

No. 04-5928

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IN THE  
*Supreme Court of the United States*

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JOSE ERNESTO MEDELLIN,  
*Petitioner,*

v.

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

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ON WRIT OF *CERTIORARI* TO  
THE FIFTH CIRCUIT COURT OF APPEALS

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Brief of *Amici Curiae*  
Bar Associations and Human Rights Organizations  
In Support of Petitioner

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**INTEREST OF *AMICI CURIAE***

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioner by several bar associations as well as several human rights and civil rights organizations.<sup>1</sup> *Amici* include Amnesty International, Association of the Bar of the City of New York, Bar Human Rights Committee of England & Wales, Center for Justice & Accountability, Global Rights, Hispanic National Bar Association, Human Rights First, Human Rights Watch, International League of Human Rights, Jacob Blaustein Institute for the Advancement of Human Rights, League of United Latin American Citizens, Mexican American Legal Defense & Educational Fund, Minnesota Advocates for Human Rights, National Association of Criminal Defense Lawyers, Robert F. Kennedy Memorial Center for Human Rights, and The Washington Office on Latin America.

Each of these bar associations and human rights groups recognize the importance of U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, or local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 (“Vienna Convention”),

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<sup>1</sup> *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Sup. Ct. R. 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration for Vienna Convention violations. Without appropriate guidance from this Court, the lower courts will continue to disregard international law and U.S. treaty obligations as the Fifth Circuit Court of Appeals has done in this case.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

The Association of the Bar of the City of New York (the Association) is a professional association of more than 22,000 attorneys from nearly every state and more than 50 countries. Much of the Association's work is accomplished through approximately 170 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. The Association is committed to the rule of law on the national and international landscape and to the principle that if the death penalty is applied, it must be applied in a fair and impartial manner. Thus, the Association has long been concerned with capital

punishment and its application. The Association has taken the lead in the analysis of practical and legal issues relating to the death penalty. *See, e.g.*, Committee on Capital Punishment Panel Presentation, *Capital Punishment in the Age of Terrorism*, 41 Cath. Law. 187 (2003); Committee on Capital Punishment, *Dying Twice: Conditions On New York's Death Row*, 22 Pace L. Rev. 347 (Spring 2002) (also at 56 Record Assoc. Bar N.Y. 358); Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Record Assoc. Bar N.Y. 129 (2000); Committee on Civil Rights, *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Record Assoc. Bar N.Y. 848 (1989); Committee on Civil Rights, *The Death Penalty*, 39 Record Assoc. Bar N.Y. 419 (1984).

The Bar Human Rights Committee of England & Wales (BHRC) is an independent group of specialist advocates and experts who work on a voluntary basis to develop law and human rights protection throughout the world. BHRC objectives are: supporting and protection of practicing lawyers and judges who are threatened or oppressed in their work; upholding the rule of law and internationally recognized human rights standards; furthering interest in and knowledge of human rights and the laws relating to human rights; advising, supporting and co-operating with other organizations and individuals working for human rights; and advising the Bar Council in connection with any human rights issue. BHRC advises on death penalty cases and provides *amicus* briefs in cases involving the death penalty in the United States.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress

that call for the application of human rights standards under United States and customary international law.

Global Rights is a non-profit public interest legal organization with projects in twenty-two countries that is engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. See, e.g., *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. The HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates. Proper application of Article 36 of the Vienna Convention is of particular interest to the HNBA, given its largely bilingual membership and its commitment to the rule of

law. Its signatory representative was a participant in the Vienna Convention Discussion Group, which led to the decision of the Oregon Department of Justice to adopt new policies to improve compliance with the Convention, as noted in the letter of April 25, 2002 from the Deputy Attorney General to William Howard Taft IV, Legal Advisor in the United States Department of State.

Human Rights First (formerly the Lawyers Committee for Human Rights) works in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous *amicus* briefs before the U.S. Supreme Court and other U.S. courts and international bodies, and believes this case presents compelling issues of justice for victims of human rights violations.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure

on them to end abusive practices. HRW has filed *amicus* briefs before various bodies, including U.S. courts and international tribunals.

