

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

**BRIEF OF INTERNATIONAL LAW
EXPERTS AND FORMER DIPLOMATS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

CHARLES OWEN VERRILL, JR.
JOHN B. REYNOLDS, III
BRUCE A. McDONALD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

LORI FISLER DAMROSCH
Counsel of Record
435 West 116th Street
New York, NY 10027
(212) 854-3740

Counsel for Amici Curiae

190344



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(800) 274-3321 • (800) 359-6859

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in international law and the application of international law by courts in the United States, and former U.S. diplomats.¹ (A List of *Amici* is set forth in the Appendix.) *Amici* have expertise concerning international tribunals, including the International Court of Justice (ICJ), and on the positions of the U.S. Department of State with respect to 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, and the respect that should be accorded such an interpretation by 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 position 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 on the view that the United States is bound to comply with the ruling of the ICJ on the treaty at issue, and that the federal judicial power is the organ to bring about such compliance.

SUMMARY OF ARGUMENT

Petitioner 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*, 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, were convicted and sentenced to death without benefit of timely consular services, and have been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for this treaty violation.

1. No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

In light of *Avena*, which is binding on the United States, this Court should revisit its per curiam ruling in *Breard v. Greene*, 523 U.S. 371 (1998), to clarify that a federal remedy is available to implement this treaty right.

The court below believed itself constrained to deny the relief that the ICJ has now found to be required to redress the treaty violations in *Avena*, by virtue of this Court's previous denial of such relief in *Breard*. When this Court considered Vienna Convention claims of which the ICJ had been seized in *Breard* and in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) [*LaGrand*], the ICJ orders in question were not final judgments, whose binding force is unquestioned, and the petitions were brought to this Court imminently before the scheduled executions, with inadequate opportunity for full briefing. Thus this Court has never given plenary consideration to the issues raised in this petition and should do so now.

Avena 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. It interprets a multilateral treaty which 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 obliged 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 *Avena*. All state and federal courts need to exercise their judicial powers within their respective jurisdictions consistently with the authoritative interpretation of the Vienna Convention given in *Avena*.

The petition should be granted to resolve an unsettled important question of federal law involving the national interest in treaty compliance, as to which the lower courts are divided and much in need of this Court's instruction. In view of the confusion in the courts below about the per curiam *Breard* holding, this Court should allow plenary review to prevent a misinterpretation of its prior ruling from obstructing U.S. compliance with obligations under four treaties.

ARGUMENT

I. THE ICJ JUDGMENT ESTABLISHES A TREATY RIGHT TO REVIEW AND RECONSIDERATION OF PETITIONER'S CONVICTION AND SENTENCE.

Petitioner's case is typical of the 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, TIAS 6820, 596 UNTS 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 they have all been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for this treaty violation. Petitioner's case is further typical in that the treaty claim was held to be procedurally defaulted for federal habeas purposes, notwithstanding the ICJ's binding ruling that the application of a procedural default rule to foreclose consideration of treaty claims is itself a violation of the Vienna Convention. This petition thus presents a proper vehicle to clarify the import of a final and binding judgment of an international court establishing the authoritative interpretation of a treaty, in respect of foreign nationals protected by the treaty whose rights are directly addressed in the judgment.

On June 29, 1993, José Ernesto Medellín, 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 rights under the Vienna Convention at any time before his trial, conviction, and sentencing. In 1994, Medellín 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. Medellín thus had no opportunity to secure help from the Mexican consulate before and during trial.

The failure to inform Medellín of his consular rights “without delay” constituted a breach of the Vienna Convention.

The violation of the Vienna Convention in Medellín’s case, and the refusal of the Texas courts and federal 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 is 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, TIAS 6820, 596 UNTS 487 [Optional Protocol], Mexico brought an application against the United States at the ICJ. After full briefing by both parties and an oral hearing held in December 2003, the ICJ entered a final judgment that specifically held in respect of Medellín:

(1) that the United States committed breaches of the obligation . . . to inform detained Mexican nationals of their rights under [Art. 36(1)(b)], in the case of the following 51 individuals: . . . Medellín (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 . . . ;

(4) 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: . . . Medellín (case No. 38). . . .

Avena, ¶ 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 his conviction and sentence. *Ibid.*, ¶ 153(9).

