No. 04-5928

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

The United States and Mexico are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Acting on the consent set forth in the Optional Protocol, Mexico initiated proceedings in the International Court of Justice seeking relief for the violation of Petitioner's Vienna Convention rights. On March 31, 2004, the Court rendered a judgment that adjudicated Petitioner's rights. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). The *Avena* Judgment built on the Court's rulings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), an earlier case also brought under the Optional Protocol.

On Petitioner's application for a certificate of appealability of the denial of his petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the *LaGrand* and *Avena* Judgments.

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. 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 *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

1. Clause 2 of Section 2 of Article II, Clause 1 of Section 2 of Article III, and Clause 2 of Article VI of the United States Constitution.

2. Article 36 of the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

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

4. Articles 92, 93(1), and 94(1) of the Charter of the United Nations, *opened for signature* June 26, 1945, 59 Stat. 1031.

5. Articles 1, 3(1), 9, 36(1), and 59 of the Statute of the International Court of Justice, 59 Stat. 1055.

STATEMENT OF THE CASE

A. The Vienna Convention and Its Optional Protocol.

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent 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 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.[1]

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[1] ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973). As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed, "the citizens of no State have a higher

The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I.

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 in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. E., 91st Cong. at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). To date, 166 States have ratified the Vienna Convention and 45 States the Optional Protocol.[2] The Vienna Convention is among the most

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interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

[2] *See Status of Multilateral Treaties Deposited with the Secretary-General*, *Vienna Convention on Consular Relations, at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

widely ratified multilateral treaties in force today. LEE, at 23-25.

B. The International Court of Justice.

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 1, 59 Stat. 1055 ("ICJ STATUTE"). The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. U.N. CHARTER art. 93, para. 1.

Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

EDWARD R. STETTINIUS, JR., SECRETARY OF STATE AND CHAIRMAN OF THE UNITED STATES DELEGATION, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE

RESULTS OF THE SAN FRANCISCO CONFERENCE 137-38 (1945).[3]

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.[4]

C. The *Avena* Judgment.

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellin 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 (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).[5]

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-

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[3] The Court is composed of fifteen judges, none of whom may have the same nationality. ICJ STATUTE, art. 3(1); *see also id.*, arts. 4, 9. "Judges are picked in their individual capacity, and are not political appointees of their respective governments." David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76 (2003). As a result, "the judges of the ICJ are rarely politicized." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 240 (2001).

[4] *See* International Court of Justice: List of Contentious Cases by Country, *at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry.htm#UnitedStatesofAmerica.

[5] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of Mr. Medellin, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. *Avena* Judgment, para. 11 (188A). The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.[6] 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 International Court expressly adjudicated Mr. Medellin's own rights. *First*, the International Court held that the United States had breached

[6] In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; s*econd*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* Judgment, paras. 77, 90-91, 125.

Article 36(1)(b) in the cases of 51 of the Mexican nationals, including Mr. Medellin, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena* Judgment, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

Second, the International Court held that in 49 cases, including that of Mr. Medellin, the United States had violated its obligations 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." *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The International Court also held that in 34 cases, including that of Mr. Medellin, the breaches of Article 36(1)(b) also violated the United States's obligation under paragraph 1(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Id.*, paras. 106(4), 153(4), 153(7) (245A-246A, 272A, 273A).

Finally, as to remedies, the International Court first denied Mexico's request for annulment of the convictions and sentences. *Id*., para. 123 (255A). The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The International Court explained, *first*, that the required review and reconsideration must take place as part of the "judicial process;" *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that 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*, that the forum in which the review and reconsideration occurred 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." *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

D. Mr. Medellin's Proceedings.

On June 29, 1993, law enforcement authorities arrested Jose Ernesto Medellin Rojas, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellin, a Mexican national, told the arresting officers he was born in Laredo, Mexico,[7] and informed Harris County Pretrial Services that he was not a United States citizen.[8] Nevertheless, as the Court of Appeals found, Mr. Medellin was not advised of his Article 36 right to contact the Mexican consul. 23A.

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America at 186 (Nov. 3, 2003) (*Avena* Case). At the time Mr. Medellin 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 represented by competent and experienced

[7] State's Ex. 113 at 000076 (Statement of Jose Ernesto Medellin Rojas).

