No. 04-5928

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

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

Respondent.

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

REPLY

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SUPREME COURT U.S.
POLICE DEPARTMENT

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ARGUMENT

I. Respondent Does Not Contest The Basic Points Of The Petition.

A. Respondent Does Not Contest That The *Avena* Judgment Constitutes Binding, Preemptive Federal Law.

Petitioner demonstrated that, because the President signed and the Senate ratified the Vienna Convention and its Optional Protocol, the United States has a binding obligation to comply with the *Avena* Judgment as a matter of international law. Pet. Pt. I.A.1. *Amici* international law experts and former diplomats confirm that point. Brief of International Law Experts and Former Diplomats as *Amici Curiae* ("International Law *Amici*") at 9-15.[1] Respondent does not contest it.

Petitioner also demonstrated that, because the Vienna Convention and its Optional Protocol are self-executing, the *Avena* Judgment constitutes preemptive federal law under the Supremacy Clause. Pet. Pt. I.A.2. Again, *amici* international law experts and former diplomats confirm the point. International Law *Amici* at 15-20.[2] Again, Respondent does not contest it.

Petitioner also demonstrated that, as preemptive federal law, the *Avena* Judgment should apply as the rule of decision in a case, like this one, brought by a Mexican national whose rights were determined in the Judgment. Pet. Pt. I.B. Again, *amici*

[1] *See also* Brief of *Amici Curiae* Amnesty International et al. at 8-9 ("Human Rights *Amici*"); Brief of *Amicus Curiae* of the Government of the United Mexican States at 4-5 ("Mexico *Amicus*"); Brief of *Amici Curiae* the European Union and Members of the International Community at 8-9 ("EU *Amici*"); Brief of Foreign Sovereigns as *Amici Curiae* at 14-18 ("Sovereign *Amici*").

[2] *See also* Human Rights *Amici* at 8-10; Sovereign *Amici* at 15.

international law experts and former diplomats agree, International Law *Amici* at 15-16,[3] and Respondent does not contest.

Finally, Respondent does not contest that, as a matter of international judicial comity and in the interest of uniform treaty interpretation, courts in the United States should apply the interpretation of the Vienna Convention in the *LaGrand* and *Avena* Judgments in any cases involving nationals of States party to that Convention. Pet. Pt. III.

In short, Respondent has not contested that, if the Petition were granted, the Court would agree with Petitioner on both questions presented.

B. Respondent Does Not Contest The Factors Counseling Review Of The Questions Presented By This Court At This Time.

Respondent also does not contest any of the factors Petitioner identifies as counseling a grant of the writ. Respondent offers a boilerplate recitation that there are neither "special or important reason(s)" nor "important questions of law to justify this Court's exercise of its certiorari jurisdiction," Opp. 8, but he nowhere contests the specific points made in the petition.

First, Respondent does not contest that the United States's failure to abide by the *Avena* Judgment would compound the treaty violation that occurred when the Texas officials failed to provide the requisite Vienna Convention notification to Petitioner. 131a ("The state concedes that Petitioner was not notified of his right to contact the Mexican consul."). The International Court of Justice has held that when the competent authorities in the United States breach their Vienna Convention notification obligations,

[3] *See also* Sovereign *Amici* at 14-16.

Article 36(2) of the Convention bars courts in the United States from applying procedural default doctrines to deny relief on a Convention claim. 247a-249a; *LaGrand*, paras. 90-91; *see also Torres v. Mullin*, 124 S. Ct. 919, 919-20 (2003) (Stevens J., concurring) (concluding that "[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair"). The Court of Appeals has held that, under *Breard*, it must still apply the Texas procedural default rule. Given this Court's role in the United States constitutional order and its standing in the international legal community, it cannot leave unreviewed a holding that would constitute a separate and independent breach of the United States's treaty obligations. Pet. 17 n.18; International Law *Amici* at 18-20. If the United States expects other States to accord to United States citizens abroad the Vienna Convention rights the United States itself played such a prominent role in bringing to life, it must ensure that the Vienna Convention is rigorously enforced at home.[4]

