *INS v. St. Cyr*, 533 U.S. 289, 301 n.16 (2001)).

[23] Federal habeas corpus has long served to enable the federal judiciary to enforce the rights of foreign nationals under international law when the state courts, in criminal proceedings, have failed to give proper effect to those rights. In the pre-Civil War era, a New York state murder prosecution that allegedly violated international law brought the nation to the brink of war with Great Britain. *See* Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 496 (1990). In response, Congress expanded the federal habeas corpus statute, which had previously applied only to prisoners in federal custody, to empower federal courts to adjudicate claims of some noncitizens detained in state custody in violation of the law of nations. *See* Act of Aug. 29, 1842, ch. 252, 5 Stat. 539 (codified at 28 U.S.C. § 2241(c)(4)); Cong. Globe, 27th Cong., 2nd Sess. 536-37 (1842) (remarks by Sen. Choate) (amendment was necessary to allow federal government to fulfill its obligation of preserving national peace); *id*. at 444 (remarks by Sen. Berrien) (object of statute "was to allow a foreigner . . . prosecuted in one of the States of the Union for an offence committed in that State" to bring an international-law issue "before the only competent judicial power to decide upon matters invoked in foreign relations or the law of nations"); *cf. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2756-59 (2004) (noting that federal Alien Tort Statute was passed by Congress in part to ensure compliance by states with the law of nations).

3. Mr. Medellín's Rights Under the *Avena* Judgment Are Judicially Enforceable.

Judicial enforcement of the *Avena* Judgment is required by the foreign policy judgments of the political branches manifest in four international treaties to which the United States is party: the Vienna Convention, the Optional Protocol, the United Nations Charter, and the Statute of the ICJ. Because the rights conferred by the Vienna Convention are self-executing, and because the United States agreed to submit to binding resolution by the ICJ of disputes concerning the interpretation and application of the Vienna Convention, Mr. Medellín's rights under the *Avena* Judgment are enforceable by the courts of the United States without any further executive or legislative action.

As an initial matter, it has never been contested that the Vienna Convention is self-executing, in light of the circumstances of its ratification and the nature of the rights conferred. When presenting the Vienna Convention to the Senate for its advice and consent, the Executive Branch explicitly represented that the obligations imposed by the Convention were "entirely self-executive and do[] not require any implementing or complementing legislation." *See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations*, S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).[24]

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[24] *See also* 21 U.S.T. 77, 185 (Proclamation of Ratification by President Nixon) ("the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof").

In the thirty-five years since the United States entered into the Vienna Convention, neither the President nor Congress has sought to pass any legislation implementing the obligations of the United States under that instrument. Ordinarily, "if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5. Here, the Executive Branch has gone one step further. In a booklet that the State Department currently provides to state and local law-enforcement agencies and displays on its website, it advises:

> The obligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR and bilateral agreements are thus "self-executing") because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.

UNITED STATES DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 44, *available at* http://travel.state.gov/pdf/CNA_book.pdf.[25]

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[25] This case is therefore fundamentally different from *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). In the *Nicaragua* case, the ICJ judgment addressed rules of customary international law concerning the use of force, an area of executive competence, while here the obligation arises under a self-executing treaty and is readily susceptible of judicial enforcement. Moreover, in the *Nicaragua* case, the U.S. nationals who sought to enforce the ICJ judgment had no relationship to the ICJ case, while here, by contrast, the ICJ has adjudicated both Mr. Medellín's and Mexico's rights. Finally, in the *Nicaragua* case, Congress had enacted legislation

(footnote continued)

Moreover, Article 36 of the Vienna Convention affords rights to foreign nationals (to receive information and seek consular assistance) and imposes obligations on United States authorities (to provide information and permit consular assistance) that operate in the context of criminal proceedings and are entirely comparable to the treaty obligations and rights that United States courts have long enforced on behalf of foreign nationals without implementing legislation. *See* Part I.B.2 above; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5 (this Court has generally given effect to "agreements conferring rights on foreign nationals . . . without any implementing legislation, their self-executing character assumed without discussion"). Article 36 of the Vienna Convention does not call for the enactment of a statute or the performance of any other action, such as the appropriation of money from the Treasury, that can only be carried out by act of Congress. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4)(c) & cmt. h.