[8] 165A.

defense counsel.[9] As a result of the Article 36 violation in his case, however, Mr. Medellin 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. Medellin, who was indigent. Unbeknownst to the court, lead counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellin's case. Memorial of Mexico, App. A ¶ 232 (June 20, 2003) (*Avena* Case). Counsel failed to strike jurors who indicated they would automatically impose the death penalty,[10] and called no witnesses at the guilt phase of trial. On September 16, 1994, Mr. Medellin was convicted of capital murder. *State v. Medellin*, No. 675430, Judgment (339th D. Ct., Tex. Oct. 11, 1994).

At the penalty phase, the only expert witness the defense presented was a psychologist who had never met Mr. Medellin. S.F. Vol. 35 at 294-349. Mr. Medellin's parents testified only briefly. *Id*. at 279-92. The entire penalty phase defense lasted less than two hours. Tr. at 343-441 (Docket).

The jury recommended a death sentence, and on October 11, 1994, the trial court sentenced Mr. Medellin to death. On March 19, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellin's conviction and sentence in an unpublished opinion. 61A.

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[9] *See* Memorial of Mexico at 11-38 *(Avena* Case*); see also Valdez v. State,* 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national); Michael Fleischman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases,* 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003) (describing Mexico's consular assistance in capital cases in Texas and elsewhere over the last several decades).

[10] *See, e.g.,* S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellin's detention when he wrote to them from death row and promptly began rendering assistance to him. Memorial of Mexico, App. A ¶ 235 (*Avena* Case).

On March 26, 1998, Mr. Medellin filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. In support of this claim, Mr. Medellin submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. 172A-173A.

After refusing to grant an evidentiary hearing, the trial court denied relief. Without changing so much as a comma, the court adopted the State's proposed findings of fact and conclusions of law, including the State's argument that the claim had been procedurally defaulted or, in the alternative, that Mr. Medellin "failed to show [his] foreign nationality," "lacked standing" to raise the Vienna Convention claim, and could not show that the violation affected the constitutional validity of his conviction or sentence. 46A-48A. On September 7, 2001, the Texas Court of Criminal Appeals affirmed in an unpublished order. 33A.

On November 28, 2001, Mr. Medellin filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellin again raised an Article 36 claim.

On June 26, 2003, the District Court denied relief and a certificate of appealability ("COA"), finding the Vienna Convention claim procedurally defaulted under "an adequate and independent state procedural rule." 82A. In the

alternative, the District Court concluded that it was compelled to deny relief by Fifth Circuit precedent to the effect that the Vienna Convention does not create individually enforceable rights, that no judicial remedy is available for its violation, and that Mr. Medellin could not show prejudice unless the Vienna Convention violation also qualified as a violation of a constitutional right. 84A-85A & n.17.

On May 20, 2004, the Court of Appeals also denied Mr. Medellin's request for a COA. 135A. The Court recognized that *Avena*, which had issued since the District Court's ruling, had been brought on behalf of Mr. Medellin, among others. It also recognized that the International Court had held in *LaGrand* and reiterated in *Avena* that, *first*, the application of procedural default rules to bar review of the Vienna Convention claim on the merits violated Article 36 of the Convention, and *second*, that Article 36 conferred individually enforceable rights. It held, however, that the first holding "contradict[ed]" this Court's brief *per curiam* order in *Breard v. Greene,* 523 U.S. 371 (1998), and that the second contravened its own ruling in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in terms of the second holding, the *en banc* Court of Appeals decided otherwise. 131A-133A.

ARGUMENT

Because the United States is party to the Vienna Convention and its Optional Protocol, the *Avena* Judgment constitutes a binding adjudication of the Vienna Convention rights of Mr. Medellin and fifty other Mexican nationals. Although the Court of Appeals recognized the impact of that Judgment on Mr. Medellin's case, it held that it was barred by prior precedent from giving effect to the Judgment.

Hence, this Court should grant the petition in order to prevent the United States from breaching its freely undertaken commitment to the international community to abide by the *Avena* Judgment. This Court should also grant the petition in order to resolve the conflicts among this Court, the International Court of Justice, and other United States courts on the proper interpretation and application of the Vienna Convention.

