Nos. 04-10566 and 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS, PETITIONER,
v.
STATE OF OREGON

MARIO A. BUSTILLO, PETITIONER,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

On Writs of Certiorari to the Supreme Courts of Oregon and Virginia

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

MATTHEW D. ROBERTS
Counsel of Record
THOMAS E. DONILON
KARL R. THOMPSON
CHARLES E. BORDEN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law. ABCNY educates the bar and the public about various legal issues, including international law and criminal procedure. ABCNY is concerned that the United States has not been honoring its obligations under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"), to inform foreign nationals arrested in the United States of their rights to consular notification and access. This failure prevents foreign nationals from enjoying the full protections that our legal system provides to guarantee fair criminal trials. It also discourages other nations from respecting the consular notification rights of U.S. nationals arrested abroad – rights that may be critical to their fair treatment by foreign criminal justice systems. ABCNY believes that this Court must hold that the Vienna Convention confers enforceable rights – both because the Convention's text confers those rights in unmistakable terms, and in order to ensure that foreign nationals in the United States and U.S. nationals abroad receive the consular notification and access guaranteed by the Convention and critical to fair criminal procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases are about ensuring a fair criminal process both for foreign nationals arrested in the United States and for U.S. nationals arrested abroad. Almost 40 years ago, the United States ratified the Vienna Convention, a multilateral treaty to which 168 nations are now parties. The Convention recognizes

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[1] Letters from petitioners and respondents indicating consent to file this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

that individuals arrested in foreign countries face alien and unfamiliar criminal justice systems. Those individuals will therefore frequently lack both the understanding and the resources needed to avail themselves of the protections foreign systems provide to ensure the fairness of their criminal procedures. The Convention addresses that problem by guaranteeing that individuals arrested in foreign countries have access to consular officials from their home countries. Those consular officials provide a cultural bridge between the foreign nationals and the criminal justice systems of the arresting countries – educating the nationals about the legal systems, making sure they have adequate representation, helping them to communicate in the language of the arresting countries, and assisting them to obtain evidence or witnesses located in their home countries. Consular assistance thus places foreign nationals – whether foreigners in the United States or U.S. nationals in a foreign country – on equal footing with other criminal defendants. It enables *all* defendants, regardless of nationality, to obtain the fairest possible resolution of the charges against them.

To ensure that consular assistance is available, Article 36 of the Convention provides that foreign nationals "shall have" the "freedom" to "communicat[e] with" and have "access to their consular officers." Vienna Convention, art. 36(1)(a). Article 36 further provides that, if a foreign national is arrested, the competent authorities of the arresting nation "shall, without delay, inform" the appropriate consular officials of the arrest if the national "so requests." *Id.*, art. 36(1)(b). Article 36 also requires that "[a]ny communication addressed to the consular post by the person arrested . . . shall also be forwarded . . . without delay." *Id.* And it mandates that the arresting authorities "shall inform" the foreign national "without delay of his rights" under the Convention. *Id.*

These provisions give foreign nationals individual rights enforceable in the courts of the United States (or other arresting nations). This Court has long recognized that treaties can give rise to individual rights, and, under the Court's treaty in-

terpretation jurisprudence, Article 36 is not a close case. Its text clearly establishes individual rights: it uses mandatory language, links state consular notification obligations to the will of individual foreign detainees, and expressly describes its provisions as "rights" and "freedom[s]" belonging to foreign nationals. Given the clarity of the text, the Court need not look any further. In any event, other interpretive guides reinforce the conclusion that Article 36 creates individual rights: The Convention's negotiation history reveals that the delegates, in agreeing upon the final version of Article 36, were fully aware that it confers individual rights. The Executive Branch's contemporaneous understanding of the Convention was in accord. And the bulk of the international community agrees.

The conclusion that Article 36 confers individual rights is not simply compelled by its text. That conclusion is also essential as a practical matter. Consular officials play a crucial role in ensuring that foreign nationals understand and are able to invoke the rights guaranteed to criminal defendants in the United States. The importance of consular assistance to foreign defendants is not mere speculation: Examples from case law vividly illustrate that consular involvement – or its absence – has a decisive impact on whether foreign nationals are able to invoke the procedural protections to which all defendants are entitled and which are essential to a fair trial.

Despite its fundamental importance, consular notification rarely occurs in the United States. For example, recent studies indicate that less than *five percent* of foreign defendants on death row received timely notification of their consular rights. Courts have long recognized that judicial enforcement is a powerful tool for giving legal rights practical force. Recognizing that the Convention creates enforceable rights thus will not only give effect to the treaty's clear language but will also improve this country's disappointing record of compliance.

The benefits of such an improvement would extend far beyond foreign defendants in the United States. Every year, thousands of Americans are arrested abroad. U.S. consular of-

ficials provide those Americans with a broad range of assistance – explaining foreign legal and judicial procedures, monitoring conditions of confinement, and, if necessary, intervening to forestall physical abuse and obtain medical attention. Consular assistance can make the difference between fair treatment and capricious punishment (or worse) for Americans arrested abroad. But, as the State Department itself has recognized, foreign nations are unlikely to comply with their consular notification obligations to U.S. nationals if the United States does not comply with its obligations to foreign nationals. Mutuality and reciprocity are foundational principles of international law. Although U.S. compliance with its consular notification obligations cannot *guarantee* that Americans will be able to secure consular assistance abroad, U.S. compliance with the Convention will strongly encourage other nations to comply as well. Protecting American interests abroad thus supplies an additional strong reason for this Court to endorse the individual rights that are plainly contained in the Convention's text.