Likewise, the right to review and reconsideration that resulted from the ICJ's interpretation and application of the Vienna Convention in Mr. Medellín's case is not just readily susceptible to judicial enforcement; it can *only* be provided by judicial process. Specifically, as a remedy for the violation of Mr. Medellín's Article 36 rights, the ICJ ordered that "the courts of the United States" provide review and reconsideration of Mr. Medellín's conviction and sentence by "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." P.A. 253a; ¶ 122; *see also* P.A. 248a-249a, ¶¶ 113-114; P.A. 274a, ¶ 153(9). As the ICJ

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by which the United States determined to take action inconsistent with the ICJ judgment, while here there is no such legislation.

recognized, that is a quintessentially judicial task. P.A. 262a, ¶ 140.

Compliance with the ICJ's judgment is a binding international obligation. When a party agrees to the jurisdiction of a designated tribunal, it agrees to abide by its decision. *Smith v. Morse*, 76 U.S. (9 Wall.) 76, 82 (1870) ("The law implies an agreement to abide [by] the result of an arbitration from the fact of submission."). Hence, an agreement to submit to the compulsory jurisdiction of an international tribunal entails a promise to comply with the result. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.").[26] Here, the United States submitted to the compulsory jurisdiction of the ICJ in disputes concerning the interpretation and application of the Vienna Convention. It therefore must comply with the ICJ's interpretation and application of the Convention in *Avena*.

The State Department has emphatically affirmed the obligation to comply with ICJ judgments in the context of the very category of treaty to which the Optional Protocol belongs. In 1985, in response to the ICJ's decision on jurisdiction in *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26), the United States withdrew its general consent to the compulsory jurisdiction of the ICJ. *See* U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*,

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[26] *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 903 cmt. g (1987) (judgment of ICJ is binding on party that submitted to its jurisdiction); SHABTAI ROSENNE: THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) (same).

DEP'T OF STATE BULL., Jan. 1986, at 67 (letter from U.S. Secretary of State to U.N. Secretary-General, Oct. 7, 1985). At the same time, it explicitly reaffirmed its "acceptance of the World Court's jurisdiction under Article 36(1) of its Statute"—that is, under the provision conferring jurisdiction when specially provided for by a treaty such as the Optional Protocol. *Id.* (Department Statement, Oct. 7, 1985). The State Department explained to the Senate Foreign Relations Committee that the United States had chosen to limit its consent to ICJ jurisdiction precisely because it fully accepted its obligation to comply when it had consented:

> We are a law-abiding nation, and when we submit ourselves to adjudication of a subject, we regard ourselves as obliged to abide by the result.

Id. at 70 (statement of Legal Adviser Abraham D. Sofaer, Dec. 4, 1985).[27]

The obligation to comply with the *Avena* Judgment results just as inexorably from the decision of the political branches to accede to the United Nations Charter and the

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[27] Unlike the Optional Protocol to the Vienna Convention, the former consent of the United States to general ICJ jurisdiction had been subject to a reservation, commonly known as the Connally Amendment, which excluded the ICJ's jurisdiction in matters "essentially within the domestic jurisdiction of the United States as determined by the United States." *Declaration on the Part of the United States of America*, proviso (b), 61 Stat. 1218, 1 U.N.T.S. 9 (Aug. 14, 1946). By acceding to the Optional Protocol to the Vienna Convention without a comparable reservation, the United States deliberately "eliminate[d] the application" of the Connally Amendment in "cases which might arise over the meaning or application of the consular convention," the Executive Branch having concluded that such a reservation was not warranted in view of "the subject matter of the Convention." S. EXEC. REP. No. 91-9, at 2 (1969) (report of Senator Fulbright); *id.* at 19 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

Statute of the ICJ. The Charter could not be more explicit: "Each Member of the United Nations undertakes 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 (P.A. 139a). The Statute is to the same effect: "A decision of the Court has no binding force *except as between the parties and in respect of that particular case*." ICJ Statute, art. 59 (P.A. 141a) (emphasis added).

