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 FIFTH CIRCUIT COURT OF APPEALS

Brief of *Amici Curiae*
Amnesty International, Association of the Bar of the City of New York, Hispanic National Bar Association, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights, and National Association of Criminal Defense Lawyers
In Support of Petitioner

KEVIN R. SULLIVAN
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 737-0500
Counsel for Amici Curiae
(Additional counsel listed on inside cover.)

William J. Aceves
225 Cedar Street
San Diego, CA 92101
(619) 515-1589

Clifford S. Anderson
Dorsey & Whitney LLP
50 South Sixth Street
Minneapolis, MN 55402
(612) 340-2631

Mariano-Florentino Cuellar
Jenny S. Martinez
Allen S. Weiner
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 723-2465

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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.[1] *Amici* include Amnesty International, the Association of the Bar of the City of New York, Hispanic National Bar Association, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights and the National Association of Criminal Defense Lawyers.[2]

Each of these bar associations and human rights groups recognize the importance of U.S. compliance with international law, as indicated by the issues set forth in this brief. *Amici* have observed firsthand the issues that arise when application and interpretation of 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") intersects with state and federal criminal law. Such issues arise on an almost daily basis. Without appropriate guidance from this Court, however, the state and federal courts have frequently failed to provide meaningful review and appropriate relief for Vienna Convention violations.

The participation of *Amici Curiae* will assist this Court in understanding the profound implications and practical consequences of these failings, and what is required to remedy these shortcomings.

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Supreme Court Rule 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. Supreme Court Rule 37.6.

[2] A complete description of *Amici Curiae* is located in the Appendix.

SUMMARY OF ARGUMENT

In *Avena*, the International Court of Justice ("ICJ") definitively interpreted the Vienna Convention as mandating specific relief in the case of Petitioner Jose Ernesto Medellin ("Petitioner" or "Mr. Medellin") and 50 other Mexican death row inmates in U.S. prisons who were not informed of their right to consular assistance. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (Judgment of March 31, 2004) ("*Avena*");[3] Vienna Convention, art. 36, para. 1. In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), however, the Fifth Circuit Court of Appeals disregarded the Vienna Convention and the ICJ in denying Mr. Medellin's application for post-conviction relief on the grounds that any violation was procedurally defaulted and was not an individually enforceable right. The Fifth Circuit's ruling, 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, thereby necessitating this petition for *certiorari*.

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 with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention.

In recent years, federal and state courts have largely either

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[3] The opinions of the International Court of Justice are available at www.icj-cij.org.

ignored or failed to respond to repeated violations of the Vienna Convention despite their constitutional duty to uphold the rule of law. These courts have frequently relied on the Supreme Court's *per curiam* denial of relief in *Breard v. Greene*, 523 U.S. 371 (1998), as authority for failing to address Vienna Convention violations. *Breard* has also been the basis for these courts to disregard the ICJ's 2001 decision interpreting the Vienna Convention in *Case Concerning LaGrand* (Ger. v. U.S.), 2001 I.C.J. (Judgment of June 27, 2001) ("*LaGrand*") and the 2004 decision in *Avena*. Moreover, the Supreme Court's denial of *certiorari* in cases involving Vienna Convention issues has left the *per curiam* decision in *Breard* as its only significant statement on the Vienna Convention. The lower courts' confusion on these issues and conflicting rulings warrant clarification from this Court.

Petitioner's case is the proper – and best – vehicle to undertake review of these critically important issues. It presents a direct conflict between the Fifth Circuit's *Medellin* decision and the ICJ's *Avena* ruling concerning this very Petitioner. It also squarely presents an important question of federal law that has not been, but should be, settled by this Court – namely, whether federal (and state) courts must adhere to the ICJ's legal interpretation of the Vienna Convention when the United States agreed to submit disputes under the treaty to the ICJ. Given the number of foreign inmates on death row whose cases raise Vienna Convention claims, the importance to foreign governments of Vienna Convention protections for their citizens, and the uncertainty and confusion in U.S. courts caused by the *Breard* decision, the Vienna Convention issues raised in Mr. Medellin's petition for *certiorari* are fully ripe and appropriate for this Court's review. Indeed, such review is necessary to ensure that the United States (including all political subdivisions) complies with its treaty obligations.