ARGUMENT

THE VIENNA CONVENTION CREATES JUDICIALLY ENFORCEABLE RIGHTS

The initial question in these cases – indeed, in any case in which a criminal defendant raises a claim or defense under the Vienna Convention – is whether the Convention creates judicially enforceable rights. The importance of that question transcends situations where a defendant seeks a suppression remedy or habeas relief. Indeed, this Court's answer to the question will determine whether a defendant can ever obtain relief for a violation of the Convention.[2]

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[2] This brief addresses only that initial question. *Amicus curiae* anticipates that the parties and other *amici* will fully address the other questions presented, including whether suppression is an available remedy for violations of the Convention and whether consideration of claims under the Convention can be precluded by procedural bar rules where the arresting state failed to comply with the Convention's notification requirements.

As four members of this Court have recognized, if the Convention does not create enforceable individual rights, a foreign detainee can "*never* complain in court – even in the course of a trial or on direct review – about a state's failure to" inform the detainee of his consular notification rights. *Medellin v. Dretke*, 125 S. Ct. 2088, 2102-03 (2005) (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently granted).[3] This Court should not – and need not – countenance that unjust result. As explained below, the text of the Convention vests foreign detainees with individual rights to consular notification and access. And recognizing those rights is essential to ensure that both foreigners arrested in the United States and Americans detained abroad receive fair criminal process.

A. Article 36 Of The Convention Creates Enforceable Individual Rights to Consular Notification And Access

Whether the Vienna Convention creates enforceable rights turns on two questions: First, is the Convention "self-executing," *i.e.*, enforceable by the courts without the need for implementing legislation? And, second, does it create individual rights? There is no serious dispute about the answer to the first question: The Convention is self-executing.[4] It therefore

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[3] The remainder of the Court did not address whether the Convention creates individual rights but instead dismissed the writ as improvidently granted in light of a successive state habeas petition, filed days before oral argument, which presented the petitioner's claims in a less complicated procedural posture. *See Medellin*, 125 S. Ct. at 2089-92 (per curiam).

[4] The State Department adopted that position when Congress was considering ratification of the Convention. S. Exec. Doc. No. 91-9, app. at 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). The United States has adhered to that position in its filings in this Court. Brief for the United States as *Amicus Curiae* at 26, *Medellin*, 125 S. Ct. 2088 (2005). The four members of the Court who addressed the question whether the Convention is self-executing reached the same conclusion in *Medellin*. 125 S. Ct. at 2103 (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently

has the "force and effect" of law, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), and "a court must enforce it on behalf of an individual" to whom it accords rights, *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); *see Foster v. Neilson*, 27 U.S. (2 Peters) 253, 314 (1829); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Consequently, the critical question for this Court is whether the Convention creates individual rights. The answer is clearly yes.

1. Treaties can create enforceable individual rights

This Court long ago recognized that treaties can create individual rights. Although a treaty is primarily an agreement among nations, it "may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Consistent with that principle, this Court has, over the course of two centuries, repeatedly permitted individual foreign nationals to assert rights arising from treaties. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 239 (1796) (enforcing a British citizen's right to collect a debt under a peace treaty providing that "creditors, on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts"); *Heong v. United States*, 112 U.S. 536, 542 (1884) (recognizing an individual right to reenter the United States under a treaty providing that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord"); *United States v. Rauscher*, 119 U.S. 407, 410, 418-19, 430 (1886) (concluding that an extradition treaty between the United States and Great Britain created an individual right to be tried only for the offense

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granted). And that view is generally shared by the lower courts. *See Jogi v. Voges*, 425 F.3d 367, 377-78 (7th Cir. 2005) (citing cases).

forming the basis of the extradition); *Asakura v. City of Seattle*, 265 U.S. 332, 339-40 (1924) (recognizing a Japanese citizen's right to engage in pawn brokering on the same terms as U.S. citizens under a treaty guaranteeing Japanese the "liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects"); *Clark v. Allen*, 331 U.S. 503, 507 (1947) (recognizing the right of a German national to sell inherited property under a treaty providing that "such national shall be allowed a term of three years in which to sell the same").

In line with those holdings, the Ninth Circuit has concluded that the Vienna Convention itself (in provisions not at issue here) confers individual rights on foreign consular officials. *See Risk v. Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991). The United States agrees. *See* Brief for United States as *Amicus Curiae* at 26 n.7, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005). Thus, there can be no question that treaties, including the Vienna Convention, may create individual rights.

2. Determining whether Article 36 of the Vienna Convention creates individual rights requires an analysis akin to statutory interpretation

To decide whether Article 36 of the Convention creates individual rights, this Court engages in an analysis similar to statutory interpretation. For a statute, the goal is to ascertain the intent of Congress; for a treaty, the goal is to ascertain the intent of the parties. *See United States v. Stuart*, 489 U.S. 353, 366 (1989); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). As with statutes, a treaty's text is by far the most important consideration in determining its meaning. *See Alvarez-Machain*, 504 U.S. at 663; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Maximov v. United States*, 373 U.S. 49, 52-54 (1963).

If the treaty's text is "difficult or ambiguous," courts may look – as when interpreting statutes – to extrinsic materials to assist in ascertaining the parties' intent. *Volkswagenwerk*, 486

U.S. at 700. These materials include the negotiation and ratification history of the treaty (which is analogous to the legislative history of a statute). *Id.* Courts may also look – again as with statutory interpretation – to the views of the Executive Branch. *See Sumitomo*, 457 U.S. at 184-85. But those views are "not conclusive," *id.* at 184, and they are due respect only if they are "reasonable," *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). Indeed, this Court has not hesitated to reject the Executive's interpretation of a treaty when that view was contrary to the treaty's text or to the Executive's previous interpretation. *E.g.*, *Chan*, 490 U.S. at 134; *id.* at 136 (Brennan, J., concurring in the judgment); *Perkins v. Elg*, 307 U.S. 325, 328, 337-49 (1939); *Johnson v. Browne*, 205 U.S. 309, 318-21 (1907).