It follows that the binding interpretation and application of the self-executing obligations of the Vienna Convention in the *Avena* Judgment must be given effect in the courts of the United States. By the Optional Protocol, the President and the Senate agreed that the ICJ would both interpret and apply the Vienna Convention. When the parties to a substantive agreement also agree that disputes arising from that agreement shall be resolved by a specified dispute-resolution procedure, the decision that results from that procedure governs the parties' obligations under the agreement no less than if the terms of the decision had been written into the agreement itself.[28] In other words, if an agreement to

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[28] *See Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17,* 531 U.S. 57, 62 (2000) (when parties "have granted to [an] arbitrator the authority to interpret the meaning of their contract's language . . . the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract[]"); *cf.* Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, *Methanex Corp. v. United States*, Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (applying an interpretation of a treaty by Free Trade Commission, a body empowered to issue "binding" interpretations of the NAFTA, represents not a retroactive application of a new rule but "an application of the correct interpretation of the governing law, which remains unchanged") (*available at* http://www.state.gov /documents/organization/6028.pdf).

substantive rights and obligations is accompanied by an agreement that a particular process must be followed to determine the interpretation and application of those rights and obligations, then the result of that process necessarily defines those rights and obligations with the same force and effect as the original agreement. Giving a treaty's self-executing provisions a meaning and application different from the one that the parties agreed is controlling would be inconsistent with the treaty itself. It follows that, just as the rights conferred by the Vienna Convention are judicially enforceable, so too are the interpretation and application of those rights in the *Avena* Judgment.

By the direction of the political branches, the United States was a party to *Avena*, and it fully participated in the case. The ICJ has now issued a decision that is "binding on [the United States and Mexico] in respect of that particular case." ICJ Statute, art. 59 (P.A. 141a).[29] The courts are an organ of the United States and hence are bound by its treaty commitments under both international law and the United States Constitution. *See* Parts I.A.2, I.B.1 above. And the ICJ's decision calls for compliance by the courts, not the executive or legislative authorities. By operation of the treaty obligations undertaken by the political branches, the courts of the United States must now "comply with the [*Avena*] decision," U.N. CHARTER art. 94, para. 1 (P.A. 139a),[30] by

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[29] *See* 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata"); *cf. Nevada v. United States*, 463 U.S. 110, 135 (1983) (entity whose interests were represented by United States in litigation was bound by judgment).

[30] *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18-19 (Thomas M. Franck & Gregory H. Fox eds., 1996) ("[T]he role of international tribunals and their influence on the operation of domestic

(footnote continued)

treating the *Avena* Judgment as conclusive of Mr. Medellín's rights under the Convention.

Thus, a failure by the courts of the United States to give effect to the Vienna Convention as conclusively interpreted and applied by the ICJ would breach the international obligations of the United States. *See* Part I.A.1 above. Conversely, it is a judicial act—review and reconsideration in accord with *Avena*—that will ensure compliance. It is therefore incumbent upon this Court to bring the state and federal courts of the United States into line with the nation's treaty commitments.

In short, by virtue of the consent of the United States to submit disputes concerning the "interpretation" and "application" of the Convention to the compulsory jurisdiction of the ICJ, the obligations under the *Avena* Judgment constitute obligations under the Convention itself in Mr. Medellín's case. Because the Convention is self-executing, the *Avena* Judgment supplies the rule of decision in his case.

II.
THE *AVENA* JUDGMENT REQUIRES REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS.

A. The Court of Appeals Should Have Given Effect to the Interpretation and Application of Mr. Medellín's Vienna Convention Rights in the *Avena* Judgment.

By the *Avena* Judgment, the ICJ expressly adjudicated Mexico's claim that Mr. Medellín's rights under the Vienna Convention had been violated, and it prescribed a remedy for that violation. The ICJ first held, reiterating its judgment in

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courts are governed by the foreign policy judgments of the President and Congress made through the governing international treaties and agreements.").

LaGrand, that the Convention confers rights on the detained national as well as his or her State of nationality. P.A. 214a-215a, ¶ 40. Hence, the Convention confers rights on Mr. Medellín.

Next, the ICJ held that the United States—in Mr. Medellín's case, in the person of the competent Texas authorities—had violated Mr. Medellín's right under Article 36(1)(b) of the Vienna Convention to be informed of his right to have the Mexican consulate notified of his detention and to have the consulate notified; his right under Article 36(1)(a) and (c) to communicate with Mexican consular officers and receive visits from them; and his right under Article 36(1)(c) to have Mexican consular officers arrange legal representation. P.A. 243a-245a, ¶ 106 (*Avena* Judgment); *see also* P.A. 131a (Court of Appeals opinion) ("The state concedes that Petitioner was not notified of his right to contact the Mexican consul.").