I. The Court Should Grant The Petition In Order To Bring The United States Into Compliance With Its Obligation To Abide By The *Avena* Judgment.

A. The Court of Appeals Was Bound to Give Effect to the *Avena* Judgment As the Rule of Decision in Mr. Medellin's Case.

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

The *Avena* Judgment is binding on the United States as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.[11] Under Article 36(1) of the Statute of the Court, the Court has jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to

[11] 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.").

the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 242 (2001). The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. I.

Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.[12] Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides that decisions of the Court are binding on the parties to the case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." RESTATEMENT (THIRD) FOREIGN RELATIONS § 903 cmt. g (1987).

[12] Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT (THIRD) FOREIGN RELATIONS § 321 cmt. a (1987).[13] Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna Convention to the International Court, the United States must now abide by its adjudication of those disputes.[14]

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

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of

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[13] *See* THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it 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.") (emphasis in original). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 466 (1995) (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

[14] *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); *see also 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.").

the federal government. Article II, section 2, clause 2, provides that the President "shall have Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only "with the Advice and Consent of the Senate." *Id.* For the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 36-37 (2d ed. 1996).

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law.[15] Hence, as this Court has long held, 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 (Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).

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[15] Emphasis added, Article VI, clause 2, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (1996) ("The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. *See Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force

> 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.

21 U.S.T. 77, 185.

B. The Court Should Ensure the United States's Compliance with its International Obligations.

Because the Vienna Convention and its Optional Protocol are fully effective as federal law, the Court of Appeals should have applied *Avena* as the rule of decision in determining whether to grant a certificate of appealability.[16] Given the

[16] For example, in *Wildenhus's Case*, 120 U.S. 1 (1887), New Jersey sought to try a Belgian crewmember who was subject to a treaty allocating criminal jurisdiction over sailors on ships in American ports between the local courts and the Belgian consulate. Asserting a right under the treaty to try the crewmember, the Belgian consul sought a writ of habeas corpus. After noting that "[t]he treaty is 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," this Court held that "[i]f it gives the consul of Belgium exclusive jurisdiction over the offense 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." 120 U.S. at 17.

United States's commitment to abide by that judgment, the district court's resolution of Mr. Medellin's Vienna Convention claim was not just "debatable," but plainly wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).[17] For the same reason, there also can be no debate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). By failing to issue the certificate, the Court of Appeals both erred as a matter of federal law and placed the United States in breach of its international obligations.[18]

This Court should grant the petition in order to prevent the breach of treaty that would otherwise result from the

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Cf. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (denying relief under Alien Tort Statute, 28 U.S.C. § 1350, in part because treaties at issue were not self-executing and thus could not "establish the relevant and applicable rule of international law").

[17] Should there be any doubt on this point, one need only look to the decision in *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations and thus "undermin[es] a major premise of [*Breard*]").

[18] *See, e.g.,* IAN BROWNLIE, STATE RESPONSIBILITY, PART 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *see also* Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 121 (Feb. 14), paras. 75-76 (issuance of arrest warrant by Belgian investigative judge violated rule of customary international law recognizing head-of-state immunity); *LaGrand* Judgment, paras. 111-15 (failure of U.S. State Department, U.S. Solicitor General, Governor of Arizona, and this Court to "take all measures at [their] disposal" to prevent execution violated United States's treaty obligation to abide by order of provisional measures); Iran v. United States, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, para. 71 (Iran-U.S. Cl. Trib. June 5, 1998) (refusal of U.S. courts to enforce Iran-U.S. Claims Tribunal award violated United States's obligation under Algiers Accords to treat Tribunal awards as final and binding).

Court of Appeals' error. To be sure, this Court does not sit to correct routine error. But the Framers gave treaties the status of supreme federal law and included cases arising under treaties within the federal judicial power precisely in order to enable this Court to prevent the lower courts of the United States from breaching an international obligation by refusing to enforce a treaty or other international obligation. U.S. CONST. art. III, § 2, cl. 1; art. VI, cl. 2.