Courts may also consult extrinsic materials, unique to treaties, that reflect their international nature. Those materials include the views of the international community, as reflected by the construction adopted by other treaty parties and the interpretation given by international bodies. *See Stuart*, 489 U.S. at 369; *Breard v. Greene*, 523 U.S. 371, 374 (1998).

A final interpretive guide unique to treaties is the principle of liberal construction. Under that principle, "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). The principle of liberal construction reflects the nature of the international context in which treaties are concluded. *See Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933). And this Court has adhered to that principle consistently over two centuries. *See Stuart*, 489 U.S. at 368; *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 127, 129 (1928); *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 487 (1880); *Shanks v. Dupont*, 28 U.S. (3 Peters) 242, 249 (1830).

None of the extra-textual sources that courts may use to clarify an ambiguous treaty is determinative; each is simply one factor among many that bear consideration. *See Air France v. Saks*, 470 U.S. 392, 400-05 (1985); *Stuart*, 489 U.S. at 366-70. Even more important, as with statutory interpretation, extra-textual considerations cannot trump the plain meaning of a treaty's text. Thus, "where the text is clear," the Court "ha[s] no power" to adopt a contrary interpretation. *Chan*, 490 U.S. at 134. *See also Maximov*, 373 U.S. at 52-54 (rejecting interpretation based on treaty's "objective" because the proffered interpretation was inconsistent with the treaty's "plain language"); *Ware*, 3 U.S. at 239 (Chase, J.) ("If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation.").

3. Article 36 creates individual rights to consular notification and access

Under these established interpretative principles, Article 36 of the Vienna Convention plainly creates individual rights. The text of Article 36 is unambiguous, and resort to other sources of interpretation is therefore unnecessary. Nonetheless, the relevant extra-textual sources confirm the clear import of the treaty language.

Article 36(1)(a) provides that "[n]ationals of [a] sending State shall have the . . . freedom" to communicate with and have access to "consular officers of the sending State." Vienna Convention, art. 36(1)(a).[5] Article 36(1)(b) mandates that, when the national of a sending State is arrested or detained, "if [the national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State." *Id.*, art. 36(1)(b). That subparagraph further commands that "[a]ny communication addressed to the

[5] As relevant here, the term "sending State" refers to the foreign national's home country. The term "receiving State" refers to the country in which the foreign national is arrested or detained.

consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay." *Id.* Article 36(1)(b) also instructs that the arresting "authorities shall inform the person concerned without delay of his rights under this sub-paragraph." *Id.* Article 36(2) makes clear that the "rights referred to" in Article 36(1) "shall be exercised in conformity with the laws and regulations of the [arresting] State," but those "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [the] Article are intended." *Id.*, art. 36(2).

Thus, the text of Article 36 confers individual rights with unmistakable clarity. It speaks in manifestly mandatory terms: Nationals of the sending State "*shall* have the . . . freedom" to communicate with and have access to their consulate. *Id.*, art. 36(1)(a) (emphasis added). The receiving State "*shall*" inform the sending State's consular post of a foreign national's arrest "if [that national] so requests." *Id.*, art. 36(1)(b) (emphasis added). The receiving State "*shall*" transmit any communications the foreign detainee wishes to send to his consulate. *Id.* (emphasis added). And the receiving State "*shall*" inform the detained foreign national of "his rights" under the Convention. *Id.* (emphasis added).

Even more significant, Article 36 does not simply impose obligations on *states* but links those obligations to *individuals*: Article 36(1)(a) specifies that "[n]ationals of a sending State" shall have the specified freedoms. *Id.*, art. 36(1)(a). The first clause of Article 36(1)(b) gives control over consular notification to the *foreign detainee* by providing that the sending State shall be notified *only* if "he so requests." *Id.*, art. 36(1)(b). And the last clause of Article 36(1)(b) specifies that "the person concerned" (*i.e.*, the foreign detainee) possesses the rights to have his consulate notified and his communications delivered. *Id.*

Finally, Article 36 repeatedly describes its provisions as creating "rights" or "freedom[s]." Article 36(1)(a) describes

the foreign national's entitlement to consular communication and access as a "freedom." *Id.*, art. 36(1)(a). Article 36(1)(b) refers to the foreign detainee's power to have his consulate notified and his communications delivered as his "rights." *Id.*, art. 36(1)(b). And Article 36(2) twice refers to the "rights" accorded by the Article. *Id.*, art. 36(2).

This Court has consistently interpreted treaties employing similar language to confer individual rights. For example, the treaties held to create individual rights in *Ware v. Hylton* and *Clark v. Allen* also used mandatory language to accord benefits to individuals. *See Ware*, 3 U.S. at 239 (treaty provided that "*creditors*, on either side, *shall* meet with no lawful impediment") (emphasis added); *Clark*, 331 U.S. at 507 (treaty stated that "*such national shall* be allowed a term of three years in which to sell" inherited property) (emphasis added). And the treaties held to create individual rights in *Heong v. United States* and *Asakura v. City of Seattle* not only used mandatory language to confer benefits on individuals but, like Article 36, also referred to "rights" or "liberties." *See Heong*, 112 U.S. at 571 (treaty provided that "*Chinese laborers* . . . *shall* be allowed to go and come of their own free will and accord, and shall be accorded all the *rights* . . . accorded the citizens and subjects of the most favored nation") (emphasis added); *Asakura*, 265 U.S. at 340 (treaty stated that "*citizens* or *subjects* of each of the High Contracting Parties *shall* have *liberty* . . . to carry on trade . . . upon the same terms as native citizens and subjects") (emphasis added) (quotation omitted).

