

No. 06-984

In The
Morris Tyler Moot Court of Appeals at Yale

JOSE ERNESTO MEDELLÍN,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

**On Writ of Certiorari to
The Court of Criminal Appeals of Texas**

BRIEF FOR PETITIONER

MICHAEL K. KROUSE
ENRIQUE R. SCHAERER
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Petitioner

QUESTIONS PRESENTED

In *Avena*, the ICJ determined that 51 Mexican nationals, including Medellín, were entitled to review and reconsideration of their convictions and sentences through the judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would discharge its international obligation by giving those 51 individuals review and reconsideration in state courts. However, the Court of Criminal Appeals of Texas refused to give effect to *Avena* or to the President's determination.

1) Did the President act within his constitutional and statutory foreign affairs authority when he issued a memorandum directing state courts to review and reconsider the convictions and sentences of the 51 Mexican nationals named in *Avena*?

2) Are state courts required by the Constitution and U.S. Treaty to give effect to *Avena* in the cases that the judgment addressed, and if so, is Texas required to grant Medellín a prejudice hearing on his Vienna Convention claim?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW..... 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF FACTS..... 2

SUMMARY OF ARGUMENT..... 8

ARGUMENT..... 12

I. The President acted within his constitutional and statutory authority when he issued a memorandum to enforce *Avena* in state courts..... 12

 A. Because of its limited scope, the Memo is no more intrusive than necessary to accomplish the President’s foreign policy objectives. 13

 B. The President acts with maximum authority because Congress has implicitly empowered him to enforce *Avena* in state courts. 15

 C. Even without congressional authorization, the President has independent authority to issue a binding memorandum to enforce *Avena*. 17

 D. The President’s Memo does not violate state sovereignty. 22

II. State courts are bound by the Constitution and U.S. Treaties to give effect to *Avena* in cases concerning the defendants named in that judgment..... 24

 A. *Avena* is binding on state courts in the cases that decision addressed. 25

 1. By joining the Optional Protocol, the United States granted the ICJ authority to issue binding final decisions in Vienna Convention cases. 25

 2. Actions by federal and state officials demonstrate their understanding that ICJ judgments have the force of federal law. 26

 3. The Constitution allows the President to give the ICJ authority to issue binding judgments in Vienna Convention cases. 28

 4. This Court has approved of another Treaty—the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards—that gives foreign judgments binding effect in state courts. 31

 B. The Texas court must address the merits of Medellín’s Habeas Petition. 33

 1. The Texas court may not refuse to enforce *Avena*. 33

 2. The outcome of Medellín’s prejudice hearing is not a foregone conclusion. 37

 3. Requiring the Texas court to conduct a prejudice hearing in Medellín’s case would not require this Court to revisit *Breard* or *Sanchez-Llamas*. 38

CONCLUSION 40

TABLE OF AUTHORITIES

Cases

<i>Am. Ins. Ass’n v. Garamendi</i> , 539 U.S. 396 (2003).....	17, 18, 19, 20
<i>Asakura v. Seattle</i> , 265 U.S. 332 (1924).....	33
<i>Breard v. Greene</i> , 523 U.S. 371 (1998).....	13, 26
<i>Burnet v. Brooks</i> , 288 U.S. 378 (1933).....	22
<i>Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)</i> , 2004 I.C.J. No. 128 (Judgment of Mar. 31).....	passim
<i>Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)</i> , Memorial of Mexico, June 20, 2003.....	4, 37
<i>Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.)</i> , 1998 I.C.J. 426 (Order of Nov. 10).....	3
<i>Chae Chan Ping v. United States</i> , 130 U.S. 581 (1889).....	22
<i>Commodities Futures Trading Commission v. Schor</i> , 478 U.S. 833 (1986).....	30
<i>Dames & Moore v. Regan</i> , 453 U.S. 654 (1981).....	15, 17, 29
<i>Durand v. Hollins</i> , 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).....	30
<i>Ex parte Medellín</i> , 223 S.W.3d 315 (Tex. Crim. App. 2006).....	passim
<i>Ex parte Republic of Peru</i> , 318 U.S. 578 (1943).....	18, 21
<i>Federal Republic of Germany v. United States</i> , 526 U.S. 111 (1999).....	26
<i>First Nat’l City Bank v. Banco Nacional de Cuba</i> , 406 U.S. 759 (1972).....	21
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698 (1893).....	22
<i>Gulf Petro Trading Co. v. Nigerian Nat’l Petroleum Corp.</i> , 288 F. Supp. 2d 783 (N.D. Tex. 2003).....	32
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965).....	36
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895).....	13, 35
<i>Kolovrat v. Oregon</i> , 366 U.S. 187 (1961).....	33
<i>LaGrand Case (F.R.G. v. U.S.)</i> , 2001 I.C.J. 466 (Judgment of June 27).....	3, 27
<i>Laker Airways v. Sabena, Belgian World Airlines</i> , 731 F.2d 909 (D.C. Cir. 1984).....	35
<i>Medellín v. Cockrell</i> , 2003 U.S. Dist. LEXIS 27339 (S.D. Tex. 2003).....	1, 5
<i>Medellín v. Dretke</i> , 371 F.3d 270 (5th Cir. 2004).....	1, 7
<i>Medellín v. Dretke</i> , 544 U.S. 660 (2005).....	passim
<i>Missouri v. Holland</i> , 252 U.S. 416 (1920).....	24, 29