The International League for Human Rights has worked to keep human rights at the forefront of international affairs and to give meaning and effect to the human rights values enshrined in international human rights treaties and conventions. The League's special mission for 62 years has been defending individual human rights advocates who have risked their lives to promote the ideals of a just and civil society in their homelands. Based in New York, with representation in Geneva and dozens of affiliates and partners around the world, the League is a non-governmental, non-profit organization now in its 62nd year. The League has special consultative status at the United Nations, the Council of Europe, and the International Labor Organization, and also contributes to the Africa Commission and the Organization for Security and Cooperation in Europe (OSCE). With the U.N. Universal Declaration of Human Rights as its platform, the League raises human rights issues and cases before the U.N. and other intergovernmental regional organizations in partnership with colleagues abroad, helping to amplify their voices and coordinate strategies for effective human rights protection.

The Jacob Blaustein Institute for the Advancement of Human Rights (JBI), founded in 1971, aims to promote the effective implementation of treaties and conventions to protect and promote human rights. JBI engages in fact gathering, analysis, education, and advocacy with a view to narrowing the gap between the promise of the Universal Declaration of Human Rights and other international human rights agreements and the realization of those rights in practice. JBI has joined a number of *amicus* briefs related to the promotion of justice for victims of human

rights abuses, and this case presents important issues relevant to the fulfillment of legal obligations under international law.

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States, and foster respect for the rule of law. We believe in the democratic principle of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of immigrants' rights since the organization's founding. Preserving the constitutional due process rights of immigrants is a primary goal of MALDEF's Immigrants' Rights program.

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based non-profit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights

practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates' Death Penalty Project was organized in 1991 to recruit Minnesota attorneys to assist death row inmates with their post-conviction appeals. Minnesota Advocates' volunteers have provided *pro bono* representation to dozens of death row inmates in 10 states. In addition to working to protect the rights of capital defendants in death penalty states, the project provides education on death penalty issues and actively advocates for the elimination of the death penalty in the United States. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including to the Inter-American Court of Human Rights concerning the request of the government of Mexico for an advisory opinion related to a Mexican national on death row in the United States.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the death penalty. In furtherance of this and other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide

variety of criminal-justice issues.

The Robert F. Kennedy Memorial Center for Human Rights (CHR) is a non-profit organization working to advance Robert F. Kennedy's vision of social justice by promoting the full spectrum of human rights throughout the world. The annual RFK Human Rights Award honors individuals who, at great risk, stand up to government oppression in the nonviolent pursuit of respect for human rights. The CHR develops and carries out projects, which enhance and complement the social change agendas of the laureates. Our work includes advocacy and legal projects with the U.S. and foreign governments, international agencies and other human rights organizations. The CHR has promoted the respect and implementation of the legal norms related to human rights at a domestic and international level, including cases before the International Labor Organization, the Inter-American Commission on Human Rights, and the World Bank Inspection Panel, encouraging both the U.S. and foreign governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

The Washington Office on Latin America (WOLA) is a non-profit policy, research, and advocacy organization working to advance democracy, human rights, and social justice in Latin America and the Caribbean. Founded in 1974, WOLA plays a leading role in Washington policy debates about Latin America. WOLA facilitates dialogue between governmental and non-governmental actors, monitors the impact of policies and programs of governments and international organizations, and promotes alternatives through reporting, education, training, and advocacy. Additionally, WOLA has worked to develop

greater respect for international legal norms and has appeared before various tribunals, including the Inter-American Commission on Human Rights, to encourage Latin American governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts will no doubt be undermined so long as the United States government fails to respect international law regarding the rights of foreign nationals in its territory.

While *Amici Curiae* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the profound negative implications and practical consequences of U.S. failure to comply with the Vienna Convention and the rulings of the International Court of Justice.

### SUMMARY OF ARGUMENT

Long before Petitioner's case arose, the political branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. The political branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261 ("Optional Protocol"). Significantly, the Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention.

In *Avena*, the ICJ definitively interpreted the Vienna Convention as mandating specific *procedural* relief in the

case of Petitioner Jose Ernesto Medellin (“Petitioner” or “Mr. Medellin”) and fifty other Mexican death row inmates in U.S. prisons who were not informed of their right to seek consular assistance. See *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (Judgment of March 31, 2004) (“*Avena*”).<sup>2</sup> The ICJ clearly and unequivocally declared that the United States is legally obligated to provide the *procedural* remedy of review and reconsideration in response to Vienna Convention violations. Indeed, it specifically referred to the Petitioner’s case, as well as the cases of fifty other Mexican nationals on death row in this country.