Prior to *Avena*, the U.S. District Court for the Southern District of Texas denied Medellín’s federal habeas corpus petition, finding that the Vienna Convention claim was

2. On March 26, 1998, Medellín filed a state application for habeas corpus, arguing that his conviction and sentence should be vacated as a remedy for the treaty violation. The state court denied the application, finding that the treaty claim had been procedurally defaulted.

procedurally defaulted under “an adequate and independent state procedural rule,” and on the alternative ground that under Fifth Circuit precedent the Vienna Convention does not create individually enforceable rights and that no judicial remedy is available for its violation. These district court conclusions of law are inconsistent with *Avena* and merit correction by this Court. 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*, ¶¶ 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*, ¶¶ 128-134, 140, 153. The *Avena* Judgment thus determined Mr. Medellín’s treaty claim favorably.

After *Avena*, the Fifth Circuit affirmed the district court’s denial of relief, finding that notwithstanding *Avena*, it was constrained to follow *Beard* and previous Fifth Circuit precedent, unless and until this Court (or the Fifth Circuit en banc) were to decide otherwise.

Meanwhile, in another post-*Avena* case, the Oklahoma Court of Criminal Appeals vacated a conviction and death sentence and remanded for review and reconsideration in implementation of *Avena*. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). Lower courts have thus reached opposite conclusions about the effects of *Avena* in the first two of the 51 cases to be decided in its aftermath. The Oklahoma court in *Torres* correctly followed the authoritative treaty interpretation in *Avena*, while the Fifth Circuit perpetuated and compounded the treaty violation committed by the Texas authorities and added an independent violation by refusing to give effect to the binding *Avena* judgment.

This Court should grant certiorari to resolve this conflict in the lower courts about the legal effects of an ICJ judgment interpreting the Vienna Convention and to clarify or reconsider its own *Beard* per curiam order in light of the authoritative treaty interpretation in *Avena* adjudicating petitioner’s own

rights (Sec. II). On certiorari, this Court should confirm the existence of federal judicial power to fulfill the treaty obligations of the United States (Secs. III-IV).

II. THIS COURT SHOULD REVISIT ITS PER CURIAM RULING IN *BREARD* IN LIGHT OF THE ICJ'S AUTHORITATIVE TREATY INTERPRETATION IN *AVENA*.

In *Breard*, this 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 Court went on to interpret Vienna Convention Article 36 in a manner that turned out to be inconsistent with the interpretation that the ICJ would later give in *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 104, and in *Avena*. The Court observed that it was “unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that Court earlier.” 523 U.S. at 378. That matter came to this Court only a few days before *Breard*'s scheduled execution date;³ the treaty issues had not been briefed on the merits at either the ICJ or this 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 (Sec. III.B). 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 interpretation of the treaty. Plenary treatment by this Court is warranted to reconsider those aspects of *Breard* that may have been based on what has subsequently been determined to be an incorrect interpretation of the treaty, as well as to revisit important questions of treaty compliance that were either not resolved or addressed insufficiently by *Breard*.

3. The *LaGrand* matter, filed the year after *Breard*, was presented to this Court only two hours before petitioner's scheduled execution. See 526 U.S. 111 (1999).

4. The ICJ later held that provisional orders are binding. See *LaGrand*, 2001 ICJ 104.

The per curiam ruling in *Breard* summarily concluded that a habeas petitioner alleging a Vienna Convention violation has no remedy on a procedurally defaulted claim. 523 U.S. at 376. The subsequent ICJ rulings in *LaGrand* and *Avena* have undercut this aspect of *Breard*. Nor did this Court consider in *Breard*, as it normally does in cases of arguable conflict between international law and otherwise applicable domestic law, whether a harmonizing construction could be found that would enable the United States to comply with its international obligations. By contrast, just last Term this Court reaffirmed the presumption of *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” Cf. *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 124 S.Ct. 2359, 2366 (2004) (rule of statutory construction applied in *Empagran* reflects principles of international law – “law that (we must assume) Congress ordinarily seeks to follow”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). Summary denial of the *Breard* petition therefore cut off exploration of alternative constructions or mechanisms that might have enabled fulfillment of U.S. treaty obligations.