<i>Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	32
<i>New York v. United States</i> , 505 U.S. 144 (1992)	14
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982).....	30
<i>Polytek Engineering Co., Ltd. v. Jacobson Co.</i> , 984 F. Supp. 1238 (D. Minn. 1997).....	32
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	14
<i>Sale v. Haitian Centers Council, Inc.</i> , 509 U.S. 155 (1993).....	19
<i>Sanchez-Llamas v. Oregon</i> , 126 Ct. 2669 (2006).....	20, 26, 38
<i>Sanitary District of Chicago v. United States</i> , 266 U.S. 405 (1925)	23
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974)	31
<i>State v. Reyes</i> , 1999 WL 743598 (Del. Super. 1999).....	37
<i>Thomas v. Union Carbide Agricultural Products Co.</i> , 473 U.S. 568 (1985)	30
<i>Torres v. Mullin</i> , 540 U.S. 1035 (2003).....	25
<i>Torres v. Oklahoma</i> , No. PCD-04-442 (Okla. Crim. App. 2004).....	28
<i>United States Diplomatic and Consular Staff in Tehran (United States v. Iran)</i> , 1980 I.C.J. 3 (Judgment of May 24).....	36
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304 (1936).....	16, 18, 19, 22
<i>United States v. Giordano</i> , 416 U.S. 505 (1974)	26
<i>Valdez v. State</i> , 46 P.3d 703 (Okla. Crim. App. 2002)	38
<i>Waterside Ocean Navigation Co. v. International Navigation, Ltd.</i> , 737 F.2d 150 (2d Cir. 1984).....	31
<i>Whitney v. Robertson</i> , 124 U.S. 190 (1888).....	18
<i>Wolsey v. Chapman</i> , 101 U.S. 755 (1879).....	22
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	23
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	12, 15, 18
<i>Yusuf Ahmed Alghanim & Sons v. Toys “R” Us</i> , 126 F.3d 15 (2d Cir. 1997).....	34
<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968)	23

Statutes

22 U.S.C. § 4802(a)(1)(D) (2006).....	15, 16
28 U.S.C. § 1257(a) (2006).....	1
9 U.S.C. § 207 (2006)	34
Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996)	13

Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611 (2006).....	18
Hostage Act, 22 U.S.C. § 1732 (2006)	17
Texas Code Crim. Proc. art. 11.071 § 5 (Vernon 2003)	2, 22

Other Authorities

ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 2, cmt. d, (2005)	35
Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts	34
Brief for the U.S. as Amicus Curiae, in <i>Breard</i> , 523 U.S. 371, 1997 LEXIS U.S. Briefs 1390	27
Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., <i>available at</i> http://www.deathpenaltyinfo.org/article.php?did=198#Reported-DROW	4
ICJ Statute, June 26, 1945, 59 Stat. 1031	16, 25
Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005).....	3
Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 21 U.S.T. 326	passim
President’s Memorandum to the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in <i>Avena</i> (Feb. 28, 2005)	7, 13, 14
Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), <i>available at</i> http://www.governor.state.ok.us/display_article.php?article_id=301&article_ty=pe=1	28
Provisional Measures Order of 5 February 2003, ICJ Reports 2003	26
Remarks of William Howard Taft, IV, State Department Legal Advisor, before the National Association of Attorneys General, March 20, 2003, <i>available at</i> http://www.state.gov/s/l/2003/44408.htm	4, 27
Restatement (Second) of Conflict of Laws § 106 (1969)	35
Restatement (Second) of Foreign Relations Law of the United States § 213 (1965)	29
Restatement (Second) of Judgments § 17 (1980)	35
Restatement (Third) of the Foreign Relations Law of the United States § 303 cmt. f (1987)	15
Restatement (Third) of The Foreign Relations of The United States § 481 (1986).....	13
S. Exec. Doc. E, 90th Cong., 2d Session (1968).....	31
The Federalist No. 44 (James Madison)	22