Second, Respondent does not contest that the Court of Appeals expressly identified a square conflict on two issues: (a) between, on the one hand, the *Breard* order and the holdings of *LaGrand* and *Avena* and, on the other, numerous United States courts on the question whether the Vienna Convention creates individually enforceable rights,

[4] *See* Pet. 2-5,19; International Law *Amici* at 14-15 (citing the *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) 1979 ICJ 7, 1980 ICJ 3, 5, 24-26 and the continued viability of the approximately 70 U.S. treaties with analogous compromissory provisions as compelling examples for the need for enforcement); Human Rights *Amici* at 2-3 ("[T]he political branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention."); Sovereign *Amici* at 13-14, ("Reciprocity provides the underpinning for Article 36 and international law generally."); Brief of *Amici Curiae* of Ambassador Bruce Laingen, *et al.* at 4 ("Formerly Detained *Amici*") ("[N]othing presents a greater threat to consular assistance abroad than the failure by officials in this country to grant the reciprocal assistance at home.").

and (b) between, on the one hand, the *Breard* order and numerous United States courts following that order and, on the other, the holdings of *LaGrand* and *Avena* on the question whether the Vienna Convention bars the application of procedural default doctrines by courts of the receiving state where the competent authorities of that state have failed in their notification obligations. Pet. 20-24. Nor does Respondent contest the conclusion of the Court of Appeals that only this Court can resolve these conflicts. *See* 132a-133a.[5]

Finally, Respondent does not contest that there is a conflict between the Court of Appeals here and the Oklahoma Court of Criminal Appeals on the question of whether binding, preemptive federal law requires that the adjudication in *Avena* of a Mexican national's own rights must be given effect in the United States legal system notwithstanding any contrary state law. Pet. Pt. II, at 24-26. Again, only this Court can resolve that conflict. *See* International Law *Amici* at 5-6, 9.

II. Respondent Provides No Basis To Deny Review.

The arguments Respondent *does* make in opposition to the Petition ignore the holdings of the Court of Appeals and misunderstand the import of those holdings.

[5] *See also* Human Rights *Amici* at 5 ("The uncertain status of the law surrounding the application of the Vienna Convention in the courts of this country is evidenced by the substantial number of federal decisions and state cases that have generated petitions for *certiorari*, all without success, over the past six years. Moreover, the lower courts have issued many calls for Supreme Court guidance, most notably in *Medellin* itself.").

A. The Court of Appeals Did Not Identify Any AEDPA Bar.

Respondent argues that this case is governed by section 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and recites standards applicable to a certificate of appealability. Opp. 8-9. Though the Court of Appeals held that Petitioner's application was subject to AEDPA, it did not rest on, or even address, any alleged AEDPA bar. *Compare* 121a-123a *with* 131a-133a. And Respondent does not contest that, on certiorari review of the denial of an application for a certificate of appealability, this Court may correct the legal standard applied by the Court of Appeals. Pet. 26 (citing *Tennard v. Dretke*, 124 S. Ct. 2562, 2569 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003)). Simply put, no AEDPA issue arises here. *See* Pet. 20-21 n.21.

B. The Court Of Appeals Did Not Rest On An Independent And Adequate State Ground.

Respondent argues that Petitioner's default under state law provided an independent and adequate state law ground barring federal review. Opp. 10-11. To the contrary, the "independent and adequate" state law ground on which Respondent attempts to rely is the very procedural default rule that the *Avena* Judgment bars United States courts from applying. Since the state law ground squarely violates preemptive federal law in the form of the *Avena* Judgment and the Vienna Convention, the questions presented are ones of federal law.