The foreshortened time frame for addressing the *Breard* petition likewise left unaddressed the important questions of federal law that would arise if responsibility for redressing treaty violations were left exclusively in state hands, beyond federal judicial power to correct, despite the national interest in compliance. The per curiam order in *Breard* intimated that the state governor was the organ of treaty compliance of last resort⁵ – a result that would appear at odds with the proper understanding of federal-state competence in treaty cases, and a reasoning that should not be extended beyond *Breard* to the *Avena* category of treaty rights confirmed by a final and binding international judgment. The court below surely adopted an excessive interpretation of *Breard* in concluding that *state* procedural default rules could cut off the exercise of a federal treaty right, especially when the authoritative international interpreter of the treaty has determined that such applications of procedural default rules are themselves treaty

5. 523 U.S. at 378.

violations. Federal courts do not lack jurisdictional power to correct such state violations.

Since *Breard*, this 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 federal jurisdictional power in foreign relations cases. These post-*Breard* rulings, all rendered after plenary briefing and considered deliberation, counsel respectful attention to *Avena* here.

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), which invalidated a state law, this Court noted 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. 530 U.S. at 383.⁶ *A fortiori*, in the face of a final binding judgment from a treaty-based dispute settlement procedure, a state rule must not impede compliance.

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), this 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. Federal judicial enforcement of self-executing treaties is to be expected, and the same should follow for implementation of authoritative international interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing (Sec. IV.A), the logic of *Sosa* favors federal judicial enforcement of the treaty.⁷

The construction of the federal habeas statute in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), suggests that this Court should not leave petitioner without a judicial remedy. In *Rasul*, even the strenuous opposition of the Executive to the availability of habeas relief did not persuade this Court that the courthouse

6. Those WTO petitions had been suspended by consent. 530 U.S. at 383. There was no final international judgment, as there is here.

7. The *Sosa* Court did not decide whether availability of international tribunals might affect enforceability of an international law claim in U.S. courts, but said it “would certainly consider” the potential relevance of international remedies “in an appropriate case.” 124 S. Ct. at 2766 n. 21.

door should be closed to foreign petitioners claiming rights under federal law. As in *Rasul*, where treaty commitments and the international reputation of the United States as a law-abiding nation were at stake, this Court is the ultimate forum to determine the availability of a judicial remedy for federally protected rights. The Court should thus grant certiorari to decide whether a federal habeas remedy is available to a petitioner invoking a treaty right that an international tribunal has determined to be well-founded.

Amici believe that upon plenary review, this Court should grant the petition on the merits, for the reasons below. But whether the Court ultimately endorses that reasoning or some other is less important than plenary consideration. At the end of the day, this Court's decision on the merits will make it possible to know with certainty at what level of government, or with which organ, the responsibility for treaty compliance lies.

III. THE ICJ JUDGMENT RESULTED FROM A TREATY-BASED JUDICIAL PROCESS TO WHICH THE UNITED STATES AGREED 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 thereunder. The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses; 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.

A. The Vienna Convention Is a Consular Treaty Negotiated and Concluded by the United States to Advance Protection of U.S. Nationals Abroad.

The Vienna Convention codifies 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 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 consular office. In respect of 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* (United States v. Mexico), 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 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 the 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 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 Vienna Convention has 166 parties as of 2004. See STATUS OF MULTILATERAL TREATIES MAINTAINED BY THE U.N. SECRETARY-GENERAL, available at <http://untreaty.un.org> [Status of Multilateral Treaties].

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 2004, 46 states have become parties to the Optional Protocol. See Status of Multilateral Treaties.

The Vienna Convention dispute settlement system promotes a uniform and high level of compliance among the treaty parties. *Avena*, ¶ 47. It is axiomatic that 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 meaning of the Vienna Convention, the United States cannot impose its own interpretation 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 the 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 164 parties to the Convention.

B. The United States Fully Consented to ICJ Jurisdiction to Decide This Dispute, Within the Framework of the U.N. Charter and ICJ Statute.

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

8. For this reason, U.S. courts ought to give careful consideration to reasoned positions of other courts – foreign or international – on points of treaty interpretation. Cf. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (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.

dispute is Article I of the Optional Protocol.⁹ The United States has 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.

