

No. AP-75,207

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

Ex Parte José Ernesto Medellín

ON APPLICATION FOR WRIT OF HABEAS CORPUS
FROM CAUSE NO. 675430 IN THE
339TH DISTRICT COURT OF HARRIS COUNTY

RECEIVED IN
COURT OF CRIMINAL APPEALS

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**BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW EXPERTS
IN SUPPORT OF APPLICANT JOSÉ ERNESTO MEDELLÍN**

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*¹

Amici are professors and scholars of law expert in the fields of international law, the application of international law by courts in the United States, and the constitutional law of U.S. foreign relations. (A List of *Amici* is set forth in the Appendix at Tab A). *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of a final judgment of the ICJ interpreting a treaty of the United States in a proceeding in which the United States participated fully, and the respect that should be accorded such an interpretation by all courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty involved in the present case. They do not take a position on the death penalty as such; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. They are united in the view that the United States is bound to comply with the ruling of the ICJ on the treaty at issue here, and that the courts of the State of Texas are required to ensure such compliance.

¹ Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amici* represents that no party, person, or entity has paid any fee for the preparation of this brief. All counsel are contributing their services pro bono.

No. AP-75,207

**IN THE COURT OF CRIMINAL APPEALS
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Ex Parte José Ernesto Medellín

**BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW EXPERTS
IN SUPPORT OF JOSÉ ERNESTO MEDELLÍN**

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, International Law Experts, respectfully submit this brief as *amici curiae* in support of Jose Ernesto Medellin.

**STATEMENT OF THE CASE, ISSUES PRESENTED,
AND STATEMENT OF FACTS**

Amici adopt the statement of the case, issues presented, and statement of facts as set forth in the submissions of the applicant.

SUMMARY OF ARGUMENT

Applicant is one of 49 Mexican nationals currently on death row in state courts in the United States, who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128. All those covered by *Avena* are similarly situated, in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations to contact the Mexican consular post, and were convicted and sentenced to death without benefit of timely consular services. The ICJ has held that applicant, as one of the subjects of the *Avena* case, is entitled to review and reconsideration of his conviction and sentence

as a remedy for violation of his rights under the Convention.

At a previous phase of the present matter, this Court denied relief on the grounds that (1) applicant had failed to comply with Texas procedural rules requiring claims to be raised at trial, and (2) applicant had no individually enforceable right to raise a claim under the Vienna Convention. *Ex parte Medellin*, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001). Both prongs of this denial have now been undercut by the ICJ's *Avena* judgment, and by the determination of President George W. Bush on February 28, 2005 that the United States will discharge its obligations under the *Avena* judgment by "having State courts give effect to the decision." Neither the *Avena* judgment nor the President's determination was available to this Court at the time of the previously considered application. This Court must therefore address their legal consequences as a matter of first impression in this State. In so doing, this Court should take account of the fact that the highest judicial body in Oklahoma has already given effect to *Avena*, even before the President's determination confirmed that it is national policy for all state courts to do so.

The *Avena* case and final judgment resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The ICJ judgment interprets a multilateral treaty that protects U.S. nationals abroad as well as foreign nationals here. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obligated under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties in force for the United States – to carry out the ICJ's judgment in *Avena*. These treaties bind the United States at the state as well as

national levels; their relevant provisions and the ICJ's judgment are directed to matters to be carried out in the ordinary course by domestic courts; and state courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States.

The ICJ judgment does not require the United States to set applicant free, or to refrain from carrying out the death penalty, if after full review the Texas courts were to find that the treaty violation had not affected the outcome. What the ICJ judgment requires, and what applicant requests here, is that judicial authorities in Texas provide review and reconsideration of applicant's conviction and sentence to take account of the treaty violation committed by Texas authorities – a violation that the United States has never contested and that the federal government expects the Texas courts to remedy. President Bush's determination on compliance with *Avena* through state courts confirms that this Court is the forum to supply the remedy that *Avena* requires the United States to provide.

ARGUMENT

I. THE ICJ JUDGMENT ESTABLISHES A TREATY RIGHT TO REVIEW AND RECONSIDERATION OF APPLICANT'S CONVICTION AND SENTENCE, WHICH PREVAILS OVER THE GROUNDS OF THE INITIAL HABEAS DENIAL.

Applicant José Ernesto Medellín Rojas is one of 49 Mexican nationals currently on state death rows who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [*Avena*]. All those covered by *Avena* are Mexican nationals who were not advised in

a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention], to contact the Mexican consular post after their arrest. They were all convicted and sentenced to death without benefit of their treaty right to timely consular assistance, and the ICJ has held that as a remedy for this treaty violation, they are entitled to review and reconsideration of their convictions and sentences. This Court must give effect to a final and binding judgment of an international court establishing the authoritative interpretation of a treaty, in respect of persons protected by the treaty whose rights are directly addressed in the judgment.

On June 29, 1993, applicant, then aged 18, was arrested in Texas and was subsequently charged with murder. Though he told the arresting officer and detaining officials that he had been born in Mexico and was not a U.S. citizen, the authorities did not inform him of his treaty rights at any time before his trial, conviction, and sentencing. In 1994, Medellin was convicted of murder and sentenced to death. Mexican consular officials learned of his detention only after he wrote to them from death row in 1997. Medellin thus had no opportunity to secure help from the Mexican consulate before and during trial. The failure to inform Medellin of his consular rights "without delay" constituted a breach of the Vienna Convention.