As James Madison emphasized at the Constitutional Convention:

> The tendency of the States to th[e] 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 (Max Farrand ed., rev. ed. 1966). Alexander Hamilton made the same point when he said that "the peace of the whole ought not to be left at the disposal of a part," so that "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To achieve that end, the Framers gave this Court the final authority to ensure enforcement of our treaty obligations.

> 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).[19]

This case presents precisely the circumstances in which the Framers expected this Court to intervene. Acting on behalf of the United States, the President, with the consent of the Senate, has agreed to abide by the *Avena* Judgment. But the Court of Appeals has concluded – in large part on the basis of this Court's own precedent – that the United States cannot comply. Left undisturbed, that decision would be the kind of "national calamit[y]" against which Madison warned – because it would send a message to the world that we preach, but do not practice, adherence to the rule of law.

While the death penalty itself is not at issue in this case, the death penalty context makes the petition all the more compelling. The next step in this case will be Mr. Medellin's execution. If there were any case in which this Court should not send a message to friends and allies that the United States is indifferent to its international commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

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[19] *See also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[T]he 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.") (statement of James Wilson).

II. The Court Should Grant The Petition In Order To Resolve The Conflicts Among This Court, The International Court of Justice, And Other United States Courts About The Vienna Convention And The *LaGrand* And *Avena* Judgments.

In *Breard v. Greene,* 523 U.S. 371 (1998), by a brief *per curiam* order, this Court refused 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 been held to have procedurally defaulted the Vienna Convention claim. [20] The Court observed that the Convention "arguably" conferred an individual right that the foreign national, as well as the State party to the Convention, could enforce. *Id*. at 376. It stated, however, that as a matter of international law, absent a clear and express statement to the contrary, implementation of the Vienna Convention was subject to the procedural rules of the forum state. *Id*. at 375. Hence, the Court concluded, the Convention did not preclude the United States from procedurally barring Breard's claim. *Id*.[21]

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[20] By the *Breard* order, the Court denied four discretionary applications (two petitions for certiorari, an application for a bill of original complaint, and an application for an original writ of *habeas corpus*), on the eve of an execution, without full briefing and oral argument, in carefully couched language. The opinion thus has limited precedential value. *See*, *e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[O]pinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits."); *United States Bancorp Mortg. Co. v. Bonner Mall Pshp*., 513 U.S. 18, 24 (1994) (noting the Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion" even when issued on the merits).

[21] In the *Breard* order, this Court also suggested that the section of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), now codified at 28 U.S.C. §2254(e)(2) (2002), would have barred review of Breard's conviction and sentence as later-in-time federal law. *Breard*, 523 U.S. at 326. That issue

Since the *Breard* order, however, the legal universe has fundamentally changed. In its 2001 *LaGrand* Judgment, the International Court expressly held, *first*, that, as this Court had suggested, the Vienna Convention conferred rights on the individual national as well as the sending State, and *second*, that the application of the procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights, constituted a violation of Article 36(2) of the Convention. *LaGrand* Judgment, paras. 77, 90-91. Needless to say, this Court did not have the benefit of those specific holdings on the interpretation and application of the Vienna Convention when it made its more general observations in the *Breard* order.

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does not affect this petition, however. Unlike Breard, Petitioner Medellin raised his Vienna Convention claim in state post-conviction proceedings, filed an affidavit in support of the claim, and requested an evidentiary hearing, which the state court denied. Under these circumstances, section §2254(e)(2) does not bar a federal evidentiary hearing on Mr. Medellin's claim. *See, e.g., Mason v. Mitchell,* 320 F.3d 604, 621 n.6 (6th Cir. 2003) (§2254(e)(2) does not apply where petitioner sought but was denied state court evidentiary hearing); *Morris v. Woodford,* 229 F.3d 775, 781 (9th Cir. 2000), *cert. denied*, 532 U.S. 1075 (2001) (same). Presumably for that reason, respondent state officials did not raise, and the Fifth Circuit had no occasion to decide, any issues concerning section 2254(e)(2). Even if that provision might somehow prove relevant in the future, moreover, it would remain the case that the issues that the Fifth Circuit *did* decide will be faced again and again by both state courts (which would be bound by the Supremacy Clause to apply *Avena* and would remain unaffected by any restriction on federal courts imposed by AEDPA) and federal courts (which would have to decide the questions presented here before reaching any alleged AEDPA bar). Finally, Petitioner respectfully submits that if provided full briefing and argument, the Court would hold, in accord with *Murray v. Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804), that the Congress that enacted section 2254(e)(2) did not intend the United States to breach its treaty obligation to abide by the Vienna Convention, the Optional Protocol, and the *Avena* Judgment.