In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit disregarded the Vienna Convention and the ICJ’s ruling in *Avena*. It denied Mr. Medellin’s application for post-conviction relief on the grounds that any violation was procedurally defaulted and that the Vienna Convention did not create individually enforceable rights. The Fifth Circuit’s rulings, and similar decisions of many other state and federal courts, are in direct conflict with the ICJ’s ruling in *Avena* and the international obligations of the United States under the Vienna Convention. These rulings undermine the rule of law, long a central feature of U.S. foreign policy. They also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance in the United States will inevitably be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the

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<sup>2</sup> The opinions of the International Court of Justice are available at [www.icj-cij.org](http://www.icj-cij.org).

judgment of the Fifth Circuit and remand this action for review and reconsideration of the violation of Mr. Medellín's Vienna Convention rights in a manner consistent with *Avena*.

## ARGUMENT

### I. UNITED STATES COURTS MUST ADHERE TO THE RULE OF LAW AND APPLY THE RULES OF DECISION ISSUED BY THE INTERNATIONAL COURT OF JUSTICE IN *AVENA*

#### A. The United States Has a Long History of Promoting Respect for the Rule of Law.

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order. No less a realist than Secretary of State Henry A. Kissinger has noted that “[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity.” Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep’t St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep’t St. Bull., 644, 644 (May 21, 1973) (“States comply with [international] law . . . because it is politic to do so.”); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* [http://dosfan.lib.uic.edu/ERC/law/press\\_statements/950615.html](http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html) (“As a nation, we have,

more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law -- law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.”).

The United States has promoted respect for international law because it reflects important American values; “[i]t is a repository of our experience and our idealism.” Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, in U.S. Dep’t of St. Dispatch, Nov. 1998, at 6 (“Law is a theme that ties together the broad goals of our foreign policy.”); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in Internal Affairs 1975 *Digest* § 1, at 16 (“It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies.”); Kissinger, *supra*, at 362 (“[D]edication to international law has always been a central feature of our foreign policy.”).

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. As noted by the U.S. Deputy Permanent Representative to the United Nations in remarks to the U.N. Security Council:

[E]stablishing and maintaining the rule of law has been an enduring theme of American foreign policy for over two

centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* [http://www.un.int/usa/03\\_147.htm](http://www.un.int/usa/03_147.htm). Thus, promotion of the rule of law is a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

*Id.* at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* <http://www.state.gov/p/9949.htm> (“Let me get right to the point. . . . Here’s what America believes in: We believe in justice and promotion of the rule of law.”).

It is expected, therefore, that the United States will be a leader in complying with the obligations of the Vienna

Convention and the Optional Protocol. In so doing, we demonstrate to “the world that the United States does indeed take its international law responsibilities seriously.” William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* <http://usinfo.state.gov>.

It is also in our interest to do so. The Vienna Convention protects U.S. citizens abroad – from tourists to business travelers. All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep’t of St., 7 *Foreign Affairs Manual*. And as our own consular officials are informed, “[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.” *Id.* at § 412 (Sept. 1, 2004). But these protections will only be provided if we comply with our international obligations and provide foreign nationals with comparable protections in the United States.<sup>3</sup> As noted by the U.S. Legal Adviser:

These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American

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<sup>3</sup> Significantly, the *Foreign Affairs Manual* recognizes the reciprocal nature of Vienna Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because “U.S. authorities do not always promptly notify that country’s consular representatives of the arrest of one of their nationals.” *Id.* at 421.2-3 (Sept. 3, 2004). In response, U.S. consular officials are instructed to point out that “[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations.” *Id.* at 421.2-3(a).

citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.