The violation of the Vienna Convention in Medellin's case, and the subsequent

refusal of the Texas courts to consider the remedial aspects of this breach of treaty,² gave rise to a dispute between Mexico and the United States. As it was entitled to do under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No 6820, 596 U.N.T.S. 487 [Optional Protocol], Mexico brought an application against the United States before the ICJ on January 9, 2003. After full briefing by both Mexico and the United States and an oral hearing held in December 2003, the ICJ entered a final judgment that specifically held in respect of Medellin:

- (1) that the United States committed breaches of the obligation ... to inform detained Mexican nationals of their rights under [Article 36(1)(b)], in the case of the following 51 individuals: ... Medellin (case No. 38) ...;
- (2) that the United States committed breaches of the obligation ... to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above ...;
- (3) that the United States ... also violated the obligation ... to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: ... Medellin (case No. 38)

Avena, para. 106. The ICJ has further specifically held that the appropriate reparation for these breaches “consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration” of Medellin’s conviction and sentence. *Ibid.*, para. 153(9).

Prior to *Avena*, this Court denied Medellin’s timely initial habeas corpus

² On March 26, 1998, Medellin filed a timely state application for habeas corpus, arguing that his conviction and sentence should be vacated as a remedy for the treaty violation. This Court denied the application, *Ex parte Medellin*, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001), on grounds which the subsequent *Avena* proceedings have shown to be based on a misunderstanding of the treaty obligations of the United States. See text at note 2 below.

application raising the Vienna Convention claim, on the basis of the trial court's conclusions that his treaty claim was procedurally defaulted for failure to raise it at trial, and alternatively that the Vienna Convention does not create individually enforceable rights for which a judicial remedy would be available.³ Both of these conclusions of law are inconsistent with *Avena* and thus must be revisited to applicant's benefit in this subsequent application for habeas corpus. In *Avena*, the ICJ explained that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights. *Avena*, paras. 111-113. The ICJ also held in *Avena* that the Vienna Convention gives rise to individual rights and that a judicial remedy of review and reconsideration of a conviction and sentence is required to redress the violation of such rights. *Avena*, paras. 128-134, 140, 153. *Avena* thus determined Medellin's treaty claim favorably, in a binding judgment that this Court cannot ignore on a subsequent habeas application.

Meanwhile, in the first post-*Avena* case to come before a state court, the Oklahoma Court of Criminal Appeals vacated a conviction and death sentence and remanded the case for review and reconsideration in implementation of *Avena*. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). The Oklahoma Court of

³ *Ex parte Medellin*, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001). On federal habeas, the U.S. District Court for the Southern District of Texas denied relief before *Avena* was decided. *Medellin v. Cockrell*, Civ. No. II-01-4078 (S.D. Tex. Apr. 17, 2003), *affirmed sub nom. Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. dismissed*, 125 S.Ct. 2088 (2005). The Fifth Circuit's denial of a certificate of appealability treated the state procedural default rule as an independent and adequate ground precluding federal appellate review.

Criminal Appeals in *Torres* correctly followed the authoritative treaty interpretation in *Avena*, even without having received guidance from the President of the United States on compliance. On remand, the Oklahoma trial court found that the treaty violation had indeed prejudiced the fairness of Torres's trial. *Torres v. Oklahoma*, No. PCD 2004-442, CF-93-4302 (Dist. Ct. Okla. County, Mar. 18, 2005). *Amici* respectfully submit that this Court should follow the *Torres* precedent, which reflects the proper understanding of the role of state courts in ensuring treaty compliance in our federal system.

In light of the authoritative treaty interpretation established in *Avena*, this Court should reconsider its previous denial of habeas relief (Section II below), and should exercise its judicial authority and duty to fulfill the treaty obligations of the United States, which were voluntarily accepted through proper constitutional processes and are binding on state courts by virtue of the Supremacy Clause of Article VI of the U.S. Constitution (Section III). The determination by President George W. Bush that the United States will discharge its obligations under *Avena* through compliance in state courts provides further support for the conclusion that this Court is the forum to supply the remedy that *Avena* requires the United States to provide (Section IV).

II. IN LIGHT OF THE AUTHORITATIVE TREATY INTERPRETATION IN AVENA, WHICH PRESENTS A LEGAL BASIS THAT WAS NOT RECOGNIZED BY AND COULD NOT REASONABLY HAVE BEEN FORMULATED FROM PREVIOUS FEDERAL AND STATE PRECEDENTS, THIS COURT SHOULD GRANT THE SUBSEQUENT APPLICATION FOR HABEAS CORPUS.