ARGUMENT

I. THIS CASE PRESENTS A DIRECT CONFLICT BETWEEN THE ICJ AND AN AMERICAN COURT, AND THIS COURT'S RESOLUTION OF THE CONFLICT WILL IMPACT MANY PENDING CASES.

This is the right case and the right time for the Supreme Court to address these important issues.[4]

First, and foremost, Mr. Medellin's case presents a direct conflict between the ICJ's interpretation of what must happen to Mr. Medellin as a result of the acknowledged Vienna Convention violations and the Fifth Circuit's interpretation thereof. It also presents the broader question of whether and how federal and state courts must adhere to the ICJ's judgments regarding the Vienna Convention in other pending cases, including those of the 50 other Mexican nationals addressed in the ICJ's *Avena* decision.

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[4] The *Avena* judgment eliminates any concerns about a premature *certiorari* petition based on provisional measures orders from the ICJ. The instant Petition thus contrasts sharply with the procedural posture of *Torres v. Mullin*, 157 L.Ed. 2d 454, 458 (2003) (Breyer, J., dissenting) ("Depending on how the ICJ decides Mexico's related case against the United States . . . I may well vote to grant *certiorari* in this case."). Nor does the case present the problem associated with what, until 2001, was the uncertain legal status of whether ICJ provisional measures orders had binding effect. *See Federal Republic of Germany v. United States*, 526 U.S. 111, 112-13 (1999) (Breyer, J., dissenting joined by Stevens, J.) ("'[A]n order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."' (quoting letter from Solicitor General filed Mar. 3, 1999, with Clerk of Supreme Court)); *id.* at 112 (Souter, J., concurring joined by Ginsburg, J.) (stating "[we] have taken into consideration the position of the Solicitor General on behalf of the United States"). In its final judgment in *LaGrand*, the ICJ determined, contrary to the position previously advanced by the United States, that ICJ provisional measures orders are legally binding. *LaGrand*, para. 109, 110.

Second, U.S. courts and practitioners need the guidance that only Supreme Court review would provide. The uncertain status of the law surrounding the application of the Vienna Convention in the courts of this country is evidenced by the substantial number of federal decisions and state cases that have generated petitions for *certiorari*, all without success, over the past six years. Moreover, the lower courts have issued many calls for Supreme Court guidance, most notably in *Medellin* itself. *See Medellin*, 371 F.3d at 280 ("We are bound to follow the precedent [*i.e.*, the Supreme Court's *Breard* decision] until *taught otherwise* by the Supreme Court") (emphasis added). *See also United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002), *cert. denied sub nom. Tello v. United States*, 538 U.S. 1042 (2003) ("The Supreme Court has not directly addressed the issue" of individual rights); *United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002) ("Confronted in recent years with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from the Supreme Court . . ."); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) ("The effect of a treaty and the consequences of its violation are ultimately federal questions that only the United States Supreme Court can finally and definitively answer."). Even members of this Court have called for such review. *See Torres v. Mullin*, 157 L.Ed. 2d 454, 458 (2003) (Breyer, J., dissenting) ("Given the international implications of the issues raised, I believe further information, analysis, and consideration are necessary.").

Finally, further consideration of these Vienna Convention issues in the lower courts would not be beneficial. The lower courts have repeatedly staked out positions contrary to *LaGrand* and now the Fifth Circuit has done so as well with respect to *Avena*.[5] Thus, little is likely to change in light of *Avena* absent

[5] In *Torres v. Oklahoma*, however, the Oklahoma Court of Criminal Appeals concluded that prior precedent cannot control in the case of a Mexican national

action by this Court. Nor is it likely the ICJ's interpretation of the Vienna Convention will change; indeed, *Avena* confirms that it will not.[6]

In sum, judicial review is necessary by the Supreme Court to address a host of critical issues that have profound national and international implications – to address whether the Vienna Convention confers individual rights, to determine whether and in what circumstances the procedural default doctrine is ever applicable to Vienna Convention claims, to establish what an appropriate prejudice standard is, and to resolve what remedies are warranted for proven Vienna Convention violations.

II. THE FIFTH CIRCUIT ERRED BY FAILING TO FOLLOW THE BINDING RULE OF LAW ESTABLISHED IN *AVENA*.

On May 20, 2004, the Court of Appeals for the Fifth Circuit denied Petitioner's request for a certificate of appealability that had been previously denied by the U.S. District Court for the Southern District of Texas. *See Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). Both courts acknowledged a Vienna Convention violation but declined to provide a remedy. This was error.