In the *Avena* Judgment, the International Court of Justice reiterated both of those holdings. Moreover, it did so in a case that *adjudicated Petitioner Medellin's own rights.* Specifically, the Court held that the United States had violated Article 36(1) of the Convention by failing to afford Mr. Medellin the opportunity to secure the assistance of the Mexican consul, and that under Article 36(2), the United States courts could not apply the procedural default doctrine to avoid assessing on the merits the impact of the violation on the proceedings that led to his conviction and sentence. *See Avena* Judgment, paras. 128-134, 140 (257A-260A, 263A).

The Court of Appeals expressly acknowledged the holdings of *LaGrand* and *Avena*, and it fully appreciated their import. It concluded, however, that existing precedent, including the *Breard* order, prevented it from complying with *LaGrand* and *Avena*. 131A-134A. This Court should grant the petition in order to resolve no less than three conflicts reflected in the decision of the Court of Appeals.

First, the Court should grant the petition in order to resolve the conflict between, on the one hand, the suggestion in the *Breard* order and the holdings of *LaGrand* and *Avena* that the Vienna Convention creates individually enforceable rights and, on the other, numerous United States courts' holdings to the contrary. On this issue, the Fifth Circuit held itself precluded from applying the holdings of *LaGrand* and *Avena* by prior precedent, this time its own. 133A (applying *United States v. Jimenez-Nava*, 243 F.3d 192,195-98 (5th Cir. 2001)).

The Fifth Circuit is not alone. While at least one District Court has recognized an individually enforceable right,[22] at

[22] *See Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y 2001) (finding that the Vienna Convention affords a private right of action to individuals).

least four other Courts of Appeals and numerous other federal and state courts have concluded that Article 36 does not create such a right.[23] That conclusion is contradicted not only by the express holdings of *LaGrand* and *Avena*, but by this Court's own suggestion in *Breard*.

Second, the Court should resolve the conflict between this Court's order in *Breard* and the holdings of the International Court of Justice in *LaGrand* and *Avena* on the issue of whether Article 36(2) precludes the application of procedural default doctrines when the United States has itself failed in its obligation of notification. On this issue, the Fifth Circuit stated flatly that *LaGrand* and *Avena* "contradict" the *Breard* order. 132A. It held, however, that it did not have the authority to "disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims." *Id.* It believed itself bound to follow that decision "until taught otherwise by the Supreme Court." *Id.*

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[23] *See United States v. Pineda*, 57 Fed. Appx. 4, 6-7 (1st Cir. 2003) (unpublished); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002); *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *Gordon v. State* 863 So. 2d 1215, 1221 (Fla. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *Cauthern v. State*, No. M2002-00929-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 149, *144-48 (Tenn. Crim. App. Feb. 19, 2004); *State v. Flores*, No. 01-3322, 2004 Wisc. App. LEXIS 446, *4-5 (Wis. Ct. App. May 26, 2004); *see also Mendez v. Roe*, 88 Fed. Appx. 165, 167 (9th Cir. 2004) (unpublished) (Vienna Convention claim not cognizable on federal habeas petition "because no clearly established federal law directs that Article 36's consular access provision institutes a judicially enforceable right"); *United States v. Nambo-Barajas*, No. 02-195(2), 2004 U.S. Dist. Lexis 6422, at *7-8 (D. Minn. Apr. 13, 2004) ("Eighth Circuit has not recognized an individually-enforceable right under article 36(b) of the Vienna Convention.").