Taft, *supra*, at 15.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

**B. The United States Is Legally Bound By the Vienna Convention and the Optional Protocol to Grant the Relief Mandated in *Avena*.**

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention, making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24,

1969.<sup>4</sup> As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), available at [http://travel.state.gov/pdf/CNA\\_book.pdf](http://travel.state.gov/pdf/CNA_book.pdf).<sup>5</sup>

The Vienna Convention provides that foreign nationals must be informed of their right to communicate with consular officials when they are arrested or detained in any manner. Vienna Convention, art. 36, para. 1. The Convention also requires that competent authorities notify the appropriate consulate if the foreign national so requests. *Id.* Finally, it entitles consular officials to visit their nationals, to communicate with them, and to arrange for their legal representation. *Id.* Thus, the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

Significantly, the United States has also signed and

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<sup>4</sup> As of January 1, 2005, there are 166 States Parties to the Vienna Convention.

<sup>5</sup> Indeed, “[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.” *Consular Notification and Access*, *supra*, at 44. Upon submitting the Vienna Convention to the Senate, the Executive branch indicated that the treaty was “entirely self-executive [sic] and does not require any implementing or complementary legislation.” S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser).

ratified the Optional Protocol to the Vienna Convention. By doing so, it recognized the ICJ's authoritative jurisdiction over questions regarding "interpretation or application of the Convention." Optional Protocol, Preamble; art. I. Moreover, under Article 94 of the United Nations Charter, the United States also has agreed to comply with ICJ decisions in cases to which it is a party. U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

In March 2004, the ICJ considered the application of the Vienna Convention in an action filed by Mexico against the United States. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. It then held that the United States violated the Vienna Convention in Mr. Medellin's case as well as in the cases of fifty other Mexican nationals. *See Avena*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ.

The ICJ stated, moreover, that "the judicial process" of

the United States is best suited to undertake review and reconsideration. *Id.*, para. 140. The ICJ emphasized that the executive clemency process is “not sufficient in itself to serve as an appropriate means of ‘review and reconsideration.’” *Id.*, para. 143. It is, therefore, the responsibility of the courts to ensure meaningful review and reconsideration. Finally, the ICJ stated that its conclusions not only applied to the cases of the Mexican nationals before it but also to the cases of other foreign nationals subject to similar situations in the United States. *Id.*, para. 151.

Under national and international law, the implications of the *Avena* ruling are clear. The United States has a binding legal obligation to comply with the Vienna Convention as well as the decisions of the ICJ concerning the interpretation and application of the Vienna Convention. But this has not occurred.

**II. AVENA REQUIRES THE PROCEDURAL REMEDY OF MEANINGFUL JUDICIAL REVIEW AND RECONSIDERATION TO DETERMINE WHETHER THE VIENNA CONVENTION VIOLATION CAUSED ACTUAL PREJUDICE WARRANTING AN APPROPRIATE SUBSTANTIVE REMEDY.**

As set forth in Part I, U.S. courts must and should abide by the decision of the ICJ in *Avena*, which adjudicated Petitioner's case in accordance with the Vienna Convention and Optional Protocol. Yet, the Fifth Circuit denied Petitioner's request for a certificate of appealability notwithstanding the *Avena* judgment. In so doing, the court denied Mr. Medellin the *procedural* remedy of review and reconsideration mandated by *Avena*. Compare *Torres v. Oklahoma*, No. PCD-04-442, at 2 (Okla. Crim. App. May 13, 2004) (remanding for an evidentiary hearing on "whether Torres was prejudiced by the State's violation of his Vienna Convention rights") (attached at Petitioner's Appendix 142a-163a). As a consequence, the court also precluded Mr. Medellin from any opportunity of obtaining a *substantive* remedy (*e.g.*, vacating his death sentence and ordering a new sentencing hearing) for an undisputed violation of his Vienna Convention rights. This was error.

Petitioner's Brief to this Court demonstrates that the Fifth Circuit's rulings on the procedural default rule and the purported lack of individually enforceable rights in this case were erroneous. The Fifth Circuit's rulings directly contradict *Avena* with respect to *procedural* remedies for violations of the Vienna Convention. The *Avena* judgment mandates the specific *procedural* relief in Mr. Medellin's case of effective and meaningful review to evaluate whether the Vienna Convention violations affected the

fairness of Mr. Medellín's criminal proceedings. This was not done.

In *Avena*, the ICJ found that there had been clear and unequivocal violations of the Vienna Convention by the United States. *Avena*, para. 153. The ICJ then observed that, “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” *Id.*, para. 119 (quoting *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21). The ICJ added that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Id.* (quoting *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No.17, p. 47).