The ICJ also granted Mr. Medellín a remedy for the violation of Article 36(1). Specifically, while it rejected Mexico's request for annulment of the conviction and sentence, P.A. 255a, ¶ 123 (*Avena* Judgment), the ICJ ordered that the courts of the United States must provide "review and reconsideration" of Mr. Medellín's conviction and sentence. P.A. 253a, 273a, ¶¶ 121-122, 153(9). The ICJ determined that this remedy is required by Article 36(2) of the Convention, which mandates that the procedures for enforcing Article 36(1) be sufficient to give its purposes "full effect." P.A. 270a, ¶ 152 (citing Vienna Convention, art. 36(2)).

The purpose of the "review and reconsideration" is 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." P.A. 253a, ¶ 122. As a result, the ICJ also held that the required review and reconsideration could not be thwarted by the application of a domestic-law

procedural bar arising from the failure of a national deprived of his notification rights timely to raise the issue in a domestic proceeding. P.A. 247a-249a, 258a-259a, ¶¶ 112-113, 133-134. Finally, the ICJ held that the court conducting the review and reconsideration would need to remedy any prejudice caused by the violation. P.A. 253a, 261a, ¶¶ 122, 138. The ICJ also made clear that "review and reconsideration" must take place within the "judicial process." P.A. 262a, ¶¶ 140-141.

The application of the *Avena* Judgment to the issues decided by the Court of Appeals is straightforward. As the Court of Appeals recognized, the ICJ squarely held that the Vienna Convention confers rights on the detained national as well as the sending state. P.A. 132a-133a (Court of Appeals opinion, citing *Avena* and *LaGrand*); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) ("[T]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest."). Hence, because the *Avena* Judgment supplies the rule of decision, the Court of Appeals was required to hold that Mr. Medellín had an "individually enforceable right" under Article 36.

As the Court of Appeals also recognized, the ICJ held that in the circumstances here, "procedural default rules cannot bar review of a petitioner's claim." P.A. 131a-132a (citing *Avena* and *LaGrand*). Hence, because the *Avena* Judgment supplies the rule of decision, the Court of Appeals was required to hold that Mr. Medellín's procedural default under Texas law could not operate to bar the review and reconsideration granted him by the ICJ. Recognizing that its decision contravened the *Avena* Judgment, the Court of Appeals nonetheless applied a Texas contemporaneous-objection rule to hold Mr. Medellín's claim procedurally defaulted. P.A. 131a-132a.

A state-law procedural bar, however, cannot foreclose federal habeas review unless it is both "adequate" and

"independent" of federal law. *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Mr. Medellín has a right under the Vienna Convention, as interpreted and applied in the *Avena* Judgment, not to have the Texas procedural bar applied to prevent review and reconsideration of his conviction and sentence in connection with his Vienna Convention claim. That right is a federal right, by virtue of the status of the Vienna Convention as preemptive federal law under the Supremacy Clause and the agreement of the United States that decisions of the ICJ are binding in cases concerning the interpretation and application of the Convention. *See* Part I above. As the Executive Branch made clear when it presented the Vienna Convention to Congress for ratification, "[t]o the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern." *Vienna Convention on Consular Relations, Hearing Before the Senate Committee on Foreign Relations*, S. EXEC. REP. No. 91-9, at 18 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

Where, as here, a state-law procedural rule is itself preempted by federal law, the rule is neither "adequate" nor "independent" of federal law. *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388, 398-99 (1986). Because no "independent and adequate" state-law ground is present, the procedural default doctrine does not apply in the present case by its own terms. *See, e.g., Lee*, 534 U.S. at 387.

Moreover, the doctrine that state procedural default rules apply in the context of federal habeas corpus proceedings is a judicially created, nonjurisdictional, prudential rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). No federal constitutional provision or statute requires its application.

Id.[31] It therefore cannot apply where it is inconsistent with a statute or treaty duly adopted by the political branches—here, the commitment of the United States to abide by the Vienna Convention, as interpreted and applied in judgments of the ICJ. U.S. CONST. art. VI. In this circumstance, the *Avena* Judgment would supersede the prudential doctrine that state procedural requirements should ordinarily be given effect in federal habeas cases even if that doctrine were otherwise applicable.