U.N. Charter, 59 Stat. 1031, T.S. No. 93 (1945)	15, 16
U.N. Charter, 59 Stat. 1051, T.S. No. 933 (1945)	25
U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970) (implemented as U.S. law by 9 U.S.C. §§ 201-208 (2000))	31
U.S. Dep't of State, 7 <i>Foreign Affairs Manual</i> 400	37
U.S. Dept. of Justice, Bureau of Justice Statistics Bull. (rev. July 14, 2004), Prison and Jail Inmates at Midyear 2003	4
Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77	passim
Vienna Convention, Hearing Before Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, at 5 (1969) (statement of State Department Deputy Legal Adviser J. Edward Lyerly)	25

Treatises

Eugene F. Scoles et al., <i>Conflict of Laws</i> 1342 (4th ed. 2000)	32
Shabtai Rosenne, <i>The Law and Practice of the International Court, 1920-1996</i> , at 1655-56 (3d ed. 1997)	25

Constitutional Provisions

U.S. Const. art. II, § 1	18
U.S. Const. art. II, § 2	18, 28
U.S. Const. art. II, § 3	18
U.S. Const. art. VI, cl. 2	25

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 223 S.W.3d 315 (Tex. Crim. App. 2006). This Court's previous dismissal of certiorari is reported at 544 U.S. 660 (2005). The district court's opinion, denying habeas relief, is reported at 2003 U.S. Dist. LEXIS 27339 (S.D. Tex. 2003). The circuit court opinion is reported at 371 F.3d 270 (5th Cir. 2004).

JURISDICTION

The Court of Criminal Appeals of Texas entered judgment on November 15, 2006. Medellín filed a petition for a writ of certiorari on January 16, 2007, which the Supreme Court granted on April 30, 2007. 127 S. Ct. 2129. Jurisdiction rests on 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. II:

Section 1: "The executive Power shall be vested in a President"

Section 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls."

Section 3: "[The President] shall receive Ambassadors and other public Ministers . . . [and] take Care that the Laws be faithfully executed"

U.S. Const. art. VI, cl. 2 ("The Supremacy Clause"):

This Constitution . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Vienna Convention on Consular Relations, Article 36:

(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. . . . ;

(b) If he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

(c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is

in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

(2): The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Optional Protocol Concerning the Compulsory Settlement of Disputes, Article I:

Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the [ICJ] by an application made by any party to the dispute being a Party to the present Protocol.

Texas Code of Criminal Procedure, Article 11.071, Procedure in Death Penalty Case, Section 5 – Subsequent Application for a Writ of Habeas Corpus

(a) If a subsequent application for a writ of habeas corpus is filed, . . . a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in . . . a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

President’s Memorandum to the Attorney General, Feb. 28, 2005¹

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the [ICJ] in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

STATEMENT OF FACTS

I. The Vienna Convention and Optional Protocol

In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention on Consular Relations (“Vienna Convention”), Apr. 24, 1963, 21 U.S.T. 77. Article 36 of the Convention was designed to guarantee open channels of communication between detained foreign nationals and their consulates in signatory countries. To secure these protections for Americans abroad, the United States agreed to provide reciprocal rights to foreign nationals in the United States. In relevant part, the provision grants individuals the right to be informed

¹ Available at <http://www.whitehouse.gov/news/releases/2005/02/print/20050228-18.html>.

“without delay” of their ability to communicate with their consular officers when they are detained by authorities in a foreign country. Vienna Convention, art. 36(1)(b). The Convention also provides that these rights “shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso” that they enable “full effect to be given to the purposes for which the rights accorded under this Article are intended.” *Id.*, art. 36(2). Presently, 167 nations are party to the Convention. 544 U.S. at 674 (O’Connor, J., dissenting).