Next, relying on *LaGrand (F.R.G. v. U.S.)* 2001 I.C.J. 104 (Jun. 27) (“*LaGrand*”), the ICJ reiterated that the mere remedy of “an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties.” *Avena*, para. 120 (quoting *LaGrand*, para. 125). Instead, the ICJ emphasized it is “incumbent upon the United States to allow the review and reconsideration of the conviction and sentence *by taking account of the violation of the rights set forth in the Convention.*” *Id.* (quoting *LaGrand*, para. 125) (emphasis added). Critically, the ICJ stated that the “choice of means” for review and reconsideration “must be left to the United States.” *Id.* (quoting *LaGrand*, para. 125).

Following the above logic, the ICJ held in *Avena* that the starting point for any remedial measures for Vienna Convention violations “should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts . . . with a view to ascertaining whether in each case the violation of

Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice.” *Avena*, para. 121.

The ICJ was careful not to mandate precisely how U.S. courts should carry out the *procedural* remedy of meaningful review and consideration. *See Avena*, para. 120, 122, 131. It left that decision for U.S. courts. But the ICJ admonished that:

It should be underlined, however, that this freedom in the choice of *means* for such review and reconsideration is *not without qualification*: . . . such review and reconsideration has to be carried out “by taking account of the violation of the rights set forth in the Convention” . . . including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

*Avena*, para. 131 (emphasis added). The ICJ rejected the U.S. contention that the clemency process was adequate to undertake the required review and reconsideration, and concluded that the judiciary was best suited to the task. *See id.*, para. 122 (assessing the significance of Vienna Convention violations “is an integral part of *criminal proceedings before the courts of the United States* . . .” (emphasis added)); para. 138 (“review and reconsideration should be both of the sentence and the conviction”); para. 140 (“The Court [ICJ] considers that it is the judicial process that is suited to this task.”). *Compare* para. 143 (noting “the clemency process . . . is . . . not sufficient in itself to serve as an appropriate means of ‘review and reconsideration’”).

Despite the unambiguous holding of *Avena* reaffirming the requirement established in *LaGrand* that U.S. courts must implement procedures to conduct review and reconsideration of undisputed Vienna Convention violations, the Fifth Circuit concluded it was not bound by *Avena*'s holding.

### **III. DISREGARDING *AVENA* WILL UNDERMINE THE CONSULAR ASSISTANCE GUARANTEES OFFERED BY THE VIENNA CONVENTION**

The consular posts of governments throughout the world, including Mexico and the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that, "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36, para. 1(c).

As Mexico emphasized in *Avena*, it is of particular importance for its consular officers to be able to arrange for legal representation before and during trial, as well as at sentencing, particularly when a severe penalty may be imposed. *Avena*, para. 104. The Mexican government has followed an established procedure to offer specific consular assistance to Mexican nationals detained in the United States. See *Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring) (attached at Petitioner's Appendix 145a-158a). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend

court proceedings.” *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also “obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation.” *Id.* at 11 (Chapel, J., specially concurring).

Not surprisingly, U.S. consular posts follow established procedures to provide consular assistance to Americans detained abroad. U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, U.S. Dep’t of St., 7 *Foreign Affairs Manual* § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department’s *Foreign Affairs Manual*, consular officers are expected “to be particularly active in, and to fully engage in, the [detained individual’s] case during the often-lengthy pretrial period.” *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to “monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services” as well as to “keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges.” *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage where U.S. policy instructs consular officers to continue providing appropriate services, including acting

as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

Notice of the availability of consular assistance is the beginning of a procedure developed and refined by consular posts to ensure that foreign nationals have adequate resources and knowledge to avail themselves of the rights afforded under the law. If the Vienna Convention and the ICJ's decision in *Avena* are not followed by U.S. courts, the procedures developed by foreign governments to assist and protect the rights of their citizens detained in this country are of little benefit. Those same rights for Americans abroad may also be in jeopardy.

### CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that “[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.” *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*, who seek to promote respect for the rule of law in their own work on a daily basis.

For the foregoing reasons, the Court should reverse the judgment of the Fifth Circuit and remand for review and reconsideration of Petitioner's Vienna Convention rights in a manner consistent with the *Avena* judgment.

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