Surely it does not help Respondent that the Court of Appeals held itself bound by this Court's *per curiam* order in *Breard v. Greene*, 523 U.S. 371 (1998). Opp. 11-13. To the contrary, that holding provides the most compelling reason why this Court should

grant review. The *Breard* order, as a denial of discretionary review, has limited precedential force, Pet. 20 n.20, and that force is further diminished by the circumstances in which it was issued – on the eve of an execution, and without the benefit of full briefing and oral argument, *id.*; *see* International Law *Amici* at 6; Human Rights *Amici* at 15-16. Even more importantly, the *Breard* order predated the *LaGrand* and *Avena* Judgments, Pet. 20-22, so this Court did not have the benefit of the rulings with which the United States had agreed to comply. Pet. Pt. I; *see also* International Law *Amici* at 6; Human Rights *Amici* at 11-12.

As the decision below demonstrates, only this Court can ensure the conformity of United States law with those Judgments and thereby ensure United States compliance with its international obligations. Pet. Pt. II. As Respondent recognizes, the Court of Appeals could not have been more explicit on the need for this Court to act:

> Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims.

Opp. 12 (quoting App. 132a (citing *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989))). If this Court does not grant review here, other United States courts will reach the same erroneous conclusion as did the Court of Appeals – that in *Breard*, this Court instructed United States courts to disregard an International Court ruling with which the elected branches committed the United States to comply. Pet. 22-26.[6]

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[6] *See* International Law *Amici* at 5; Human Rights *Amici* at 10, 15-19; *see also* Mexico *Amicus* at 12-14 (explaining that lower courts have followed *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), which relied on

C. This Court Should Not Decide The Merits Of The Vienna Convention Claim When The Court Of Appeals Expressly Refused To Reach It.

Finally, Respondent argues that this Court should deny the Petition because, were a court to address Petitioner's Vienna Convention claim, it would hold that Petitioner has already received the review and reconsideration ordered by the International Court of Justice. Opp. Pt. III. Respondent is wrong on several grounds.

First, the Court of Appeals did not address, in the alternative or otherwise, that Petitioner had received the review and reconsideration to which the International Court of Justice held he was entitled; it held that this Court's order in *Breard* required that courts in the United States continue to apply procedural default rules in the very circumstances that the International Court of Justice held violated the Vienna Convention. It is no answer to a Petition presenting questions worthy of this Court's review that Respondent believes that, at the end of the day, it will defeat on the merits a request for relief that the judgment under review held could not even be considered. Respondent has this Court's role backwards: the Court chooses to decide a question presented so that lower courts in a wide range of cases may apply its holding; it does not, in the course of deciding a Petition, leap ahead to determine logically subsequent questions that the lower court judgment did not address and that the Petition does not present. Here, the questions whether *Avena* permits a court in the United States to reconsider whether review and reconsideration is required in a given case and, if so, whether it has already been

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the pre-*LaGrand* views of the State Department to hold that Article 36 does not give rise to individual rights).

provided to Petitioner were not questions decided by the Court of Appeals or presented by the Petition.

Second, that point applies with special force here in light of the nature of the questions presented. As the International Court of Justice observed, it is not the *outcome* of the review and reconsideration in any particular case that will determine the United States's compliance with its Vienna Convention obligations, but the *provision* of the review and reconsideration by the United States's courts. 273a. The *Avena* Judgment was rendered after an adversarial proceeding during which the United States fully recited the course of United States proceedings through the District Court's habeas decision, which had come down between Mexico's submissions and those of the United States. Counter Memorial of the United States of America at A-223, App. 38, para. 7 (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. Nov. 3, 2003); *see also* Memorial of Mexico at A1192 (Mex. v. U.S.), No. 128 (I.C.J. June 20, 2003). Yet the Judgment leaves no doubt that the required review and reconsideration had not yet occurred. Specifically, the International Court held that it would be premature to find a breach of Article 36(2) in those cases, including Petitioner's, in which judicial redress in the United States had not yet been exhausted and hence review and reconsideration could still be ordered. 249a. The Court then ordered as relief that such review and reconsideration take place in those cases, including Petitioner's, in which it had found violations of Article 36(1). 273a. In other words, by asking this Court to deny Petitioner the review and reconsideration of his Vienna Convention claims that the International

Court of Justice held he should receive, Respondent asks this Court to sanction the very noncompliance with the *Avena* Judgment that Petitioner asks this Court to prevent.