Also in 1969, the United States ratified the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes (“Optional Protocol”), Apr. 18, 1961, 21 U.S.T. 326. This instrument provides that “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice [“ICJ”],” and allows parties to the Protocol to bring disputes to the ICJ. *Id.* at 326. Since 1998, the United States has three times been the subject of proceedings in the ICJ concerning Convention violations by the states. *See Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 426 (Order of Nov. 10); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (Judgment of June 27); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31) (“*Avena*”). After the ICJ decided *Avena* in Mexico’s favor, the United States gave notice of its withdrawal from the Optional Protocol. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005).

The three proceedings before the ICJ demonstrated the extent to which individual states violate the Convention. *See also* 544 U.S. at 674 (O’Connor, J., dissenting) (“In this country, the individual States’ (often confessed) noncompliance with the treaty has been a vexing problem.”). A survey conducted by the Mexican Foreign Ministry of the forty-five Mexican consulates in the United States revealed that violations remain widespread. *Avena*, Memorial of Mexico, June 20,

2003 (“Memorial of Mexico”). Together, the consulates identified 89 cases since 2001 where Mexican nationals detained on murder charges were not notified of their Article 36 rights. *Id.* at 66. Of these, 36 were capital cases. *Id.* at 67. The State Department has acknowledged this failure to comply with Vienna Convention obligations. *See* Remarks of William Howard Taft, IV, State Department Legal Advisor, before the National Association of Attorneys General (“Taft Remarks”), March 20, 2003, *available at* <http://www.state.gov/s/l/2003/44408.htm> (stating that “the United States has not done as well as it should in complying with these obligations, which we insist upon so strenuously for our own nationals”).

Noncompliance is a foreign affairs concern, since foreign nationals are regularly subject to state criminal justice systems. For example, in 2003, noncitizens accounted for over 10% of the prison population in California, New York, and Arizona, and numbered 56,000 across all states. 544 U.S. at 674 (O’Connor, J., dissenting) (citing U.S. Dept. of Justice, Bureau of Justice Statistics Bull. ¶ 5 (rev. July 14, 2004), Prison and Jail Inmates at Midyear 2003). As of March 28, 2007, 124 noncitizens from 33 nations were on state death rows. Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., *available at* <http://www.deathpenaltyinfo.org/article.php?did=198#Reported-DROW>. By jurisdiction, Texas has 28 foreign nationals on death row, California has 47, and Florida has 21. Since 1976, states have executed 22 foreign nationals. *Id.* As Justice O’Connor observed, “[n]oncompliance with our treaty obligations is especially worrisome in capital cases.” 544 U.S. at 674.

II. Procedural History

A. Medellín’s Conviction and Initial Habeas Petitions

Jose Ernesto Medellín, a Mexican national, confessed to participating in the rape and murder of two teenage girls in 1993. 544 U.S. at 662. At the time of his arrest, Medellín told police officers that he was born in Laredo, Mexico. He also told the Harris County Pretrial

Services that he was not an American citizen. *Id.* at 675. Nonetheless, Medellín was convicted and sentenced to death without ever being informed that he could contact his consular authorities. *Id.* The Mexican consulate only became aware of Medellín’s case six weeks after his conviction was affirmed, when Medellín wrote them a letter from Texas death row. *Id.*

In his first state habeas petition, Medellín claimed that this failure by Texas to advise him of his consular rights violated Article 36 of the Vienna Convention. As relief, he sought an evidentiary hearing to determine whether he suffered prejudice from this violation. The Texas trial court denied his petition, claiming that Medellín’s failure to object at trial procedurally barred his Vienna Convention claim. *Id.* at 675. The Texas Court of Criminal Appeals summarily affirmed. Medellín then filed a federal habeas petition in the U.S District Court for the Southern District of Texas. That court also denied relief, stating that Texas’ procedural default rule was an adequate and independent state ground, and therefore barred federal consideration of the defaulted claim. 2003 U.S. Dist. LEXIS 27339. Medellín then sought a Certificate of Appealability (“COA”) from the U.S. Court of Appeals for the Fifth Circuit.

Meanwhile, Mexico initiated proceedings in the ICJ against the United States on behalf of 54 Mexican nationals, including Medellín, sentenced to death in nine U.S. states.² Mexico claimed that these defendants had not been informed of their right to consular notification, and that the application of procedural default rules to their Convention claims failed to give “full effect” to the purposes of the Convention.

B. The *Avena* Decision

On March 31, 2004, while Medellín’s application for a COA was pending before the Fifth Circuit, the ICJ decided *Avena*. The court determined that the United States had failed to fulfill its obligation under Article 36(1)(b) of the Convention to provide consular notification to

² Arizona, Arkansas, California, Florida, Nevada, Ohio, Oklahoma, Oregon, and Texas.