In *Breard v. Greene*, 523 U.S. 371 (1998), the U.S. Supreme Court accepted that it should "give respectful consideration to the interpretation of an international treaty

rendered by an international court with jurisdiction to interpret such" 523 U.S. at 375. Nonetheless, in a procedural posture not conducive to plenary consideration of the important issues at stake, the Supreme Court went on to interpret Vienna Convention Article 36 in a manner that turned out to be inconsistent with the interpretation that the ICJ later gave in *LaGrand* (F.R.G. v. U. S.), 2001 ICJ 104, and in *Avena*. In *Breard*, the treaty issues had not been briefed on the merits at either the ICJ or the Supreme Court; and the ICJ order in question was a provisional measures order whose effect was disputed,⁴ rather than a final judgment whose binding force is clearly established by the U.N. Charter and the ICJ Statute (see Section III.B below). By contrast, the present matter has had the benefit of full briefing at the ICJ with full U.S. participation, and the final judgment constitutes an authoritative and legally binding interpretation and application of the treaty. This Court should thus reconsider those aspects of its previous ruling that may have been based on what has subsequently been determined to be an incorrect interpretation of the treaty; should give priority to *Avena* over any pre-*Avena* rulings of federal or state courts that may have influenced the previous denials of relief in this matter; and should settle important questions of this Court's own responsibility to ensure treaty compliance that were either not resolved on the merits or were addressed insufficiently in earlier proceedings.

⁴ The ICJ later held that provisional measures orders are binding. *LaGrand*, 2001 ICJ 104. Cf. *Medellin v. Dretke*, 125 S.Ct. 2088, 2091 n. 3 (2005) (noting that *Breard*, unlike the present case, did not involve a final ICJ judgment).

A. Petitioner's Treaty Right to Procedural Protections as Ordered by the ICJ Cannot Be Precluded by a Failure to Raise the Treaty Claim at Trial.

This Court's previous ruling in the present matter concluded that a habeas petitioner alleging a Vienna Convention violation has no remedy on a procedurally defaulted claim. The ICJ ruling in *Avena* has undercut this holding, and has also cast doubt on the soundness of pre-*Avena* state and federal decisions on which this Court may have relied in its previous disposition.

It is important, in the view of *Amici*, to keep in mind the purpose of Article 36 of the Consular Convention, which (like the *Miranda* rule in the United States) is not addressed to guilt or innocence or to the appropriateness of a sentence. Rather, Article 36 is addressed to procedural safeguards to inform a defendant of his rights, so that the determination of guilt and of punishment in the event of conviction are carried out under procedures enabling the defendant to have the benefit of all the rights to which he is entitled – including his treaty rights. It cannot be the law that a treaty-based opportunity to secure a treaty-based right, whose very purpose is to protect a foreign defendant, can be snuffed out by failure to assert the right under a state procedural rule, when that failure itself arises from a violation of the treaty by state officials. As in the *Torres* case in Oklahoma, where the state courts granted review and reconsideration in implementation of *Avena* and subsequently found that the treaty violation had prejudiced the fairness of the original trial, this Court must ensure a forum in which the treaty claim can be determined on its merits.

This Court's previous disposition left unaddressed the important questions of law

that would arise if responsibility for redressing violations of an international treaty committed by state authorities were thought to be beyond the power of the state judiciary to correct on a habeas corpus application. Absent a judicial remedy, the state governor would be the organ of treaty compliance of last resort – a result clearly at odds with the Supremacy Clause of Article VI of the U.S. Constitution which obliges state *judges* to fulfill treaties,⁵ as well as with the ICJ's conclusion in *Avena* that executive clemency is an inadequate remedy for a treaty violation. For similar reasons, state procedural default rules cannot cut off the exercise of a treaty right,⁶ when the authoritative international interpreter of the treaty has determined that such applications of procedural default rules are themselves treaty violations. This Court has the authority and duty to correct such violations on a subsequent habeas application.

B. Recent Decisions of the Supreme Court Support Compliance with the ICJ Judgment by This Court.

Since *Breard*, the U.S. Supreme Court has addressed the considerations that properly inform the allocation of authorities between state and national levels in respect of foreign relations, as well as those affecting jurisdictional power in foreign relations cases. These post-*Breard* rulings bear upon the duty of this Court to give effect to the ICJ judgment in *Avena*.

⁵ “[A]ll 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.

⁶ As the Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 212 (1962), “Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.”

In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), the Supreme Court noted, in invalidating a state law, that European states and Japan had lodged complaints at the World Trade Organization against the state measure, and that the national government had been embroiled for some time in an international dispute settlement procedure.⁷ *A fortiori*, in the face of a final and binding judgment from a treaty-based dispute settlement procedure, a state procedural rule must not impede treaty compliance and a judicial remedy must be available.

In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court invalidated a state law because of conflict with federal policy embodied in an executive agreement on Holocaust claims. The judgment of an international tribunal authoritatively interpreting a treaty approved by the Senate under Article II of the Constitution stands on a stronger footing than the executive policy that was held to preempt state law in *Garamendi*. See further Sections III.C and IV below.

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004), even the strenuous opposition of the Executive to the availability of habeas relief did not persuade the Supreme Court that the courthouse door should be closed to foreign habeas petitioners. Here, of course, the President supports rather than opposes the judicial remedy that this Court has power to grant. As in *Rasul*, the international commitments and the reputation of the United States as a law-abiding nation are at stake. This Court should therefore act to preserve and effectuate the availability of a judicial remedy for denial of rights guaranteed by an

⁷ There was no final international judgment in *Crosby*, as there is here, since the WTO proceedings had been suspended by consent.

international treaty, as confirmed and mandated by the ICJ.