Finally, by asking this Court to conclude that Petitioner has already received the remedy of review and reconsideration as a ground to deny the Petition, Respondent asks this Court to reach conclusions in disregard of the International Court's holdings on a series of questions about the requirements of review and reconsideration that the Court of Appeals did not decide.[7] For example, as a matter of substance, the International Court squarely held that Article 36 requires that violations of the Vienna Convention be addressed in their own right, not only if they happen to correspond to other rights accorded by United States law. *See* 261a ("The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law."). Yet the state and federal rulings on which Respondent attempts to rely analyzed Petitioner's claims as cognizable only in the guise of a federal constitutional claim. 55a-57a, 84a-85a; *see also* Mexico *Amicus* at 7-8. "Review and reconsideration" conducted on the basis of a fundamentally flawed understanding of the right involved could not possibly meet the requirements of *Avena*.

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[7] In a footnote, Respondent argues that Petitioner has waived his right to eventual review of the Vienna Convention claim on the merits because he has failed to seek certiorari review of the merits of the claim. *See* Opp. at 16, n. 7 (citing *Heath v. Alabama*, 474 U.S. 82 (1984); *Illinois v. Gates*, 462 U.S. 213 (1983); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Hill v. California*, 401 U.S. 797 (1971); and *Cardinale v. Louisiana*, 394 U.S. 437 (1969)). The cases he cites in support of that argument, however, hold only that certiorari will not be granted to review a state court judgment where the question presented was neither raised in nor passed upon by the highest state court. *See* 28 U.S.C. §1257. Those holdings are entirely irrelevant here. In any event, a petitioner does not waive a claim by declining to seek certiorari review of a question not decided by the judgment of which review is sought.

For another example, as a matter of procedure, the International Court held that review and reconsideration must entail an "examin[ation of] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." 253a. In the United States, factfinding occurs in an evidentiary hearing. Yet the state and federal rulings on which Respondent attempts to rely denied Petitioner's request for such a hearing. Again, "review and reconsideration" of this kind cannot meet the requirements of *Avena*.

This Court should ensure that Petitioner receives the review and reconsideration that *Avena* held he was due. When that occurs, a court should find that given, among other things, his young age, his indigence, the suspension of his counsel from the practice of law for ethical violations, the incompetence of his counsel at the guilt and penalty phases, and the extraordinary assistance Mexico provides its nationals facing capital charges, the Vienna Convention violation undermined the fairness of his capital murder trial and prejudiced his defense. *See* Pet. at 9.[8]

III. This Court Should Decide Now Whether The *Avena* Judgment Binds United States Courts.

The Court of Appeals reached two basic holdings on Petitioner's Vienna Convention claim: "1) it [was] procedurally defaulted, and 2) even if it were not procedurally defaulted, the Vienna Convention . . . does not confer an individually

[8] *See* Mexico *Amicus* at 10-12; Sovereign *Amici* at 7-10; *see also* EU *Amici* at 5-6 ("Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.").

enforceable right." 131a-133a. Those holdings reduce to the single, straightforward question of whether a court in the United States must apply the *Avena* Judgment as the rule of decision in a case, like this one, brought by a Mexican national whose rights were adjudicated in that Judgment. Pet. at i (first question). Because the Court of Appeals also discussed *LaGrand*, this case would also allow the Court to settle the import of the *LaGrand* and *Avena* Judgments in cases involving nationals of both Mexico and other States Party to the Vienna Convention. Pet. at i (second question).