Again, the Fifth Circuit is not alone. While at least one District Court has applied *LaGrand*,[24] at least five other Courts of Appeals and numerous other federal and state courts have concluded that the *Breard* order precludes them from following *LaGrand* or have simply ignored *LaGrand*.[25]

Finally, the Court should grant the petition in order to resolve the conflict between the Fifth Circuit and the Oklahoma Court of Criminal Appeals on the issue of whether the adjudication in *Avena* of a Mexican national's own rights must be given effect in the United States courts notwithstanding any inconsistent United States precedent. The Fifth Circuit failed to perceive a difference between *LaGrand*, in which the International Court of Justice addressed the Vienna Convention in a case that was binding only between Germany and the United States, and *Avena*, in which, after adjudicating Mr. Medellin's own rights, the Court gave a judgment that required the United States to take

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[24] *See United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations).

[25] *See, e.g., Villagomez v. Sternes*, 88 Fed. Appx. 100, 101 (7th Cir. 2004) (unpublished) (without referring to *LaGrand*, holding Vienna Convention claim procedurally defaulted); *United States v. Nishnianidze*, 342 F.3d 6, 18 (1st Cir. 2003) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 426 (6th Cir. 2003) (same); *Drakes v. INS*, 330 F.3d 600, 606 (3d Cir. 2003) (same); *United States v. Sanchez*, 39 Fed. Appx. 10, 11 (4th Cir. 2002) (unpublished) (same); *Mckenzie v. Dep't of Homeland Security*, No. 3:04cv0067, 2004 U.S. Dist. LEXIS 7041, at *6-8 (D. Conn. Apr. 23, 2004) (same); *Nambo-Barajas*, 2004 U.S. Dist. Lexis 6422, at *9 (same); *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (same); *State v. Escoto*, 590 S.E.2d 898, 906 (N.C. Ct. App. 2004) (same); *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (acknowledging *LaGrand,* but holding, in light of *Breard*, Vienna Convention claim procedurally defaulted). *See also Plata v. Dretke*, No. 02-21168, slip op. (5th Cir. Aug. 16, 2004) (denying certificate of appealability in post-*Avena* case).

specific steps in his case. 131A-133A. By contrast, in *Torres v. Oklahoma*, 142A-163A, the Oklahoma Court of Criminal Appeals recently recognized that prior precedent cannot control in the case of a Mexican national subject to the *Avena* Judgment.

In *Torres*, the Court stayed the execution of a Mexican national subject to the *Avena* Judgment and, in accord with that Judgment, remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. Though the *Torres* order did not set forth the Court's reasoning, the concurring and dissenting opinions make it clear that, but for the *Avena* Judgment, the Court would have held the Vienna Convention claim procedurally defaulted.[26] 142A-163A. However, as Judge Chapel stated in a concurring opinion, and the majority presumably recognized, "this Court is bound by the Vienna Convention and Optional Protocol" and hence required to give full effect to the *Avena* decision. 147A, 150A. Thus, although the Oklahoma Court's own precedent would have required that it disregard *LaGrand* in favor of *Breard*'s treatment of procedural default, the Oklahoma Court was now bound to follow, as a matter of federal law, the holding in the *Avena* Judgment that Torres's Vienna Convention claim could not be procedurally barred. 153A & n.21.

By the *Avena* Judgment, the International Court of Justice determined the rights of 49 Mexican nationals in addition to Messrs. Torres and Medellin. Thus, in 49 more cases, United States courts will face the question on which the Court of

[26] Hours after the Court of Criminal Appeals ruled, Governor Brad Henry commuted Mr. Torres's sentence to a term of life without parole, stating "[u]nder agreements entered into by the United States, the ruling of the ICJ [in *Avena*] is binding on U.S. courts." Press Release, Office of Governor Brad Henry, *Gov. Henry Grants Clemency to Death Row Inmate Torres* (May 13, 2004), http://www.governor.state.ok.us/display_article.php?article_id= 301&article_type=1.

Appeals here and the Oklahoma Court of Criminal Appeals split – whether *Avena*'s adjudication of the Article 36 rights of individual Mexican nationals must be given effect in United States courts notwithstanding the *Breard* order or any other inconsistent United States authority.