Finally, the Supreme Court's disposition of applicant's federal petition strongly implies that this Court is now properly seized of applicant's treaty claim and should accord the internationally required remedy, free from any perceived impediments from state procedural rules or from prior denial of relief in this or similar matters. In dismissing certiorari after oral argument, the Supreme Court observed *per curiam* that Medellin had filed the present application in reliance in part on President Bush's action which occurred after certiorari had been granted, and that the state court proceeding "may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ *required*, and that Medellin now seeks in this proceeding." *Medellin v. Dretke*, 125 S.Ct. 2088, 2090 (2005) (emphasis added); see also 125 S.Ct. at 2089. The Supreme Court also distinguished its own *Breard* ruling, noting that at the time of *Breard* "we confronted no final ICJ adjudication." *Id.* at 2091 n. 3.

As President Bush has confirmed, it thus falls to this Court to fulfill its obligation under the U.S. Constitution and international law to ensure that Texas courts properly cure the treaty violation that Texas officials committed in failing to inform Medellin of his treaty rights, through the remedy of review and reconsideration *required* by the ICJ. We now turn more specifically to the nature of the international obligation involved.

III. THE ICJ JUDGMENT RESULTED FROM A TREATY-BASED JUDICIAL PROCESS TO WHICH THE UNITED STATES AGREED, IN WHICH THE UNITED STATES PARTICIPATED FULLY, AND WHICH BINDS THE UNITED STATES AS A WHOLE.

Amici respectfully draw the attention of this Court to the fully consensual nature of

the obligations undertaken when the United States agreed by treaty to the rules of consular law in the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes. The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses in treaties; but once having given consent to a treaty and to a treaty-based dispute settlement provision, the United States is bound to comply with the obligations to which it has agreed. State courts are required to ensure such compliance under the Supremacy Clause.

A. The Vienna Convention Protects U.S. Nationals Abroad and Foreign Nationals in the United States.

The Vienna Convention codifies and transforms into multilateral treaty law a body of rules that evolved over centuries. Until the 1960s, consular practice was governed by customary law and bilateral treaties. While the core customary law of consular relations was generally well-understood, uncertainties persisted and disputes frequently arose. Disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – led to diplomatic protests and international arbitration. See 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970).

In the 1920s, a U.S.-Mexican Claims Commission (established by treaty to resolve disputes involving treatment of nationals) considered claims of several U.S. nationals for having been arrested in Mexico and detained without access to a U.S. consular office. Regarding the opportunity to communicate with the consulate, the Commission held that

“a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity.” *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; see also 4 Hackworth 830. Conversely, in an incident where Mexico complained that California officials had not given the Mexican consulate access to a Mexican citizen detained in a California jail, the Department of State stressed the importance of California’s compliance with the standards maintained by the United States in its dealings with other countries:

Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

By the middle of the 20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law not only produce greater certainty in rules governing state behavior, but also enjoy a clearer status than uncodified custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance with consular law and avoid or mitigate the kinds of problems that the examples from U.S.-Mexican practice illustrate; it would also obviate the need for special arbitration agreements in consular disputes.

Codification of the rules of consular law was undertaken by the U.N. International

Law Commission [ILC]. See 1961-II Y.B. INT'L L. COMM'N 88-128. A diplomatic conference on the ILC draft resulted in the Vienna Convention, which was opened for signature on April 24, 1963, and entered into force on March 19, 1967. See Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States played a leading role in the Vienna conference and in the negotiations over the specific wording of Article 36 of the Vienna Convention and the Optional Protocol. See Report of U.S. Delegation at 41, 59-61. Indeed, the United States proposed the provision on dispute settlement that became the Optional Protocol. See Report of U.S. Delegation at 72-73. Not only did the United States initiate and actively advocate the proposal for binding dispute settlement, but it resisted others' efforts to eliminate or weaken the dispute settlement provisions. See Report of U.S. Delegation at 73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol on compulsory dispute settlement that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.* As discussed below, the United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969. As of 2005, the Vienna Convention has 167 parties. See STATUS OF MULTILATERAL TREATIES MAINTAINED BY THE U.N. SECRETARY-GENERAL, *available at* <http://untreaty.un.org>.

The Vienna Convention system promotes a uniform and high level of compliance among the treaty parties. *Avena*, para. 47. Of course, no state can unilaterally determine the meaning of an international treaty. See *Jesse Lewis (The David J. Adams) Claim* (U.S.

v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (decision of British court could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,⁸ or establish the measure of its own treaty compliance. For the same reason, disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach of the Convention, cannot be determined by the United States as one party to the dispute. For authoritative resolution of such disputes, the Optional Protocol confers jurisdiction on the ICJ.

Refusal to grant review and reconsideration of Medellin's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when Texas authorities failed to inform Medellin of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 165 parties to the Convention. In view of the immense number of nationals of the United States who travel or work abroad, the United States has a special

⁸ For this reason, U.S. courts ought to give careful consideration to reasoned positions of foreign or international as well as U.S. courts on points of treaty interpretation. Cf. *Olympic Airways v. Husain*, 124 S.Ct. 1221, 1232 (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its judgment is not just advisable but required. By the same token, the judgment of the Oklahoma Court of Criminal Appeals in *Torres* should be followed, in the interests of consistent application of the present treaty throughout the United States.

stake in the worldwide, faithful performance of the Convention.