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subject to the *Avena* judgment. *See Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (attached at Petitioner's Appendix 142A-163A). The *Torres* decision provides a further basis to grant review to resolve the conflict between the Oklahoma court and the Fifth Circuit over the degree to which *Avena* binds U.S. courts faced with violations of Article 36 of the Vienna Convention.

[6] Significantly, the ICJ indicated that its analysis of the Vienna Convention should not be limited to Mexican nationals. According to the Court, "the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States." *Avena*, para. 151.

The Fifth Circuit's decision directly contradicts the *Avena* final judgment that mandates specific relief in Mr. Medellin's case. Among other errors, the Fifth Circuit: (1) failed to correct the lower court's use of the procedural default rule; and (2) failed to acknowledge that the Vienna Convention creates individually enforceable rights. To be faithful to *Avena*, the Fifth Circuit was obligated to order the lower court to engage in review and reconsideration of Petitioner's case that would fully consider whether the Vienna Convention violations impaired the fairness of his underlying conviction and sentence. *See Avena*, para. 138. The Fifth Circuit's utter disregard for *Avena's* key holdings warrants granting *certiorari* so that this Court may correct these manifest errors of law that have had a fundamental impact on Mr. Medellin's case and on the cases of other foreign nationals on death row in the United States. This review will also provide the Court with the opportunity to clarify the appropriate prejudice standard to apply when considering Vienna Convention violations.

Under *Avena*, for example, it would be inappropriate for courts to apply an exceedingly stringent standard of prejudice that restricts relief for Vienna Convention violations to trials that are conducted in manifestly unconstitutional ways. No prejudice standard utilized during review and reconsideration can be harmonized with *Avena* if it prevents the review process from affording "full weight" to the violation in determining whether a conviction or sentence should stand. *Id*., para. 138-39. Rather, as some courts in the United States have already recognized in analogous settings, an appropriate review and reconsideration process should consider whether the Vienna Convention violation harmed Mr. Medellin's "'interests in such a way as to affect potentially the outcome'" of his trial or his sentence. *See United States v. Rangel Gonzales,* 617 F.2d 529, 530 (9th Cir. 1980) (citation omitted). Therefore, the proper analysis of prejudice turns not on whether the violation of an individual's Article 36 rights resulted in a violation of constitutional due process, but on whether the denial of rights would have had an "effect" on the fairness of the trial. *See Breard*, 523 U.S. at 377.

A process that turns the prejudice inquiry into an analysis of

whether the judicial proceedings violate constitutional due process does not satisfy the principles of the Vienna Convention or *Avena*. The ICJ took pains in *Avena* to distinguish review of constitutional defects in trial proceedings – which are distinct questions – from review and reconsideration of whether the violation had a material effect on a foreign national's conviction or sentence.

In sum, the Fifth Circuit's refusal to grant a certificate of appealability to address the lower court errors concerning the Vienna Convention violations in Mr. Medellin's case merits Supreme Court review. A grant of *certiorari* would provide this Court with a needed opportunity to clarify the status of the law and would ensure U.S. compliance with its legal obligations. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

III. FEDERAL AND STATE COURTS HAVE FAILED IN THEIR CONSTITUTIONAL DUTY TO UPHOLD THE RULE OF LAW IN CASES INVOLVING THE VIENNA CONVENTION.

A. The United States Agreed To Be Legally Bound By The Vienna Convention And The Optional Protocol.

Over 30 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. 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. It 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 ratified the Optional Protocol to the Vienna Convention. By doing so, it recognized that the ICJ's "interpretation or application of the Convention" is authoritative. 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. United Nations Charter, *opened for signature* June 26, 1945, art. 94, 59 Stat. 1031, T.S. No. 993.

Under international law, the implications of U.S. ratification of the Vienna Convention and the Optional Protocol are significant. Specifically, the United States has a binding legal obligation to comply with the Vienna Convention and the ICJ's decision in *Avena*.