Each of these issues will be faced again and again by both state and federal courts addressing applications by other Mexican nationals whose rights have been adjudicated in *Avena* and other foreign nationals seeking to invoke the authority of *Avena* and *LaGrand*. This Court should grant the petition in order to resolve the disabling conflicts over the proper legal rule and thereby free United States courts from the straightjacket that, they erroneously believe, requires them to breach the solemn promises made by this country's elected representatives in the Vienna Convention and its Optional Protocol. *See Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004) (correcting the legal standard on certiorari review of denial of a COA); *Miller-El v. Cockrell,* 537 U.S. 322, 341 (2003) (same).

III. The Court Should Grant The Petition To Ensure International Judicial Comity And Uniform Treaty Interpretation.

Even if the *Avena* Judgment did not constitute an adjudication of Mr. Medellin's own rights to which United States courts are obligated to give effect as a matter of both international and United States law, the International Court's rulings in *LaGrand* and *Avena* should be given effect in the interest of international comity and uniform treaty interpretation.

A. The Court Should Grant the Petition in the Interest of International Judicial Comity.

This Court has long promoted the goal of comity between the courts of different nations. *See*, *e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In a world of enormous economic interdependence and regular international travel and migration, the courts of more than one nation will frequently have jurisdiction to address disputes arising from any given course of events. RESTATEMENT (THIRD) FOREIGN RELATIONS § 421 (1987). As a result, our courts will frequently have occasion to accord respect to proceedings in another State's courts. That respect can take a variety of forms, including the recognition of a foreign judgment, *see Hilton*, 159 U.S. at 164; forbearance from adjudicating a given case in favor of more efficient proceedings before the courts of a foreign country, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981); forbearance from exercising jurisdiction in recognition of the greater interest of a foreign country, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-19 (1993) (Scalia J., dissenting); and forbearance from interference by antisuit injunction with proceedings in the courts of another country, *see Gau Shan Co. v. Bankers Trust Co.,* 956 F.2d 1349, 1354-55 (6th Cir. 1992). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing agreement to arbitrate before foreign arbitral tribunal); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (enforcing agreement to litigate before foreign court).

This "comity of courts" cannot be confined to the judgments and proceedings of national courts. As many have remarked, the subject matter and frequency of international adjudication continue to expand. *See, e.g.,* Dietmar Prager, *The Proliferation of International Judicial Organs*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 279 (Niels M. Blokker et al., eds., 2001). As individual States

continue to entrust the resolution of specific categories of disputes to international tribunals, national courts will need to extend the same respect to those tribunals.

This case presents the most compelling opportunity possible for according judicial comity to the ruling of an international tribunal. Not only has the United States agreed to the jurisdiction exercised by the International Court of Justice, the most important court in the international legal system, but that Court, in rendering its judgment, has itself sought to engage the United States courts in a collaborative judicial enterprise. Specifically, though that Court had jurisdiction to grant Mexico's request for annulment of the convictions and sentences, s*ee Avena* Judgment, para. 119 (252A-253A), it chose not to do so. Instead, the Court ordered that the United States courts themselves conduct review and reconsideration of the convictions and sentences tainted by the violations, in accord with the criteria laid down in the judgment, and then fashion relief for any prejudice. *Id*., para. 153(9) (274A).

"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 that melds the once distinct planes of national and international law." Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003); *see also* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). This Court should accept that invitation by granting the petition to ensure compliance by United States courts with the "authoritative interpretation of Article 36" pronounced in the *LaGrand* and *Avena* Judgments. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J.).

B. This Court Should Grant the Petition to Ensure Uniform Interpretation of a Multilateral Treaty.

The parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Here the United States and some 44 other signatories to the Convention also agreed to submit disputes concerning the interpretation and application of the treaty for binding adjudication by the International Court of Justice. Surely those parties' agreement to that single forum strengthens the presumption that the parties were looking for a consistent interpretation of the treaty provisions. It follows that a State party to the Vienna Convention should defer to the interpretation of the Convention by that Court – especially, needless to say, when that State is not only party to the Convention, but party to the very case in which the Court issued the interpretation.

Again, the *Avena* Judgment confirms that the International Court recognized its own responsibility to ensure uniform interpretation of the treaty. The Court 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 cases between parties to the Convention. *See Avena* Judgment, para. 151 (269A-270A). Again, therefore, this Court should reciprocate by granting the petition in order to ensure that United States courts abide by the Court's authoritative interpretation of the Convention.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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