B. The United States Fully Consented to ICJ Jurisdiction to Decide Disputes Under the Vienna Convention, Within the Framework of the U.N. Charter and ICJ Statute, and Is Therefore Bound to Comply.

Amici respectfully emphasize that the United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted a binding obligation to carry out the resulting judgment. The basis for the compulsory jurisdiction of the ICJ over this dispute is Article I of the Optional Protocol.⁹ The United States consented through the proper processes under domestic and international law both to submit Vienna Convention disputes to ICJ jurisdiction, and to comply with the ICJ's judgment in a matter interpreting a treaty with an agreed dispute settlement protocol.

Under Article 94(1) of the U.N. Charter, 59 Stat. 1031, T.S. 993, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which is annexed to the U.N. Charter and is an integral part thereof,¹⁰ decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added); thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellin matter), the decision of the ICJ

⁹Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

¹⁰ According to Article 93 of the U.N. Charter, all U.N. Members are *ipso facto* parties to the ICJ Statute.

is indeed binding. By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the duty to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." At all times relevant to *Avena* and *Medellin*, the Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute, as President Bush's determination confirms.¹¹ Proceedings under Article 36(1) produce binding judgments under Article 59 of the Statute.¹²

It is critical for the United States to uphold the obligatory character of an ICJ judgment concerning the Vienna Convention, not only in order to uphold the integrity of commitments of international law but also because this treaty protects important U.S. interests. The United States was the first state to turn to the ICJ in a Vienna Convention

¹¹ On March 8, 2005, the United States gave notice of withdrawal from the Optional Protocol. Under international law, this notice could take effect only prospectively and does not affect in any way the rights of Mexico and of applicant under *Avena*. See Section IV below for President Bush's conclusive determination that the Vienna Convention and Optional Protocol were both in force for the United States at all relevant times and gave rise to obligations under *Avena* to be discharged in state courts.

¹² The treaty-based compulsory jurisdiction between states under Article 36(1) of the ICJ Statute is entirely separate from the procedure under Articles 65-68 of the ICJ Statute according to which the ICJ may render advisory opinions to international organizations in certain matters. The *Avena* ruling in respect of *Medellin* is not an advisory opinion but rather a binding judgment under Article 59 of the ICJ Statute and Article I of the Optional Protocol.

dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in Tehran in 1979. See *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol to submit to compulsory jurisdiction when disputes arise and to abide by ICJ decisions. See 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152. The availability of the ICJ to the United States in that case marked a major advance over the situation prior to the Vienna Convention, when the United States was unable because of the lack of preexisting jurisdictional consent to bring disputes about denial of consular access to an authoritative tribunal.¹³ When the ICJ indicated provisional measures against Iran in 1979 and entered a final judgment in favor of the United States in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.¹⁴ These

¹³ In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access in respect of four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Vienna Convention and the Optional Protocol.

¹⁴ See Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici's* knowledge, with only two exceptions (see below) all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, *TREATIES IN FORCE*. Two treaties with ICJ compromissory clauses came into force for the United States after the completion of the Morrison study: the Convention on the Physical Protection

include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:¹⁵ in total, the United States has been party to 21 cases at the ICJ,¹⁶ of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.¹⁷ Since each of the 70 treaties with an ICJ dispute settlement clause entails binding obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial

of Nuclear Materials, T.I.A.S. No. 11080 (in force as of Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force as of Jan. 6, 1985).

In 1985 the United States gave notice of termination of its acceptance of compulsory jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of its treaty of friendship, commerce and navigation with Nicaragua, the two bases of jurisdiction on which the ICJ had relied in the *Nicaragua* case, note 18 below.

As noted above (note 10) the United States has recently given notice of withdrawal from the Optional Protocol under the Vienna Convention. That notice has no effect on Medellín's legal rights under *Avena*.

¹⁵ For a listing of all ICJ cases from 1946 to the present grouped by state, see the ICJ website at www.icj-cij.org [ICJ Website].

¹⁶ The United States has also taken part in almost all of the two dozen proceedings involving requests for advisory opinions under Article 65 of the ICJ Statute. See Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions*, in *CROSSROADS* at 423; for a current listing, see ICJ Website.

¹⁷ The cases initiated by the United States include seven involving Soviet-bloc aerial incidents. The United States invoked the ICJ in the *Tehran Hostages* case against Iran (1979-81), the *Gulf of Maine Boundary* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). See text at notes 20-22 below.

protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals as confirmed in *Avena*, and it is therefore the responsibility of the judiciary in this case to ensure compliance.

The United States has a crucial stake in maintaining a record of compliance with ICJ judgments, since we continue to be an active litigant in that forum. Compliance with ICJ final judgments has generally been quite high, including in the cases in which the United States has been a party: recent studies find overall compliance with approximately two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period.¹⁸ States have exceptionally disregarded the ICJ's rulings when they considered that the Court lacked a proper consensual foundation to decide the case, notably where respondents insisted that the Court had been granted no competence to decide a matter involving a state's vital national security interests.¹⁹ In the present case, of course, jurisdiction was by consent and no U.S. security interest would be prejudiced by compliance. Indeed, President Bush's determination (Section IV below)

¹⁸ See Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (finding compliance rate of 60% with final judgments issued over last 15 years, with likelihood that rate would go up to 80% rate for previous periods in light of states' efforts to achieve compliance over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (finding an overall compliance rate of 68%, counting disregard of provisional measures orders as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, in CROSSROADS at 288, 310-319 (finding only 5 cases of noncompliance with final judgments 1946-1986).