In short, whether the Court of Appeals should have issued the certificate of appealability on Mr. Medellín's Vienna Convention reduces to the single question of whether the *Avena* Judgment supplies the rule of decision in this case. As a matter of constitutional structure and principle, it plainly does. *See* Part I above.

This Court should so hold. On certiorari review of the denial of an application for a certificate of appealability, this Court necessarily states what the law is in order to correct the erroneous resolution of legal questions by the courts below. *See Tennard v. Dretke*, 124 S. Ct. 2562, 2573 (2004) (on review of denial of COA, holding that Court of Appeals applied improper legal standard); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). In reversing the Court of Appeals on its denial of Mr. Medellín's application for a certificate of appealability, this Court should hold that the *Avena* Judgment supplies the rule of decision in his case. At a minimum, this Court should hold that reasonable jurists would find debatable the disposition of Mr. Medellín's claims in view of

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[31] Consistent with its prudential origins, the doctrine is subject to judicially-created exceptions. Specifically, this Court has crafted an exception to procedural default when the petitioner can show cause and prejudice or a fundamental miscarriage of justice. *See, e.g., Coleman*, 501 U.S. at 750; *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

the interpretation and application of his rights under the Convention in the *Avena* Judgment, and that the issues presented here are "adequate to deserve encouragement to proceed further," entitling him to a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. at 327.

B. This Court's Per Curiam Opinion in *Breard* Does Not Bar Relief In This Case.

The only reason that the Court of Appeals did not apply the *Avena* Judgment to Mr. Medellín's application was its view that, on the issue of whether the Vienna Convention conferred individual rights on the detained nationals, it was bound by prior precedent of its own, and on the issue of whether it should give effect to the Texas procedural bar, it was bound by this Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998). P.A. 131a-133a. *Breard*, however, is distinguishable because, unlike here, the *Breard* Court did not have before it a final and binding interpretation and application of the Vienna Convention in the form of a final judgment by the ICJ adjudicating the petitioner's rights.

In its per curiam opinion in *Breard*, this Court declined to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had procedurally defaulted the Vienna Convention claim. The Court observed that the Convention "arguably" conferred rights on an individual detainee as well as on the foreign country of which the detainee was a national. *Id*. at 376. It stated, however, that as a matter of international law, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375. The Court found this rule of international law "embodied in the Vienna Convention itself" by virtue of its Article 36(2). *Id*. The Court noted that that provision states that "the rights

expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Id*. at 375 (quoting Vienna Convention, art. 36(2) (P.A. 138a)). Hence, the Court stated, the Convention did not preclude the United States from giving effect to Breard's procedural default under Virginia law. *Id.* at 375-77 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

At the time of the *Breard* order, the ICJ had not addressed the merits of Mr. Breard's claim and, of course, had not rendered a final judgment in either *LaGrand* or *Avena*. It also had never before addressed Article 36(2) of the Vienna Convention (P.A. 138a), which was discussed by this Court in *Breard*. In the *Avena* Judgment, the ICJ interpreted and applied that Article and, specifically, the "full effect" proviso, in a case adjudicating Mr. Medellín's own rights. *See* P.A. 194a-195a, 247a-249a; ¶¶ 14(3), 112-113. Consistent with its earlier holding in *LaGrand*, the ICJ held that, where the United States had failed in its Article 36(1) notification obligations, Article 36(2) precluded it from applying a procedural bar that would prevent the review and reconsideration that ICJ had ordered as a remedy for that violation. P.A. 247a-249a, ¶¶ 112-113. The ICJ thereby identified in Article 36(2) "a clear and express statement" as to the implementation of the Convention of the sort that this Court had recognized in *Breard* would take precedence over domestic procedural rules. *Breard*, 523 U.S. at 375.

Given the interpretation and application of Mr. Medellín's own rights in the *Avena* Judgment, Mr. Medellín stands in a fundamentally different posture than did Mr. Breard. Mr. Medellín's rights were adjudicated in a final and binding ICJ judgment; Mr. Breard's were not. The *Breard* decision therefore does not control this case.