Indeed, even if Article 36 were a *statutory* provision, it would clearly create individual rights. In determining whether a statute creates an individual right, the Court considers whether it uses "explicit right- or duty-creating language," *Gonzaga University v. Doe*, 536 U.S. 273, 284 n.3 (2002) (quotation omitted), whether it employs mandatory language, *see id.*, and whether it is "phrased in terms of the persons benefited," *Cannon v. University of Chicago*, 441 U.S. 677,

692 n.13 (1979). As described above, Article 36 meets all three of those criteria. This Court has concluded that statutes create individual rights, even when they do *not* describe the entitlements that they create as "rights," provided that they use mandatory language directed at a benefited class. *See Gonzaga*, 536 U.S. at 284 n.3 (noting that Title VI and Title IX both create individual rights and highlighting their use of the phrase "*[n]o person* in the United States *shall*") (quotation omitted). Here, Article 36 not only uses mandatory language directed toward a specific benefited class but also explicitly employs the term "rights." It is thus virtually certain that, if Article 36 were a statute, this Court would hold that it creates individual rights. *See Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting).

Since Article 36 would create individual rights if it were a statute, there can be no doubt that it does so as a treaty. This Court has long taken a liberal approach to the interpretation of treaties. *See supra* p. 8. As Justice Story put it almost two hundred years ago in *Shanks*: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?" 28 U.S. at 249. Under that approach, the Court has enforced individual rights in treaties that would likely not have been held to confer rights under the analysis used for statutes. *See, e.g.*, *Rauscher*, 119 U.S. at 410-11 (enforcing individual right under treaty that did not purport to confer benefit on individuals). Where, as here, a treaty satisfies the standards for creating individual rights by statute, there is even more reason to recognize an individual right under the treaty.

Because the text of Article 36 is clear, there is no reason to consult other sources, such as the prefatory language to the Convention or to Article 36 itself. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982). In

any event, those sources do not require a different result. Although the Convention's preamble disclaims an intent to "benefit individuals," in context, that disclaimer refers to the lack of intent to benefit individual *consular officials*, not to an intent to restrict the rights of foreign nationals. *See Jogi v. Voges*, 425 F.3d 367, 381 (7th Cir. 2005); Report of the U.S. Delegation to the United Nations Conference on Consular Relations, *reprinted in* Vienna Convention on Consular Relations, S. Exec. Doc. No. 98-118, at 46 (May 8, 1969).

The prefatory language introducing Article 36 is also fully consistent with the conclusion that the Article confers individual rights. That language indicates that the provisions of Article 36 are intended to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Vienna Convention, art. 36, preface. But that purpose is fully consistent with an individual right to consular notification and access. By placing the decision to notify the consulate in the hands of the detained foreign national, Article 36 simultaneously assists consular officials in performing their functions and protects the individual rights of the detained foreign nationals to choose whether they want assistance. *See* S. Exec. Doc. No. 98-118, at 60.

The drafting debates on the Convention likewise indicate that Article 36 is concerned with individual rights as well as facilitating the consular function. The original draft of Article 36(1)(b) required consular notification of arrest or detention in every case, regardless of the desires of the detainee. *See* S. Exec. Doc. No. 98-118, at 59. When the delegates amended the Article – by tying consular notification to a detainee's request and requiring receiving States to notify detainees of their rights to consular notification and communication – the delegates explicitly recognized that they were changing the Convention "to 'protect the rights of the national concerned.'" Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations*, 18 Mich. J. Int'l L. 565, 597 n.200 (1997)

(quoting United States delegate); *see id*. at 597-98; S. Exec. Doc. No. 98-118, at 59-60. Similarly, when one delegation proposed amending Article 36(1)(a) to eliminate its reference to foreign nationals' freedom to communicate with their consulates, other delegates recognized that this was an attempt to eliminate an individual "right" to consular communication from the Convention. *See* Kadish, 18 Mich. J. Int'l L. at 596-97. The amendment was withdrawn in the face of strong opposition, and Article 36(1)(a) retained language recognizing this freedom of communication. *Id*.

Consistent with this negotiation history, the Letter of Submittal from the Secretary of State to the President and the Report of the United States Delegation both indicated that the Convention recognized individual "right[s]." *See* S. Exec. Doc. No. 98-118, at vi, 60. Those documents make clear that the Executive Branch's contemporaneous interpretation of the Convention was that it created individual rights. That original interpretation of the Convention is still reflected in the numerous references to individual rights contained in the State Department's booklet on Consular Notification and Access, *see* U.S. Department of State, Consular Notification and Access at 3, 14, 15, 18, 19, 20, *available at* http://travel.state.gov/pdf/CNA_book.pdf, and its Foreign Affairs Manual ("FAM"), *see* 7 FAM § 421.1-1 (Sept. 3, 2004), *available at* http://foia.state.gov/regs/fams.asp?level=2&id=8&fam=0.[6] The cur-

[6] The statement in a 1970 letter that the State Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States," *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000), is not to the contrary. That statement does not address whether the Convention creates individual rights. And the statement cannot mean that the Convention would not require the states to do *anything* new. Regardless of whether the Convention creates enforceable rights, it indisputably requires arresting authorities to inform foreign nationals that they are entitled to notify and communicate with their consulates. Consistent with that requirement, the State Department's Consular Notification and Access booklet explicitly instructs state

rent Executive Branch view that the Convention does not create individual rights is due little weight, because it is inconsistent with both the plain text of the Convention and the contemporaneous interpretation of U.S. negotiators and other diplomats. *See supra* p. 8.