¹⁹ See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, discussed further at note 26 below. For similar reasons, France denied the existence of proper ICJ jurisdiction in the *Nuclear Tests* cases (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing their acceptances under the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

underscores the U.S. interest in ensuring compliance.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (France v. United States), 1952 ICJ 176.²⁰ In the *Gulf of Maine Boundary* case (Canada/United States), 1984 ICJ 246, the final judgment drew a single maritime boundary in the Gulf of Maine area. Both sides accepted the judgment and promptly complied.²¹ In *ELSI*, 1989 ICJ 15, the United States evidently favored the ICJ forum as part of its diplomacy and accepted the final judgment as dispositive of the

²⁰ The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all pending cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive of legal issues. See Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco—Criminal Jurisdiction over U.S. Citizens— ... —International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199 (1981) (noting that the French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary").

²¹ Compliance having been assumed and therefore not challenged, only a few cases in the two countries refer to the ICJ judgment as part of the relevant legal background for matters in litigation. See, e.g., *Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned, with reference to vessel operator's apprehension of possibility of detection by Canadian patrol boat on Canadian side of the line); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54, [1992] F.C.J. No. 410, *reversed*, [1995] 2 F.C. 467, 1995 F.C. LEXIS 146, *affirmed*, [1997] 1 S.C.R. 12, [1997] S.C.J. No. 5 (plaintiff sought lobster fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485, 1985 CarswellNat 439 (Tax Court of Canada 1985), paras. 142-147 (taxpayer claimed that offshore fish processing activity occurred "in Canada"; Tax Court noted that ICJ decision had become available after arguments had concluded).

claims it had raised with Italy on behalf of U.S. investors.²² Thus, apart from *Nicaragua* (addressed in note 26 below) and such continuing compliance problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.²³ In view of the U.S. interest in maintaining this compliance record,²⁴ this Court should enter

²² See Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

²³ In addition to the cases discussed in the text, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. France, U.K., U.S.), 1954 ICJ 19, was dismissed because of the absence of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugoslavia v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an ex gratia payment in settlement. *Lockerbie* (Questions of Interpretation and Application of the 1971 Montreal Convention) (Libya v. U.S.), 2003 ICJ 152, was discontinued in connection with an overall settlement of matters in dispute. *Vienna Convention on Consular Relations* (Paraguay v. U.S.), 1998 ICJ 426, was discontinued after the entry of provisional measures and before proceedings on the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

²⁴ On the rare occasions when the United States has failed to abide by consensually-assumed dispute settlement obligations, U.S. interests have unquestionably suffered as a result. Many authors have documented the detriments to U.S. economic, commercial, political and other interests in Mexico from the prolonged failure of the United States to comply with the arbitral award in Mexico's favor in the *Chamizal Tract* arbitration. See, e.g., SHELDON B. LISS, *A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964* 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, *MÉXICO Y EL ARBITRAJE INTERNACIONAL* 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (on U.S. difficulties in negotiating with Mexico over expropriation of American-owned agrarian and petroleum properties, in view of U.S. noncompliance with *Chamizal* award); see also FRANCIS J. WEBER, *THE*

the appropriate orders to uphold the U.S. obligations of compliance in the present case.

The Supreme Court has long recognized that when the United States undertakes to participate in an international dispute settlement procedure, the good faith of the United States is implicated in carrying out the resulting award. See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), the Supreme Court explained that claims by nationals of one country against another can be “sources of friction” in international relations and that international dispute settlement procedures embraced by the U.S. political branches are a traditional and proper method for resolving such grievances. The Supreme Court has likewise repeatedly referred to the ICJ as an authoritative tribunal for settling disputed points of international law.²⁵ Implementation of the *Avena* judgment here is thus consistent with established jurisprudence in respect of international dispute settlement.

C. The Vienna Convention, Optional Protocol, and *Avena* Bind the State Courts and May Be Implemented Through Judicial Action.

The ICJ judgment in respect of Medellin implements a treaty obligation of the

UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (on linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President John F. Kennedy said in a news conference in 1962 that because the United States had not carried out the award, “Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries.” See *Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual *Chamizal* settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. See Liss at 95-97; 3 Whiteman at 680, 696-699. For similar reasons (see Section IV), President Bush has authority to settle the present treaty dispute with Mexico.

²⁵ See, e.g., *United States v. Maine*, 475 U.S. 89 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985); *United States v. Louisiana*, 394 U.S. 11 (1969) (all referring to the *Fisheries* case (U.K. v. Norway), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all state courts. Hence, on Medellin's current habeas petition, *Avena* must be followed as the rule of decision.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. See 115 Cong. Rec. 30997 (Oct. 22, 1969).²⁶ The Vienna Convention has been understood at all times to be a self-executing treaty. As the Department of State witness informed the Senate in the hearings on the Vienna Convention, "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. See also RESTATEMENT, Intro. Note preceding § 464. Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law not only is required by the Supremacy Clause but was spelled out explicitly in the State Department's responses to the Senate's questions, as follows:

Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?