In *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (P.A. 142a-163a), the Oklahoma Court of Criminal Appeals—the only other court in the United States to consider the effect of the *Avena* Judgment in the case of a Mexican national subject to the judgment—recognized that *Breard* no longer controls with respect to Mexican nationals whose rights were determined in the *Avena* Judgment. The Oklahoma court's precedent decided prior to the *Avena* Judgment would have required it to disregard the ICJ's judgment in *LaGrand* in favor of *Breard*'s treatment of procedural default. *See Valdez v. State*, 46 P.3d 703 (Okla. 2002). But as Judge Chapel explained in his concurrence, the issuance of the *Avena* Judgment made the case one "of first impression." P.A. 145a & n.1 (distinguishing *Valdez*). As a result, the *Torres* court ordered an evidentiary hearing on the Vienna Convention claim of Osvaldo Torres whose Vienna Convention claim had earlier been held defaulted. P.A. 142a-144a.

If, however, the Court concludes that it must revisit the issues decided in *Breard*, *Breard* should be overruled. As definitively determined by the ICJ in *LaGrand* and *Avena*, applying procedural default rules to prevent enforcement of Vienna Convention rights is inconsistent with Article 36 of the Convention when the competent authorities of the detaining country have themselves failed in their Vienna Convention obligations. P.A. 247a-249a, ¶¶ 111-113 (*Avena* Judgment); *LaGrand*, ¶¶ 88-91.

The *Breard* opinion carries little force as a matter of stare decisis. *Breard* denied four applications for discretionary relief, consisting of two petitions for certiorari, a motion for leave to file an original bill of complaint, and a petition for an original writ of habeas corpus. 523 U.S. at 373-75, 378-79. As an opinion accompanying the denial of discretionary writs, the *Breard* decision "cannot have the same effect as decisions on the merits." *Teague v. Lane*, 489 U.S. 288, 296

(1989) (regarding prior denial of petition for writ of certiorari). Moreover, the *Breard* decision is a per curiam opinion issued without full briefing or oral argument. This Court has previously acknowledged its "customary skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion," even when issued on the merits. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). That rule should apply with special force to a decision issued in the circumstances of *Breard*—not only without full briefing or oral argument, but in hurried circumstances, on the eve of an execution. *See* 523 U.S. at 378; *see also Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (denying leave to file case on eve of execution). In any event, the international dimension of this case would warrant a fully considered reexamination of *Breard* if the *Avena* Judgment had not made it inapplicable.

III.

THIS COURT SHOULD GIVE EFFECT TO THE *AVENA* JUDGMENT IN THE INTEREST OF COMITY AND UNIFORM TREATY INTERPRETATION.

Because the *Avena* Judgment interpreted and applied Mr. Medellín's own rights under the Vienna Convention, the Court of Appeals had an obligation under the Supremacy Clause to give that adjudication effect as the rule of decision in Mr. Medellín's case. Even if no such obligation were present, however, the Court of Appeals should have recognized the judgment as a matter of international comity in Mr. Medellín's case and given effect to the judgment as an authoritative interpretation and application of the judgment in a case, such as that of Mr. Medellín, involving a national of a party to the Convention.

A. The *Avena* Judgment Should Be Recognized on Comity Grounds.

This Court has long acknowledged that the decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on grounds of comity. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Court explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64. Under the principle of comity and similar doctrines, the Court has repeatedly counseled respect for the competence of foreign courts and the efficacy of their proceedings.[32]

No less respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes. *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996) (discussing value of

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[32] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (agreement to arbitrate before foreign arbitral tribunal enforced); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981) (action dismissed in favor of foreign court under doctrine of forum non conveniens); *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 8-9 (1972) (agreement to litigate before foreign court enforced); *Ritchie v. McMullen*, 159 U.S. 235, 243 (1895) (foreign judgment enforced under *Hilton* comity rule).

"mutual trust and respect" between national and international courts).[33] By the Optional Protocol, the United States agreed to submit disputes "arising out of the interpretation and application" of the Vienna Convention to the ICJ, the principal judicial organ of the United Nations; was given a full and fair opportunity to litigate the dispute there; and in fact took full advantage of that opportunity. *See* Statement of the Case above. In these circumstances, the courts of the United States should recognize and enforce the *Avena* Judgment.