There are 48 Mexican nationals in addition to Petitioner and Osbaldo Torres[9] whose Vienna Convention rights were adjudicated in *Avena* and are now at some stage of post-conviction review. Every time one of those nationals seeks to vindicate his Vienna Convention rights in a state court, whether on direct appeal, original state habeas, or successor state habeas, in circumstances where the competent authorities failed in their Convention obligations, the court will first have to decide the questions presented here – whether the Supremacy Clause requires the court to apply *Avena*'s procedural default holding over any inconsistent state law or, alternatively, the court should apply that holding and its counterpart in *LaGrand* as a matter of international comity and in the interest of uniform treaty interpretation. A decision on those points now would therefore provide guidance to state courts in dozens of capital cases.

Likewise, every time one of those individual nationals presents a Vienna Convention claim for federal habeas review, the federal court, too, will first have to

[9] The case of Rafael Camargo, another of the 51 Mexican nationals afforded relief by the *Avena* Judgment, was resolved pursuant to a stipulation by which the parties agreed that Mr. Camargo's death sentence would be commuted to life imprisonment if he waived his right to appeal.

decide the questions presented here. It may be that in some such case, unlike here, the court will then have to decide a contention by the respondent state official that AEDPA bars federal habeas relief, *Avena* notwithstanding. *Compare Breard*, 523 U.S. at 376-77 (as subsequently enacted rule, AEDPA provision barring evidentiary hearing in circumstances presented barred relief on Vienna Convention claim), *with Murray v. Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) (an Act of Congress supercedes an international agreement only if the purpose of the Act to supercede is clear and if the act and agreement cannot be fairly reconciled) *and* Restatement (Third) of the Foreign Relations Law of the United States, § 115 (1) (a) (1987). But, even in those cases, review here would provide critical guidance, because the federal court would not address whether AEDPA prevents it from complying until it decides that it has an obligation to comply in the first place. Thus, review here would provide equally necessary guidance to both state and federal courts hearing the individual claims of the Mexican nationals whose rights were adjudicated in the *Avena* Judgment. Pet. 20-21 n.21.

Further, there are some 118 foreign nationals on death row in the United States.[10] A large proportion of those individuals will come from Vienna Convention countries. If the competent authorities in the United States violated the Vienna Convention in 51 of the 52 cases decided by the International Court in *Avena*, it is likely that they violated the Convention in many of those other cases. Thus, decision on the second question would

[10] This figure is as of September 15, 2004. *See* Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#Reported-DROW>.

provide guidance to the many courts that will adjudicate the Vienna Convention claims of nationals of other States Party to the Vienna Convention.

Finally, by granting the petition, this Court would not only instruct state and federal courts in the United States, but it would speak to the world. The Court of Appeals has held, in effect, that by the *per curiam* order in *Breard*, this Court instructed courts in the United States to ignore the holdings in *Avena* and *LaGrand* and thereby place the United States in breach of the international commitments made by the elected representatives of the American people. That holding places in doubt this Nation's very commitment to the rule of law. It also places in danger the millions of American nationals who live, work, and travel in foreign countries, whose officials might be less inclined to abide by the Vienna Convention when, even in cases involving the ultimate penalty of death, the United States has declined to do so.[11] Only this Court can correct the Court of Appeals's misunderstanding, and this Petition provides the perfect opportunity to do so.

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[11] *See* Formerly Detained *Amici* at 11-12 (noting the importance of vigorous and robust enforcement of the Vienna Convention given that approximately 3.2 million Americans reside abroad, Americans make about 60 million trips abroad each year, and 2500 Americans were arrested abroad in 2002 alone); Mexico *Amicus* at 15-16 ("It should be clear...that if the United States fails to observe its obligations under the Vienna Convention, or fails to observe a judgment rendered under the authority of the Optional Protocol to that Convention, that failure would give other countries reason to ignore their own obligations to the United States and its citizens.").

CONCLUSION

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

Dated: New York, New York
November 9, 2004

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