Answer [after explaining a possible area of conflict not relevant here].

²⁶ The Vienna Convention and Optional Protocol entered into force for the United States on December 24, 1969. See RESTATEMENT (Third) of the Foreign Relations Law of the United States (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (preceding § 464) and § 465.

To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of self-executing treaty obligations.²⁷ Just as no legislation was required to implement the treaty obligation to inform Mexican nationals of their consular rights, no further action from the federal political branches is needed to afford Medellin the treaty-based remedy that the ICJ has found to be necessary to redress the failure to inform Medellin of this right.²⁸ *Avena* clarifies obligations that existed when Medellin was

²⁷ The decision in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), which includes dicta suggesting that an ICJ judgment might not be self-executing, is distinguishable. In *Nicaragua*, the ICJ judgment did not involve a self-executing treaty, but rather entailed aspects of international law (the use of military force) that would be considered non-self-executing in U.S. law. The plaintiffs who sought to enforce the ICJ's *Nicaragua* judgment lacked any relationship to the ICJ case, see 859 F.2d 938, while *Avena* explicitly deals with Medellin and specifies the remedial dimension of his claim under a self-executing treaty. Finally, Congress and the President had repudiated the ICJ judgment in *Nicaragua* by enacting a subsequent statute in conflict with it, which the court of appeals found determinative, see 859 F.2d 936-937. Here, there is no statute rejecting *Avena*, and the President has formally endorsed compliance through state courts. See Section IV.

²⁸ See Section IV on President Bush's determination. In *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2763, 2767 (2004), the Supreme Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Judicial enforcement of self-executing treaties is to be expected, and the same should follow for implementation of authoritative and binding international interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing, and since the President supports state judicial implementation here, *Sosa*'s reasoning favors enforcement of applicant's treaty rights in a state habeas proceeding.

arrested (the obligation to inform him of his treaty rights) and subsequently when he was tried, convicted, and sentenced in ignorance of his treaty rights (the treaty-based obligation to remedy the violation from failure to inform). The remedy prescribed is well within the competence of this Court to review and correct illegal acts in connection with criminal trials.

In failing to give applicant the consular notification and opportunity of consular assistance required by the Vienna Convention, Texas authorities placed the United States in violation of its treaty obligation, as the ICJ has held. The ICJ did not order the United States to pay monetary compensation (which Mexico did not request), but it held that an apology was not enough. The reparation ordered by the Court was for the United States to grant review and reconsideration of the conviction and sentence of applicant and other similarly situated Mexican nationals. What applicant seeks is vindication in concrete terms of a treaty-based right that the ICJ has awarded to Mexico in the exercise of diplomatic protection on his behalf and for his benefit. Failure to accord this treaty-based remedy would place the United States in continuing violation of its obligation to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the manner in which state criminal jurisdiction would ordinarily be exercised.²⁹ Treaties may

²⁹ Since both Mexico and the United States are federal states, there is a strong interest in ensuring compliance with international obligations at both state and federal levels, in both the United States and Mexico. If U.S. states were free to violate and then fail to remedy treaty violations, with no judicial remedy available, the consequences in U.S.-Mexican relations would be severe. The United States as a whole is responsible for state violations of international law. Where state courts can avoid such violations

and often do require states to modify the exercise of their judicial jurisdiction, and even to refrain from exercising criminal jurisdiction. For example, the Vienna Convention codifies rules of international law granting immunities from judicial jurisdiction to consular officers, including in criminal matters. See Vienna Convention, arts. 41-45. Where a treaty provides for the immunity of a foreign official from judicial jurisdiction, state and federal courts alike are required to recognize the immunity accorded by international law, notwithstanding any impact on state law enforcement interests. See *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul had to be dismissed because of immunity under Vienna Convention). Cf. *In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The obligation of state judges to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), the Supreme Court established that a treaty with Britain would prevail over state laws confiscating the

by carrying out the judgment of an authoritative international tribunal, they are required to do so.

In the early twentieth century, in preparation for an arbitration with Mexico involving protection of nationals of one country in the territory of the other, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of considerations of U.S. federalism that would apply on a mirror-image basis. The Department of State replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth 593, 597 (1943).

Indeed, the United States has even accepted an obligation to make monetary reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. See RESTATEMENT § 207, Reporters' Note 3.

property of British subjects:³⁰

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. ... It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. -- If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole. ...

Four things are apparent on a view of this 6th article of the National Constitution. ... 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

In *Asakura v. Seattle*, 265 U.S. 332 (1924), a treaty providing for rights of Japanese nationals to carry on trade on a nondiscriminatory basis was invoked to invalidate a city ordinance excluding foreigners from certain occupations. The Supreme Court said:

The treaty is binding within the State of Washington. ... It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

265 U.S. at 341.

State courts have frequently upheld treaty rights in cases coming within their

³⁰ See also *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law).

Treaties providing inheritance rights for aliens have been held to prevail over state laws disqualifying aliens from inheriting. See *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties giving aliens such rights. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

jurisdiction, without awaiting any instruction from the federal Executive or the legislature. The Court of Appeals of Kentucky, in an opinion that the Supreme Court later called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878). Indeed, state courts have regularly applied consular treaties as the supreme law of the land on a self-executing basis. See, e.g., *In re Zaleski*, 292 N.Y. 322 (1944) (holding a U.S.-Polish consular treaty to be the supreme law of the land and giving it a liberal construction to allow the Polish Consul-General to act as the personal agent for a Polish national and to exercise her right of election under a will).