B. The United States Has A Long History Of Promoting Respect For The Rule Of Law.

Review by this Court is necessary to demonstrate that the United States continues to take its international legal obligations seriously. Regardless of how this Court resolves the merits of Petitioner's case, it would send a damaging message overseas were this Court to decline even to review a judgment of a federal appellate court that is in direct conflict with a binding decision of the ICJ. In our federal system, it is plainly the function of this Court to interpret federal law, including treaties, and to ensure compliance by state officials. *See* U.S. Const. art III, § 2, cl. 2 (the "judicial Power shall extend to all . . . Treaties made . . ."); *id.*, art. VI, cl. 2 ("[A]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Marbury*, 5 U.S. at 177; *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

Throughout its history, the United States has consistently asserted that violations of international law have serious

consequences for international order. The United States has also promoted respect for international law because it reflects important American values. 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.[7]

Regrettably, this has not occurred. Review in this case, therefore, is warranted so that the Supreme Court may uphold the rule of law and "the supreme Law of the Land." In so doing, the Court will also demonstrate to "the [ICJ] and 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 National Association of Attorneys General*, at 1 (available at: http://usinfo.state.gov).

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[7] *See, e.g.,* Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Department of State Bulletin 353, 354 (Sept. 8, 1975) ("[T]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity."); Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Department of State Bulletin 644, (May 21, 1973) ("States comply with international law . . . because it is politic to do so."); Memorial of the United States of America, (U.S. v. Iran), 1982 I.C.J. PLEADINGS (CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN) 227 (Nov. 29 1979); Oral Argument of the United States of America, (U.S. v. Iran), 1982 I.C.J. PLEADINGS (CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN) 255 (Nov. 29, 1979); Letter from President Ford to Seymour J. Rubin, *reprinted in* 1975 Digest of United States Practice in International Law 16 ("[I]t 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."); Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, U.S. Department of State Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."). *Cf. FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

C. Federal And State Courts Have Repeatedly Failed To Provide Meaningful Review and Relief For Vienna Convention Violations.

Despite this country's deep commitment to the rule of law, federal and state courts in this country have failed to provide meaningful review and relief for repeated and undisputed violations of the Vienna Convention. In doing so, they have implicitly relied upon, or expressly cited to, this Court's 1998 *per curiam* opinion in *Breard*. Conversely, they have all but ignored the ICJ's subsequent decision in *LaGrand*. And, as demonstrated by Petitioner's case, *Avena* is subject to a similar fate absent intervention by the Court. The failure of U.S. courts to abide by ICJ decisions has led to substantial conflict between the ICJ and American courts, leaving uncertain the rule of law regarding the Vienna Convention in this country. The Supreme Court's repeated denial of *certiorari* in cases where Vienna Convention issues were raised below has only contributed to this uncertainty. Review by the Court is necessary to resolve the conflict and to answer the important and recurring legal questions raised by this case.

1. The Supreme Court's *Breard per curiam* opinion.

More than six years ago, this Court denied the petition for a writ of *certiorari* of Angel Francisco Breard, who was seeking relief from his death sentence on the grounds of Article 36 Vienna Convention violations. *See Breard*, 523 U.S. at 373, 378-379.[8] *Breard*, which was rendered before the ICJ had

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[8] In *Breard*, the Court also denied Paraguay's petition for writ of *certiorari* that argued its rights under the Vienna Convention were violated as a result of Breard's conviction. Additionally, the Court denied Breard's petition for an original writ of *habeas corpus*, Paraguay's motion for leave to file a bill of complaint, and the accompanying stay applications of both Breard and Paraguay. *Breard*, 523 at 378-379.

spoken on the interpretation of the Vienna Convention, has created confusion in the lower courts.

In stating that Breard procedurally defaulted his claim, this Court expressed the general view that Article 36(2) of the Vienna Convention does not bar the application of procedural default rules to Convention claims. *Id.* at 375. The Court noted that the application of American procedural default rules was permissible "absent a clear and express statement to the contrary." *Id.* Moreover, the Court observed that (at least at that point in time) such procedural default rules could theoretically be harmonized with the language of the Vienna Convention itself so long as they allow "'full effect to be given to the purposes for which the rights accorded under'" Article 36 of the Convention were intended. *Id.* at 375 (citing Article 36(2), [1970], 21 U.S.T. at 101).[9]

When it rendered its *Breard* decision, however, the Supreme Court did not have the benefit of a final ICJ merits judgment concerning the nature and scope of the Vienna Convention and its attendant obligations.