Other extra-textual interpretive guides also confirm that Article 36 creates individual rights. Most notably, the International Court of Justice ("ICJ") has so held. *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466, 492-94 (June 27). In all cases involving the Convention, this Court owes "respectful consideration" to the ICJ's interpretation because the ICJ is "an international court with jurisdiction to interpret" that treaty. *Breard*, 523 U.S. at 375. But the ICJ's interpretation is entitled to even greater weight in these cases. The Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 326, gives the ICJ "compulsory jurisdiction" over disputes between parties to the Protocol arising out of the interpretation of the Convention. The United States was a party to the Protocol both when the ICJ held, in the *LaGrand Case*, that Article 36 creates individual rights and when the arrests in these cases were made. The ICJ's interpretation is therefore binding on the United States here. *See* 21 U.S.T. 326; *see also, e.g.*, Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Bustillo v. Johnson*, No. 05-51. Moreover, there are currently 45 parties to the Protocol, and each of those 45 parties is bound to follow the ICJ's interpretation. Thus, even if the United States were not formally bound by the ICJ's interpretation, that interpretation would still be entitled to significant weight as evidence of how other treaty parties interpret the Convention. *See supra* p. 8.

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and local law enforcement personnel that they must tell foreign detainees of their right to consular access, and it provides suggested statements for complying with that obligation, *id.* at 74-75 (dissenting opinion).

In sum, the plain language of the Convention, and the weight of the extra-textual interpretive sources, both make clear that Article 36 confers individual rights. As the remainder of this brief explains, it is essential that the Court give effect to the command of the Convention's text. Recognizing that the Convention confers enforceable rights is critical to ensuring that the United States adheres to the Convention's requirements. That adherence, in turn, is vital to guaranteeing that foreign nationals arrested in the United States and U.S. nationals arrested abroad are able to avail themselves fully of the panoply of protections that assures a fair criminal process.

B. Enforceable Rights To Consular Notification And Access Are Essential For Foreign Nationals To Receive The Basic Protections That Guarantee A Fair Criminal Process

Although respondents contest that the Convention creates enforceable rights, no one disputes that it obligates the United States to inform foreign detainees that they are entitled to notify their consulates of their arrests and to communicate with consular officials. In practice, however, the United States hardly ever complies with that undisputed obligation. The overwhelming majority of foreign nationals arrested in the United States are not informed of their rights to consular notification and access. As a result, those nationals are often unable to avail themselves of basic protections designed to ensure fair criminal procedures – including the right to counsel, *Miranda* protections, and the right to exculpatory evidence.

It is thus vital that the notification of consular rights required by the Convention actually take place – both to vindicate the Nation's international obligations and to preserve its commitment to due process of law. And a powerful way for this Court to ensure adherence to the Convention's requirements is to honor the Convention's provisions creating an individual, judicially enforceable right to consular notification.

1. Whether foreign nationals are notified of their rights to consular assistance often determines whether they obtain the fundamental rights guaranteed to criminal defendants

Many foreign nationals lack a basic understanding of the American legal system. In addition, their ability to communicate in English is often limited. As a result, foreign detainees will frequently not completely comprehend the charges against them or their fundamental legal rights. Kadish, 18 Mich. J. Int'l L. at 605. Consular officials play a critical role in remedying that problem. "The consulate ensures that a detained national fully understands the nature of the charge against [him], as well as [his] legal rights and options." Anne James, *The International Justice Project, Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA* at 21 (hereinafter "James"). In essence, the consulate serves as a "cultural bridge" between the foreign defendant and the local legal system. *Id.* And that cultural bridge is often crucial to place the arrested foreign national "on par with a non-foreigner." Kadish, 18 Mich. J. Int'l L. at 606.

Consular officials provide an array of assistance to ensure that detained foreign nationals obtain the procedural protections to which criminal defendants are entitled under U.S. law. The following list illustrates the types of assistance provided:

- ***Consular officials ensure that foreign nationals are informed of their rights in a language that they understand.***

Most frequently, that information includes an explanation of the right to an attorney, as well as the right not to speak to the police in the absence of an attorney. It may also include, for example, reassurance that the detainees will not suffer adverse consequences if they choose not to talk, and notice that they can have a court-certified interpreter present at legal proceedings. *See, e.g.*, *Cardenas v. Dretke*, 405 F.3d 244, 251-52 (5th Cir. 2005) (Mexican consulate would have explained to defendant the significance of rights to counsel and to remain silent); *United States v. Ortiz*, 315 F.3d 873, 884 (8th Cir.

2002) (former Consul General for Colombia in Chicago testified that, had he been in contact with defendants, he would have advised them of their right to an attorney); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003) (parties stipulated that, "had the Philippine consulate been notified of [defendant]'s detention, it would have advised him to talk to an attorney before giving a statement"); *State v. Navarro*, 659 N.W.2d 487, 488 (Wis. Ct. App. 2003) (Mexican consular employee stated that, had he been given the opportunity to speak with the defendant, "he would have advised him not to make or sign any statements whatsoever until the assistance of legal counsel had been obtained"); *State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001) (Mexican consul submitted affidavit stating that he would have "advised [defendants] not to speak with anyone, and that they in fact would not suffer any adverse consequence if they chose not to give statements . . . , that they can also have a court certified interpreter to be present at any stage of the proceedings, and also about the right to request assistance of legal counsel").

The majority of American citizens are very familiar with the right to counsel and the right against self-incrimination, which provide the foundation for a fair criminal trial. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Strickland v. Washington*, 466 U.S. 668, 684 (1984). But those rights may be "meaningless or insignificant to many foreign detainees," who may be unaccustomed to our adversarial system of justice or come from countries where remaining silent under questioning can be used against them in court. James at 21. Therefore, without consular assistance to explain the significance of those rights, foreign nationals may waive them unwittingly. *Id.* at 21-23.

- ***Consular officials provideforeign nationals with infɑrmation about lawyers who an represent them.***

Consular officials routinely "contact the arrested person and undertake to determine whether the attorney on the case is

adequately qualified or whether a more qualified attorney is required to properly defend the arrested individual." *Cauthern v. State*, 145 S.W.3d 571, 591 (Tenn. Crim. App. 2004) (testimony of German Deputy Consul General); *see, e.g.*, *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999) (Mexican consul stated that, had defendants contacted him, he would have "assist[ed] them in obtaining competent legal representation").