The Supreme Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). Where, as here, the Senate unanimously approved a treaty designed to secure the rights of Americans around the world and the ICJ has entered a judgment requiring review and reconsideration of a state conviction and sentence as the remedy for violation of that same treaty, this Court is not free to ignore the treaty-based judgment in favor of the foreigner. If Texas were to defeat the national

interest in treaty compliance here, it would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and requires state courts to enforce them.

In *Hines v. Davidowitz*, 312 U.S. 52 (1941), which invalidated a Pennsylvania alien registration law as incompatible with the federal scheme for regulation of the treatment of aliens, the Supreme Court emphasized:

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. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. ... [A]part from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65. The Court found it of importance that the state measure “is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits” *Ibid.*

IV. THIS COURT SHOULD GIVE EFFECT TO *AVENA* AS THE RULE OF DECISION, IN LIGHT OF PRESIDENT BUSH'S DETERMINATION THAT THE UNITED STATES WILL COMPLY WITH *AVENA* THROUGH STATE COURT PROCEEDINGS.

Amici submit that the effect of President Bush's determination on compliance with *Avena* is to remove any doubt that the *Avena* judgment constitutes the rule of decision in all cases in which the individuals covered by *Avena* have presented their Vienna

Convention claims to state courts. The text of the presidential determination states:

SUBJECT: Compliance with the Decision of the International Court of Justice in

Avena

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

This determination first of all acknowledges the party status of the United States to the relevant treaties and the jurisdiction of the ICJ to decide the dispute; it further acknowledges the existence of international obligations for the United States under the *Avena* judgment; and it provides that compliance in state courts will discharge those obligations. Where the President of the United States has formally acknowledged the obligatory force of a treaty and treaty-based decision establishing the interpretation of the treaty, a state court has no authority to reach a different view of either the existence of the obligation or the duty to comply.

As a general rule, the views of the federal Executive on matters involving treaties are given "great weight;" and while the Supreme Court has counseled that such views are "not conclusive upon a court called upon to construe such a treaty in a manner involving

personal rights,” see, e.g., *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939), and has reserved to the judiciary the prerogative of *expanding* the personal rights claimed by individuals under treaties beyond the Executive position, it has never been known to *restrict* a treaty right that the Executive has formally acknowledged. Cf. *Factor v. Laubenheimer*, 290 U.S. 276 (1933) (interpretation giving liberal construction rather than restricting rights claimed under treaty is to be preferred). Surely a *state* court has no authority to deviate from the Executive position formally accepting that the United States has an international obligation concerning a treaty right invoked by a foreign national and will discharge that obligation, in view of the national interest in treaty compliance. Cf. *Baker v. Carr*, 369 U.S. 186, 212 (1962), citing *Terlinden v. Ames*, 184 U.S. 270, 285 (1902) (duty of courts to accept Executive view that U.S. has undertaken and not terminated a treaty obligation,, and to resolve any conflicts with state law in favor of treaty compliance).

This view of the President’s determination also coheres with the consistent jurisprudence of the Supreme Court on the authority of the President to settle disputes with foreign governments in a manner that supplies the rule of decision for state courts and displaces any contrary state law. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Supreme Court approved the settlement of claims with the Soviet Union by executive agreement and found that the policy of the United States as determined by the President would displace any contrary state law. In *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court confirmed that an executive policy in favor of achieving “legal peace” with foreign

governments had to prevail over a state law affecting the jurisdiction of state courts.³¹

Whatever might be the limits of Executive authority to settle the claims of foreign governments and their nationals against the United States and its states in some hypothetical scenario not involved here,³² it falls clearly within the core of Executive power under the Constitution for the President to accept the outcome of a treaty-based dispute resolution process as definitively settling an underlying dispute over treatment of a foreign national by one of the states.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of Texas are remedied by the Texas courts themselves, as proper organs of treaty compliance in the U.S. federal system. Review and reconsideration of Medellin's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with this treaty obligation. Such consequences could include refusal of other parties to the Vienna Convention to ensure the treaty-based rights of U.S. nationals abroad, as well as prejudice in connection with dispute settlement under other treaties and in our bilateral relationship with Mexico.

By granting the writ of habeas corpus in order to afford the remedy of review and reconsideration required to redress the treaty violation, this Court will fulfill its


³¹ See also *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981) (upholding executive claims settlement power to settle claims through an international dispute mechanism, and applying executive policy as definitive in pending lawsuits involving foreign state interests).

³² No question is presented here, for example, of constitutional rules on expenditures, or of presidential powers where Congress has placed qualifications on U.S. acceptance of a particular dispute settlement procedure.

responsibility within our constitutional system and will maintain the standard for compliance with international obligations that is critical to protect U.S. interests abroad.

Respectfully submitted,

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I hereby certify that, pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, on this 29~~th~~ day of July, 2005, I served a copy of the foregoing Brief of *Amici Curiae* International Law Experts in Support of Jose Ernesto Medellin via the method indicated on the following:

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