[9] The Court also stated that Breard's claim was procedurally barred by observing that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted long after the Vienna Convention became effective in the United States, precluded federal habeas review of Breard's conviction and sentence. *See Breard,* 523 U.S. at 376. The Fifth Circuit did not rely on the AEDPA in its ruling. In any event, no AEDPA bar could apply in this case because Petitioner Medellin raised his Vienna Convention claim in state post-conviction proceedings, filed a supporting affidavit, and requested an evidentiary hearing, which the state court denied. *See* Petition for Writ of Certiorari at 21, *Medellin v. Dretke*, --- U.S. --- (2004) (No. 04-5928); s*ee, e.g., Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003) (finding that § 2254(e)(2) does not apply where petitioner sought but was denied state court evidentiary hearing); *Morris v. Woodford*, 229 F.3d 775, 781 (9th Cir. 2000), *cert. denied*, 532 U.S. 1075 (2001).

2. The ICJ's *LaGrand* and *Avena* decisions.

In 1999, Germany instituted proceedings before the ICJ against the United States, alleging violations of the Vienna Convention in the case of two German nationals who had been sentenced to death in Arizona.[10] One of the two German nationals was executed prior to the issuance of the ICJ's provisional measures order. While the ICJ subsequently issued a provisional measures order requesting that the United States delay the execution of the second German national pending its final resolution of the case, it did not rule on the merits of the underlying claim at that time.[11]

Before the ICJ had completed its consideration of the merits of the underlying claim, the Supreme Court, again in a *per curiam* decision, denied Germany's eleventh hour motion for leave to file a bill of complaint and motion for preliminary injunction to delay the execution of Walter LaGrand. *See Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam). LaGrand was executed following this Court's denial of Germany's request for relief.

On June 27, 2001, the ICJ issued its final judgment in *LaGrand*. The Court found that the United States had violated the Vienna Convention. *LaGrand*, para. 73. Among its holdings, the ICJ held Article 36(1)(b) creates and confers individual rights to consular notification for detained nationals, and does not simply accord rights to the sending State. *Id.,* para.

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[10] Walter and Karl LaGrand were German nationals who, like Mr. Medellin here, were never informed of their right to communicate with their country's consular officials, either when they were arrested and charged with capital murder or when they were sentenced to death. *LaGrand,* para. 15.

[11] When this provisional measures order was issued, it was unclear whether such orders were legally binding. The ICJ would subsequently rule on the binding nature of its provisional measures orders in its merits ruling in *LaGrand*.

77, 91. The ICJ also made clear that a prejudice inquiry is irrelevant for determining the threshold issue of whether there has been a Vienna Convention violation. *Id.*, para. 72-74. It further held that the United States failed to carry out its obligations under the Vienna Convention when it applied the "procedural default" doctrine to preclude courts from giving full effect to the right of consular access. *Id.*, para. 91.

LaGrand establishes that procedural default rules cannot interfere with the obligation of states to give "full effect to the purposes" of the Vienna Convention. This portion of the ICJ's ruling "undermin[es] a major premise" of the Court's *per curiam* decision in *Breard*.[12] *See Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *cf. Breard*, 523 U.S. at 375. Regarding remedies, the ICJ held that, for individuals subject to prolonged detentions or convicted and sentenced to severe penalties, "it would be 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" and that "an apology is not sufficient." *LaGrand*, para. 123, 125.

Three years later, the ICJ revisited the Vienna Convention in an action filed by Mexico against the United States and removed any doubt about the legality of the U.S. conduct. In *Avena*, the ICJ held that the United States violated the Vienna Convention in Mr. Medellin's case as well as in the cases of 50 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

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[12] The rationale for the ICJ's holding is simple: the United States cannot shift to the foreign national the consequences of its own violation. *See Torres*, 157 L.Ed. 2d at 455 (2003) (Stevens, J., dissenting) ("Applying the procedural default rule in Article 36 claims . . . is manifestly unfair . . . [because] . . . a foreign national who is presumptively ignorant of his right to notification should not be deemed to have waived the Article 36 protections [he does not know about] simply because he failed to assert that right in a state criminal proceeding.").

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" 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.