This assistance may involve placing foreign nationals in contact with lawyers who speak their language and understand their cultural background. James at 31. Or it may entail assuring that a foreign detainee's lawyer has the appropriate kind of experience, such as experience with death penalty cases. *Id.*; *see, e.g.*, *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting habeas corpus relief to Mexican national because his "trial counsel's inexperience in capital litigation caused him to believe" that funds were not available "to properly investigate [the national's] childhood, social history or other aspects of his life," and noting that, if the defendant had obtained consular assistance, "the Government of Mexico would have intervened in the case, assisted with [the national's] defense, and provided resources to ensure that he received a fair trial and sentencing hearing"); Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985) (Polish consulate would have helped death-eligible defendant obtain an attorney with death-penalty experience). *See generally Strickland*, 466 U.S. at 685-86 (recognizing the "crucial role" of counsel, particularly at capital sentencing).

- ***Consular officials help foreign nationals obtain evidence and witnesses located in their home countries.***

Even where a foreign national understands the U.S. legal system and has access to a competent attorney, the foreigner may still be handicapped in presenting his case. "Crucial evi-

dence favourable to the defence may exist only in the defendant's home country but may lie beyond the reach of defence counsel. The gathering of important documents may require the consulate to correspond with other branches of the home government, or may rely on the notarizing function of the consulate for their legal verification." James at 21.

In death penalty cases, for example, the defendant's background and life experiences are often central to the case in mitigation. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-25, 534-35 (2003). In such cases, "the gathering of mitigation evidence and locating mitigating witnesses" in the foreign national's home country are "[a]mong consular officials most important duties." *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005); *see, e.g.*, *LaGrand Case*, 2001 I.C.J. at 491 (noting that German consular officials would have assisted counsel in developing mitigating evidence from the defendants' childhood). Evidence from a foreign national's home country may also be important to the defense in non-capital cases. *See, e.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 387-88 (6th Cir. 2001) (Nigerian consulate stated that delay in notification prevented it from bringing witnesses to the United States in time for trial, and the district court concluded that the inability to call the witnesses could prejudice the defendant).

As these examples suggest, consular involvement can have a significant impact on whether arrested foreign nationals are able to avail themselves of their rights under U.S. law. For instance, after Mexican national Ricardo Aldape Guerra received the death penalty in Texas state court, the Mexican consulate helped him secure pro bono representation from a large law firm. Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. Int'l & Comp. L. 359, 371 (2003). The consulate also assisted Guerra in uncovering significant evidence that had not been presented at his trial. *Id.* Utilizing the newly discovered evi-

dence, the firm filed a habeas corpus petition that alleged a variety of prosecutorial misconduct, including pretrial intimidation of witnesses, use of false evidence at trial, and failure to disclosure exculpatory evidence. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995). The district court granted the petition and set aside Guerra's conviction. *Id.* at 637.

The case of Victor Hugo Saldano, an Argentine arrested and tried in Texas for murder and kidnapping, provides another illustration of the positive impact of consular assistance. The Argentinian consulate, which was monitoring Saldano's trial, informed his counsel that testimony offered by a state witness to support the death penalty was constitutionally impermissible because it urged jurors to consider Saldano's race in determining whether he was a future threat to society. *See* Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligations as a Matter of Life or Death*, 8 Sw. J. L. & Trade Am. 335, 350-51 (2001-02). The consulate then helped Saldano obtain appellate counsel, *id.*, who pursued the issue all the way to this Court. This Court set aside the state court decision that had affirmed Saldano's conviction and sentence. *Saldano v. Texas*, 530 U.S. 1212 (2000).[7]

In contrast, when consular officials are not notified about a foreign national's arrest, the national often fails to invoke basic procedural protections – and usually suffers deleterious consequences as a result. For example, Gregory Madej is a Polish national who was sentenced to death in Illinois even though his consulate was not notified about his arrest or trial. Madej, who was represented by counsel with no death penalty experience, repeatedly failed to take advantage of strategic op-

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[7] On remand, the Texas Court of Criminal Appeals reaffirmed Saldano's conviction and sentence. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). Saldano then filed a successful petition for federal habeas corpus, *Saldano v. Cockrell*, 267 F. Supp. 2d 635 (E.D. Tex. 2003), which was upheld on appeal, *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004).

portunities that would have helped him avoid the death penalty. For example, Madej rejected a proposed plea bargain that provided for only life imprisonment, and he failed to collect or present mitigating evidence at his sentencing hearing. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985). Sixteen years after Madej was convicted and sentenced to death, the Polish Consulate was notified about his arrest. In connection with Madej's habeas petition, the Consulate stated that it would have helped Madej obtain an attorney experienced in death penalty litigation, and that attorney, among other things, likely would have advised Madej to accept the plea bargain and assisted him in obtaining mitigating evidence. *Id.*

Also instructive is the case of Joseph Faulder, a Canadian who was twice convicted and sentenced to death for a murder that occurred during a robbery. *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996). Faulder, who was later determined to have organic brain damage, "presented no affirmative evidence at the guilt phase of either trial, and no mitigating evidence." Kadish, 18 Mich. J. Int'l L. at 578. The Canadian consulate was not notified about Faulder's plight until after the imposition of the second death sentence. Once informed of Faulder's situation, Canadian officials helped Faulder's attorney locate numerous mitigation witnesses – all of whom were available at the time of Faulder's original trial but none of whom testified in that proceeding. Henry Weinstein, *Foreigners on Death Rows Denied Rights, U.S. Says*, L.A. Times, Dec. 10, 1998, at A1. Canadian officials also stated that, had they been informed of Faulder's arrest at the time it occurred, they would have helped Faulder find an attorney who would have pursued his case aggressively from the beginning and who would have brought out evidence of his mental impairment. *Id.* Given Faulder's diminished capacity, the consulate's effort might have enabled him to avoid the death penalty. *Id.* As these cases illustrate, whether or not a foreign national is noti-

fied of his consular rights can determine whether or not he obtains the basic protections that ensure the fairness of our criminal justice system.