The ICJ is the "principal judicial organ of the United Nations." U.N. Charter, 59 Stat. 1031, T.S. 993, art. 92. It functions according to the Statute of the ICJ, 59 Stat. 1055, T.S. 993 [ICJ Statute], which is annexed to the U.N. Charter and is an integral part thereof. According to Article 93 of the Charter, all U.N. members are *ipso facto* parties to the ICJ Statute. Under Article 94(1) of the Charter, "[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 ICJ Statute, 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 the *Avena* case (which includes the Medellin matter), the decision of the ICJ is indeed binding. The United States accepted the duty to comply with ICJ judgments by ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the Senate under Article II of the Constitution in 1945. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

Jurisdiction of the ICJ is founded on consent and reciprocity under Article 36 of the ICJ Statute. The ICJ case involving Medellin arises under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol is a treaty in force under Article 36(1) of the ICJ Statute. Proceedings under Article 36(1) of the ICJ Statute produce binding judgments under Article 59 of the Statute.

9. Article 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."

It is extremely important for the United States to uphold the obligatory character of compulsory jurisdiction under the Optional Protocol and the binding nature of ICJ judgments thereunder, not only in order to uphold the integrity of commitments of international law but also because this treaty and treaty-based jurisdictional mechanism protect critical U.S. interests. The United States was the first state to invoke the Optional Protocol, when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. written and oral 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. ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152. The availability of the Optional Protocol 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 the ICJ.¹⁰ 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 decisions in U.S. and foreign tribunals.

Approximately 70 other treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.¹¹ These include

10. 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. *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), 1954 ICJ Pleadings 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99, 103. Hungary is now party to the Optional Protocol.

11. 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). To the best of *Amici's* knowledge, all such treaties remain in force for the United States as of 2004, as specified for each such treaty in the Department of State publication, *TREATIES IN FORCE*.

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:¹² in total, the United States has been party to 21 cases at the ICJ,¹³ of which 10 were brought by the United States as applicant or by special agreement and 11 have been brought against the United States.¹⁴ 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) and 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations.

IV. THE VIENNA CONVENTION, OPTIONAL PROTOCOL, AND AVENA BIND THE STATE AND FEDERAL COURTS AND MAY BE IMPLEMENTED THROUGH FEDERAL JUDICIAL ACTION.

The ICJ judgment in respect of *Medellin* implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all state and federal courts. As regards a state conviction and death sentence, the responsibility for implementing this obligation belongs in the first instance to the state authorities who have competence in respect of the conviction and sentence or who have custody of the prisoner. If petitioner has exhausted state remedies and has

12. 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].

13. The United States has also taken part through written statements and oral argument 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 *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 423 (Lori F. Damrosch, ed., 1987); for a current listing, see ICJ Website.

14. The cases initiated by the United States include seven involving Soviet-bloc aerial incidents. More recently, the United States invoked the ICJ in the *Tehran Hostages* case against Iran (1979-81), the *Gulf of Maine Boundary* case (Canada 1981-84), and the *ELSI* case (Italy 1987-89).

filed a federal habeas petition, then *Avena* should be followed as the rule of decision.

A. The Vienna Convention and Optional Protocol Are Binding Under International Law and U.S. Law Pursuant to the Senate’s Advice and Consent.

Under international law, treaty relations arise by the consent of states. Once a treaty is in force for a state, that state is obliged under the rule of *pacta sunt servanda* to perform the treaty in good faith. 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). 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.

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 Lysterly, 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].

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 the Vienna Convention is a self-executing treaty, and 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.¹⁵ Just as no legislation was required to implement the treaty obligation to inform Mexican nationals of their consular rights, no legislative action 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. *Avena* is thus a clarification of obligations that existed when Medellin was 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). By failing to accord this treaty-based remedy to Medellin, the court below did not fulfill its duty to ensure compliance with the Vienna Convention.

15. 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*, nor any hint that the Executive would not want compliance.

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.¹⁶ Treaties may 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 treaty immunity, notwithstanding any impact on state law enforcement. See *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consular officer dismissed because of Vienna Convention immunity).

B. U.S. Courts Are Required to Give Effect to Treaty-Based Rights of Foreigners.

The obligation of all U.S. judges, state or federal, to give effect to treaty-based rights of foreigners is beyond doubt¹⁷. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:

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. . . . – If a law of a State, contrary to a treaty, is not void, but voidable

16. Since both Mexico and the United States are federal states, there is a strong national 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 federal judicial remedy, 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 U.S. courts can avoid such violations by carrying out the judgment of an international tribunal, they are required to do so.