3. Federal and state courts have relied on *Breard* to disregard *LaGrand* and *Avena.*

Given this Court's admonition in *Breard*, that "we 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, it is clear that *LaGrand* and *Avena* have significantly altered the legal landscape since this Court last spoke on these issues. But in the absence of more definitive guidance from this Court, the lower courts have continued to rely on *Breard*, despite its lack of precedential value, as the Fifth Circuit erroneously has done in Petitioner's case. *See* discussion *supra* Part II. As a result, the lower courts remain uncertain about, or simply ignore, the impact of the ICJ's decisions in *LaGrand* and *Avena*.

It is well-settled that, to the extent *Breard* is a decision denying *certiorari*, it lacks precedential value. *See Teague v. Lane*, 498 U.S. 288, 296 (1989); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950); *United States v. Carver*, 260 U.S. 482, 490 (1923). Moreover, *Breard* was not derived from full briefing, argument, consideration, or deliberation, *see Breard*, 523 U.S. at 379-81 (Stevens, J. and Breyer, J., dissenting), and thus is a less than solid precedent in other respects as well. *See Hohn v. United States*, 524 U.S. 236, 251 (1998) ("We have felt less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument."). Nonetheless, the lower federal and state courts have consistently relied on *Breard* to disregard the ICJ's opinions in *LaGrand* and *Avena*.

A review of the case law reveals substantial conflict between U.S. courts and the ICJ on the nature and scope of the Vienna Convention. *See Torres*, 157 L.Ed. 2d at 455 (Stevens, J., respecting denial of *certiorari*) ("There is obvious tension between the holding in *Breard* and the purpose of Article 36 of the Vienna Convention" as interpreted by the ICJ.). Relying on *Breard*, several federal circuits have sidestepped the question of whether the Vienna Convention creates judicially enforceable individual rights, choosing either not to reach the question, or merely assuming an answer without deciding the issue. Such courts have rationalized their approach by concluding that deciding the issue was not necessary to their ultimate case disposition. *See, e.g., Ortiz*, 315 F.3d at 886-87; *United States v. Minjares-Alvarez*, 264 F.3d 980, 987-88 (10th Cir. 2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884-85 (9th Cir.) (en banc), *cert. denied*, 531 U.S. 991 (2000).

Several federal circuits and some state courts have either held, or at least intimated, that the Vienna Convention does not create individual rights, thus directly conflicting with the ICJ's interpretation of the treaty. These courts have relied upon a

variety of distinct theories: the presumption against private rights under international treaties; the contention that the Vienna Convention does not explicitly create individual rights and is ambiguous on that question; the assertion that the Convention's ratification and legislative history do not support a finding of individual rights; the historical position of the executive branch of the United States that the Convention does not create individual rights; the assertion that other countries do not recognize such rights or provide a remedy in their criminal justice systems; and the argument that this Court has not allowed even signatory nations to the Convention to pursue actions. *See, e.g., United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir.) (suggesting that Vienna Convention may not create individual rights), *cert. denied*, 537 U.S. 1038 (2002); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) (same); *Emuegbunam*, 268 F.3d at 394 (concluding that Vienna Convention does not create individual rights); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.) (same), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir.) (*en banc*) (suggesting that Vienna Convention may not create individual rights), *cert. denied,* 531 U.S. 956 (2000). *See also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003) (concluding *LaGrand* did not hold that Article 36 creates legally enforceable individual rights); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.) (same), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001) (concluding that Vienna Convention does not create individual rights), *cert. denied*, 535 U.S. 937 (2002).

Still other U.S. courts have continued to use the procedural default doctrine to avoid reaching the merits of Vienna Convention claims, notwithstanding the ICJ's clear holdings on this issue after *Breard*. These courts include the Fifth Circuit in this very case.[13] *See Medellin*, 371 F.3d at 279-80. *See also*

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[13] Indeed, the Petitioner's case also reveals how courts continue to rely on outdated interpretations of the Vienna Convention. In *Medellin*, the Fifth

Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 425-26 (6th Cir. 2003); *Valdez v. State*, 46 P.3d 703, 706-10 (Okla. Crim. App. 2002).

U.S. courts have also relied on *Breard* to bar meaningful review and reconsideration – even in cases of undisputed Vienna Convention violations – by requiring, as a *procedural* prerequisite to obtaining such review, a preliminary demonstration of prejudice, such as proof that the violations impacted the outcome of a trial or deprived a defendant of a federal constitutional right. *See, e.g., Ortiz*, 315 F.3d at 878; *Minjares-Alvarez*, 264 F.3d at 987; *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied sub nom. Arnulfo Zuniga v. United States*, 531 U.S. 1131 (2001); *United States v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999), *cert. denied*, 530 U.S. 1283 (2000); *United States v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999); *Bell*, 563 S.E.2d at 707. Such rulings contradict the ICJ, which has held that, for undisputed Vienna Convention violations, a showing of prejudice is *not* a prerequisite to obtaining the threshold *procedural* relief of review and reconsideration. *See LaGrand*, para. 72-74, 125.