2. Recognizing that the Convention confers enforceable rights will provide a provide a powerful incentive for the United States to comply with the Convention's consular notification requirements

Unfortunately, notification of consular rights is the exception rather than the rule in United States. Recent studies indicate that less than five percent of foreign nationals sentenced to death received timely notification of their consular rights. *See* Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States* (May 28, 2005), http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (concluding that "only 7 cases of complete compliance with Article 36 requirements have been identified so far, out of more than 160 total reported death sentences"); Amnesty Int'l, *United States of America: A time for action – Protecting the consular rights of foreign nationals facing the death penalty*, at 4 (Aug. 2001) (observing that, in "virtually every one" of the 120 cases in which foreign nationals were sentenced to death between the reinstatement of the death penalty and 2001, "the arresting authority failed to inform the nationals of their consular rights"). The rate of consular notification appears to be even lower for non-capital cases. For example, an examination of New York City arrest records from 1997 revealed that 53,000 foreign nationals were arrested, but consulates were notified of the arrests in only *four* cases. *See* Warren, *supra*.

The current environment – in which there is no clearly established enforceable right to consular notification – has thus been ineffective in ensuring that the government complies with its obligations under the Vienna Convention. That should not be surprising. As Justice Holmes long ago recognized, "[l]egal obligations that exist but cannot be enforced are ghosts that are

seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). Conversely, judicially enforceable individual rights are powerful tools to promote compliance with legal requirements. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 384 (1982) (noting that an individual right to enforce the Commodity Exchange Act provides "a significant incentive for the exchanges to obey the law"); *Cannon*, 441 U.S. at 705-06 (concluding that a private right of action is "necessary to – the orderly enforcement" of Title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (recognizing an enforceable right to compel state compliance with Section 5 of the Voting Rights Act because otherwise the Act "might well prove an empty promise"). By recognizing that the Vienna Convention creates judicially enforceable rights to consular notification and access, the Court can simultaneously honor the Convention's text and reverse this country's unfortunate history of noncompliance with its treaty obligations.

C. Enforceable Rights To Consular Notification and Access Are Critical To The Protection of U.S. Nationals Arrested Abroad

A holding that the Convention confers individually enforceable rights is also important to ensure the fairest possible treatment of U.S. nationals arrested abroad. Consular assistance is critically important to Americans detained in foreign countries. Indeed, consular assistance may be even more vital for U.S. detainees abroad than for foreign detainees in our country. U.S. nationals arrested abroad not only face unfamiliar legal systems but may be more likely than detainees in the United States to confront coercive interrogation or inhumane conditions of detention. Consular involvement guards against those abuses. But U.S. detainees abroad will not seek consular assistance unless other nations comply with their obligations under the Vienna Convention to notify the detainees of their consular rights. And both international law and common sense

teach that foreign nations will not respect their Vienna Convention obligations unless the United States respects its own.

1. Consular notification and assistance are necessary to ensure fair treatment of U.S. nationals detained abroad

Every year, millions of Americans travel to foreign countries or choose to live outside the United States. According to the State Department, "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the U.S. each year." Bureau of Resource Management, U.S. Department of State, *FY2004 Performance and Accountability Report* (2004), *available at* http://www.state.gov/s/d/rm/rls/perfrpt/2004/html/39024.htm. Moreover, the number of Americans who venture abroad is increasing. The United States issued a record total of 8.8 million passports in 2004, an increase of 1.5 million from the previous year. *Id.*

Millions of Americans are therefore at risk of being arrested by a foreign criminal justice system. Every year, that risk becomes an unfortunate reality for thousands of U.S. nationals. The State Department's Bureau of Public Affairs estimates that "more than 2,500 American citizens are arrested abroad" each year. Bureau of Public Affairs, U.S. Department of State, *International Travel Safety Information for Students* (2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/29556.htm. Less formal detentions increase that number significantly, so that the total number of Americans arrested or detained abroad annually is almost 6,000. Kevin Herbert, Managing Director of the Office of Overseas Citizens Services, U.S. Department of State, *The Terrorist Threat to American Presence Abroad*, Part II, Threat to Citizens Overseas, University of Virginia, Apr. 12-13, 1999, http://www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm.

Often "the only people [American detainees] can turn to for help are American diplomats." Statement of R. Nicholas Burns, State Department Spokesperson (Sept. 29, 1995),

http://www.hri.org./docs/statedep/1995/95-09-29.std.html. As the State Department has explained, providing that assistance is the "most important function" of U.S. consular officers. U.S. Department of State, 7 FAM § 412. Indeed, in 2004 alone, consular officials paid 6,920 visits to Americans abroad. Daniel B. Smith, Principal Deputy Assistant Secretary for Consular Affairs, Testimony Before the U.S. House of Representatives, Comm. on International Relations (May 12, 2005), *available at* http://www.house.gov/international_relations/109/smi051205.pdf.

American consular officers provide arrested U.S. nationals with a broad range of assistance, both legal and humanitarian. Consular officers provide U.S. detainees with the names of reputable lawyers and other information about local legal aid. 7 FAM § 422. Consular officials explain the legal and judicial procedures of the foreign government and the detainee's legal rights. *Id.* Consular officers also intervene with foreign governments on behalf of detained Americans, where necessary, to "forestall physical abuse" and "to demand medical attention" and "a prompt investigation" when physical abuse has occurred. *Id.* In addition, consular officers ensure that detained Americans have basic necessities such as food and water, *id.* at § 423.9, offer to contact family or friends, *id.* at § 423.7, and take steps to protect the detainees' personal property, *id.* at § 423.8.