The review and reconsideration directed by the *Avena* Judgment constitutes far less of an intrusion into the domestic criminal justice system than did the release of the convicted criminal ordered by this Court in *Johnson v. Browne*, 205 U.S. 309 (1907), the dismissal of the indictment ordered by this Court in *United States v. Rauscher*, 119 U.S. 407 (1886), or the turnover for trial by the Belgian consul requested by the petitioner in *Wildenhus's Case*, 120 U.S. 1 (1887)—all of which this Court has recognized as necessary and enforceable consequences of our treaty obligations. *See* Part I.B.2 above. In contrast to the minimal intrusion on Texas's criminal processes, Mr. Medellín seeks recognition of his procedural rights in a case in which his life is at stake. Also at stake is the reputation of the United States as a nation committed to the rule of law, in circumstances involving its relations with one of its closest neighbors.

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[33] *See* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998) (discussing application of comity as between international courts and courts of the United States); Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003) ("If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation. . . .").

In rendering the *Avena* Judgment, the ICJ showed great respect for the sovereign interests of the United States and the competence of its courts. Rather than grant Mexico's request for annulment of the convictions and sentences, *see* P.A. 209a-210a, ¶¶ 31-34 (*Avena* Judgment), the ICJ held that United States courts should conduct review and reconsideration of the convictions and sentences tainted by the violations in accordance with the criteria laid down in the judgment, and then fashion relief for any prejudice. P.A. 273a, ¶ 153(9). The United States should reciprocate.

As a matter of international comity, if not legal obligation, this Court should require courts in the United States to recognize the *Avena* Judgment by undertaking the review and reconsideration of Mr. Medellín's conviction and sentence that the ICJ ordered.

B. The *LaGrand* and *Avena* Judgments Should Govern in the Interest of Uniform Treaty Interpretation.

The Court should also follow the result reached by the ICJ in the interest of uniform treaty interpretation. One of the purposes of the Vienna Convention on Consular Relations was to achieve uniformity in the law of consular relations by replacing the web of customary law and practice and bilateral conventions that had previously governed.[34] Like other parties to the Vienna Convention, the United States acceded to the Convention in order to "further friendly relations between nations through the orderly development of *uniform* standards of consular practice." S. EXEC. REP. No. 91-9, at 3 (1969) (report of Sen. Fulbright) (emphasis added).

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[34] Prior to the Vienna Convention, "[c]onsular relations ha[d] been regulated . . . mainly by bilateral agreements or other less formal arrangements and by national laws. As a result, there [had been] a wide variety of practices." *Report of the United States Delegation*, *supra*, at 41.

When a multilateral convention results from an objective to achieve uniformity in its field of coverage, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting); *see also id.* at 655 n.9 (majority opinion) (not disputing point, but distinguishing foreign cases).[35] After all, "treaties are made, not by only one of the contracting parties, but by both," THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961)—or, in the case of a multilateral treaty, by all. The objective of uniformity would be defeated if the national courts of each party to a treaty insisted on their own interpretation of the treaty.

The presumption in favor of uniform treaty interpretation should apply with special force here, where some 46 nations party to the Convention, including the United States and Mexico, have adopted the Optional Protocol designating a single forum for binding resolution of disputes concerning its interpretation and application. Given its consent to the ICJ's jurisdiction, the United States should treat as authoritative *any* interpretation or application of the Convention by that court. But surely it should do so when the ICJ has interpreted and applied the Convention in a case in which the United

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[35] *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (looking to foreign adjudications to ensure consistent interpretation of treaty); *Air France v. Saks*, 470 U.S. 392, 404 (1985) (finding "opinions of our sister [treaty] signatories to be entitled to considerable weight"); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) ("When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.").

States was a party, in which it fully participated, and in which it had a full opportunity to present its views.

The ICJ itself recognized its responsibility to ensure the uniform interpretation of the Vienna Convention. In a concluding paragraph of the *Avena* Judgment, it stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future case between parties to the Convention. P.A. 268a-269a, ¶ 151.

There is no reason for this Court to depart from the carefully reasoned decision of the ICJ on the issues it decided in the *LaGrand* and *Avena* Judgments. This Court should instruct the Court of Appeals to follow those judgments in the interest of uniform treaty interpretation.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals and remand the case with instructions to issue a certificate of appealability and to apply the *Avena* Judgment as the rule of decision in his case.

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