Finally, notwithstanding that this Court left open the possibility that in certain cases a Vienna Convention violation could lead to "overturning of a final judgment of conviction,"

Circuit relied on its decision in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001), to conclude that Article 36 of the Vienna Convention confers no individually enforceable rights "until either the Court [*i.e.,* the Fifth Circuit] sitting *en banc* or the Supreme Court say otherwise." *Medellin*, 371 F.3d at 280. In *Jimenez-Nava*, the Fifth Circuit relied on a First Circuit case, *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), as well as the State Department's interpretation of the Vienna Convention that was submitted in *Li*. *See Jimenez-Nava*, 243 F.3d at 197. But the State Department's interpretation of the Vienna Convention can no longer be viewed as persuasive or even up-to-date since it was issued prior to the ICJ's opinions in both *LaGrand* and *Avena*.

Breard, 523 U.S. at 377, lower courts have routinely held that dismissals of indictments and suppression of evidence or confessions are not permissible remedies. *See, e.g., Ortiz*, 315 F.3d at 886-87; *Duarte-Acero*, 296 F.3d at 1281-82; *De La Pava*, 268 F.3d at 165; *Emuegbunam*, 268 F.3d at 390-91; *Minjares-Alvarez*, 264 F.3d at 985-87; *Jimenez-Nava*, 243 F.3d at 198-200; *Lawal*, 231 F.3d at 1048-49; *Lombera-Camorlinga*, 206 F.3d at 885-88; *Li*, 206 F.3d at 60; *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003), *cert. denied, Conde v. Florida*, 124 S. Ct. 1885 (2004); *Commonwealth v. Diemer*, 785 N.E.2d 1237, 1245 (Mass. App. Ct. 2003), *cert. denied*, 124 S. Ct. 1144 (2004); *Bell*, 563 S.E.2d at 707. As *Avena* recently clarified, while some showing of prejudice may be required to obtain *substantive* relief, what is crucial in the review and reconsideration process is the existence of "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." *Avena*, para. 121, 139 (emphasis added).

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Mr. Medellin's petition for a writ of *certiorari*.

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Respectfully submitted,

William J. Aceves
225 Cedar Street
San Diego, CA 92101
(619) 515-1589

Kevin R. Sullivan
Counsel of Record
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 737-0500

Clifford S. Anderson
Dorsey & Whitney LLP
50 South Sixth Street
Minneapolis, MN 55402
(612) 340-2631

Mariano-Florentino Cuellar
Jenny S. Martinez
Allen S. Weiner
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 723-2465

Counsel for Amici Curiae

APPENDIX

List of *Amici Curiae*

Bar Associations

Association of the Bar of the City of New York

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).

Hispanic National Bar Association

The Hispanic National Bar Association ("HNBA") is an incorporated, non-profit, national association representing the interest of over 25,000 Hispanic American attorneys, judges, law

professors, and law students in the United States and Puerto Rico. The HNBA serves Hispanic attorneys, judges, law professors and law students, providing a forum for the exchange of ideas, the administration of justice and the promotion of integration of Hispanics in the study, practice, instruction and adjudication of law.

Mexican American Bar Association

The Mexican American Bar Association ("MABA") was established in 1959 as a legal organization committed to helping the Latino community. Its mission is the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy. Today, MABA is one of the largest and most prominent legal associations in the nation. MABA members include over 700 lawyers, judges, politicians, and business people of various ethnic backgrounds, serving in their respective fields of law and holding prominent positions of leadership in local, state and federal government. MABA is committed to promoting respect for the rule of law and the application of the law to all people.

National Association of Criminal Defense Lawyers

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 NADCL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

Human Rights and Civil Rights Organizations

Amnesty International

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.

Human Rights First

Since 1978, Human Rights First (formerly the Lawyers Committee for Human Rights) has worked 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

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.

League of United Latin American Citizens

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 principal of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and 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 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.