For many U.S. nationals arrested abroad, consular assistance makes the difference between fair treatment and capricious punishment. For example, in December 2004, consular officials helped secure the release from custody of Avnish Bajaj, a U.S. citizen and CEO of an Indian online auction house wholly owned by eBay. Paul Watson, *India Roiled by Internet Sex Case*, Boston Globe, Dec. 22, 2004, *available at* http://www.boston.com/news/world/asia/articles/2004/12/22/india_roiled_by_internet_sex_case. Bajaj was arrested in Delhi after pornographic materials were unwittingly sold on his com-

pany's website. A lower court ordered that Bajaj be held in jail without bail. After receiving notification of his predicament, the American consulate informed high-ranking State Department officials, and the U.S. government placed diplomatic pressure on India to ensure that Bajaj received fair treatment. In addition, consular officials visited him in detention and attended the appellate hearing that resulted in his release. *Avnish Bajaj's Arrest Worries Colin Powell*, Agence France-Presse, Dec. 21, 2004, *available at* http://avnish-bajaj-news.newslib.com/story/1186676.

In stark contrast to Bajaj's case stands the example of Robert Fielding, a U.S. citizen seized from his hotel by Belarusian authorities in 2001. Fielding, who did not receive consular notification or assistance, was "subjected to a 10-hour interrogation by law enforcement officials who just 'happened' to be accompanied by the television cameras of Belarusian National Television . . . . During this entire interrogation process, he was denied the right to legal counsel, forced to sign a statement, and subjected to being filmed by the state-controlled Belarusian National Television that later showed parts of this interrogation on its prime-time national 'news' program 'Rezanans' less than 24 hours after his deportation." Embassy of the United States of America, Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding, Aug. 29, 2001, http://minsk.usembassy.gov/html/fielding.html. Moreover, after his brutal interrogation, Fielding was forced to leave Belarus for Poland without the opportunity "to gather any of his personal belongings from his legally-registered residence in Minsk." *Id.*

The ability of U.S. consulates to provide assistance to Americans detained abroad hinges on whether consular officials receive prompt notification of the detentions. As the State Department Foreign Affairs Manual instructs consular officers, "[p]rompt notification is the necessary first step in obtaining early access to the arrestee." 7 FAM § 421. And

early access is the linchpin to ensuring that U.S. detainees receive fair treatment. "With early access to each prisoner [consular officials] can go a long way towards guaranteeing against mistreatment and forced statements at the time of arrest," and can provide timely "information about responsible legal counsel and judicial procedures." Leonard F. Walentynowicz, Bureau of Security and Consular Affairs, U.S. Department of State, U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94 Cong., 1st Sess. Part II, at 6 (1975). The State Department therefore instructs consular officials that "it is essential that [they] obtain prompt notification whenever a U.S. citizen or national is arrested." 7 FAM § 421. And the Department identifies the Vienna Convention as the principal authority through which consular officers can obtain the necessary notification. *Id.* § 421.1; *see id.* § 413.1. Thus, compliance by other nations with their consular notification obligations under the Convention is crucial for the protection of Americans abroad.

2. Foreign nations will not honor the Vienna Convention's consular notification requirements unless the United States ensures that the requirements are enforced in this country

Foreign nations are unlikely to comply with the Convention's consular notification requirements unless the United States also complies with those requirements. As this Court has long recognized, "mutuality and reciprocity" are the foundation of international law. *Hilton v. Guyot*, 159 U.S. 113, 228 (1895); *see Souffront v. La Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 483 n.9 (1910). It is therefore unreasonable to expect other nations to comply with their treaty obligations if the United States refuses to comply with its own. That conclusion follows not only from basic principles of international law but from fundamental precepts of human relations. *See* H.T.D. Rost, *The Golden Rule: A Universal Ethic* (1986). Thus, if the United States does not ensure that foreign

nationals arrested in this country are notified of their consular rights, other nations are likely to respond in kind.

The State Department is well aware of that reality. Then-Secretary of State Madeline Albright described the situation succinctly in a 1998 letter to then-Governor of Texas George W. Bush. The Secretary observed that "[w]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad." *See* Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 Leiden J. Int'l L. 367, 376 (2002) (quoting Secretary of State Albright). Similarly, the State Department instructs state and local law enforcement officials that their rigorous adherence to the Convention's requirements "will permit the United States . . . to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad." U.S. Department of State, Consular Notification and Access at 13.

The same sentiments have been echoed by numerous judges reviewing legal challenges by criminal defendants who were denied their consular rights. As Judge Butzner eloquently stated in *Breard v. Pruett*, "United States citizens are scattered about the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *see also United States v. Carrillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) ("If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."); *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring) ("Why should Mexico, or any other

signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases.").

There is, of course, no guarantee that other nations will respect the rights of U.S. nationals under the Vienna Convention, no matter how scrupulously the United States respects the rights of foreign nationals, and no matter how this Court rules in these cases. But rigorous compliance with the Convention by the United States will provide a strong incentive for other nations to comply. And recognition that the Convention confers judicially enforceable rights will provide a powerful mechanism to ensure compliance by the United States. Even more important, the existence of individual rights is firmly grounded in the text of the Convention and supported by other interpretive considerations. This Court should therefore hold that the Convention creates enforceable, individual rights to consular notification and access.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of petitioners, the judgments of the Supreme Courts of Virginia and Oregon should be reversed.

Respectfully submitted.

MATTHEW D. ROBERTS
Counsel of Record
THOMAS E. DONILON
KARL R. THOMPSON
CHARLES E. BORDEN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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