17. Treaties providing inheritance rights for aliens have been held to prevail over state laws. *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).

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. . . .

[I]t 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, 341 (1924), this Court said:

The treaty . . . 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.

State and federal courts have frequently upheld treaty rights, without awaiting any instruction from the federal Executive or the legislature. The Court of Appeals of Kentucky, in an opinion that this Court later called “very able” (*United States v. Rauscher*, 119 U.S. 407, 427-428 (1886)) wrote:

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, 702-703 (1878).

In *Hines v. Davidowitz*, 312 U.S. 52, 64-65 (1941), this 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. . . . [T]here 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.

This Court there invalidated a state measure “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.” 312 U.S. 67. This 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 the ICJ has entered a final judgment requiring review and reconsideration of a state conviction and death sentence as the remedy for violation of a treaty, no court in the United States is free to ignore the treaty-based judgment in favor of the foreigner.

CONCLUSION

Amici urge this Court to ensure that actions of the authorities in Texas do not cause irreparable damage on the international plane. Review and reconsideration of Medellín’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 this and other treaties. This Court should revisit its per curiam ruling in *Breard* in order to ensure compliance with the treaty obligations of the United States. By instructing the courts below to afford the remedy of review and reconsideration required to redress the treaty violation, this Court will fulfill its 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,

CHARLES OWEN VERRILL, JR.
JOHN B. REYNOLDS, III
BRUCE A. McDONALD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

LORI FISLER DAMROSCH
Counsel of Record
435 West 116th Street
New York, NY 10027
(212) 854-3740

Counsel for Amici Curiae

APPENDIX — LIST OF AMICI

Lori Fisler Damrosch is the Henry L. Moses Professor of Law and International Organization at Columbia University and editor of *The International Court of Justice at a Crossroads* (1987). As an attorney in the U.S. Department of State between 1977 and 1981, she was one of the counsel for the United States in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1979 ICJ 7, 1980 ICJ 3, and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

Jeffrey Davidow is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush. From 1996 to 1998, he was Assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired as America's highest-ranking diplomat, one of only three people to hold the personal rank of career ambassador.

Richard N. Gardner is Professor of Law and International Organization at Columbia University and was previously U.S. ambassador to Italy and Spain. As Deputy Assistant Secretary of State for International Organization Affairs, he was involved in the U.S. position in *the Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163. He served as counsel for the United States at the ICJ in the *Eletronica S.p.A. (ELSI)* case, 1989 ICJ 15.

Louis Henkin is University Professor Emeritus at Columbia University and a past president of the American Society of International Law. He served as Chief Reporter for the American Law Institute's *Restatement*

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(Third) of the Foreign Relations Law of the United States and is the author of *Foreign Affairs and the United States Constitution* (2d ed. 1996).

Jim Jones served in the U.S. Congress representing Oklahoma from 1973 to 1987. He was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. He served as U.S. ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle award, the highest honor that can be given to a non-Mexican. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange.

Harold Hongju Koh is the Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law of the Yale Law School. As an attorney in the Department of Justice in the early 1980s, he was involved in the jurisdictional phase of *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 1984 ICJ 392. He was Assistant Secretary of State for Democracy, Human Rights and Labor between 1998 and 2001.

Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law at New York University School of Law. He served in the Office of the Legal Adviser of the U.S. Department of State between 1961 and 1966 and was Deputy Legal Adviser from 1964 to 1966. He was Associate Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* and acted as counsel for the United States in the *Oil Platforms* (Iran v. United States) case, 1996 ICJ 803, 2003 ICJ.

Appendix

Bernard H. Oxman is Professor of Law at the University of Miami School of Law and a former Assistant Legal Adviser of the U.S. Department of State. He was a legal consultant for the United States in the *Gulf of Maine Boundary* case, 1984 ICJ 246.

W. Michael Reisman is the Myres S. McDougal Professor of International Law at Yale University and a former member and president of the Inter-American Commission on Human Rights. He has served as counsel in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 ICJ 40, and for the Philippines in *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 2001 ICJ.

Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

Anne-Marie Slaughter is the Dean of the Woodrow Wilson School at Princeton University and the immediate past president of the American Society of International Law. She was formerly the J. Sinclair Armstrong Professor of Comparative and International Law at Harvard University.