51 Mexican nationals who had been sentenced to death.³ 2004 I.C.J. ¶ 90. To remedy these violations, the ICJ required the United States to “permit review and reconsideration of these nationals’ cases by the United States courts . . . with a view to ascertaining whether in each case the violation . . . caused actual prejudice to the defendant . . .” *Id.* ¶ 121. The ICJ did not specify the means by which American courts had to provide such review, but stressed that it would require American courts to “fully examin[e] and tak[e] into account” the violation and “the possible prejudice caused by that violation.” *Id.* ¶ 138. Furthermore, review and reconsideration was required for both the conviction and the sentence, and had to be carried out in judicial proceedings. *Id.* The ICJ ruled that executive clemency hearings were insufficient, since review had to take place by means of “a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention,” and since “it is the judicial process that is suited to this task.” *Id.* ¶ 139, 140, 143.

The ICJ also held that the Convention did not allow the indiscriminate use of procedural default rules to foreclose review and reconsideration in those 51 cases. While noting that procedural default rules were not invalid per se, the ICJ held that courts could not use such rules in cases where the failure to inform the defendant of his Treaty rights had prevented him from timely asserting them. Previously, in *LaGrand*, the ICJ held that the procedural default rule, as applied to the LaGrands, violated Article 36(2) of the Convention, because the rule prevented “full effect [from being] given to the purposes for which the rights accorded under [Article 36] are intended.” *Id.* ¶ 113. In *Avena*, the ICJ again determined that U.S. courts could not use procedural default rules to foreclose review for actual prejudice in the 51 cases at issue. *Id.*

³ Three capital defendants from Illinois had their sentences commuted by Governor Ryan during the case.

Despite the ICJ's decision, the Fifth Circuit concluded that Medellín's Vienna Convention claim lacked the requisite merit for a COA. 371 F.3d 270 (5th Cir. 2004). This Court granted certiorari to review this decision on December 10, 2004. 543 U.S. 1032 (2004).

C. The President's Memo and Medellín's Subsequent Habeas Petition

Due to intervening events, this Court chose not to decide Medellín's case the first time it granted review. First, before oral arguments, President Bush directed the state courts with jurisdiction over the 51 cases from *Avena* to provide the required review and reconsideration. See President's Memorandum to the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005) ("President's Memo"). The President's Memo expressed his determination that "the United States [would] discharge its international obligations under the decision of the [ICJ] in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity." *Id.*

Relying on *Avena* and the President's Memo as separate bases for relief that were not available for his first state habeas petition, Medellín filed a second state habeas petition four days before oral argument in this Court. 544 U.S. at 663-64. Medellín then moved to stay further proceedings pending the pursuit of his Texas petition. *Id.* at 668. This Court decided to dismiss Medellín's case as improvidently granted, stating that there was a possibility that Texas courts "may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required, and that Medellín now seeks in this proceeding." *Id.* at 664.

The Texas Court of Criminal Appeals, however, refused to address the merits of Medellín's Vienna Convention claim. In its view, *Avena* and the President's Memo did not preempt state criminal procedure rules barring subsequent habeas petitions, and did not qualify as previously unavailable factual or legal bases under those rules. 223 S.W.3d 315. On January 16, 2007, Medellín took up this Court's offer and filed a subsequent petition for a writ of

certiorari. *See* 544 U.S. at 664 n.1 (stating that Medellín could seek certiorari from the Texas courts' disposition of the state habeas petition, and that this Court would "in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum" and *Avena*). This Court granted certiorari on April 30, 2007. 127 S. Ct. 2129 (2007).

SUMMARY OF ARGUMENT

The United States is obligated by Treaty to give effect to *Avena*. Several international instruments make ICJ decisions binding on the parties to a particular case. When *Avena* was decided, the United States was a member of the Optional Protocol, which gave compulsory jurisdiction over Vienna Convention disputes to the ICJ. The ICJ Statute, Article 59, made ICJ decisions binding on the parties to a particular case. Furthermore, the U.N. Charter, Article 94, states that each member, including the United States, will comply with decisions of the ICJ in any case to which it is a party. Because the United States was party to *Avena*, these self-executing Treaty obligations make that judgment binding on the United States.

In *Avena*, the ICJ held that the United States violated its obligations under the Vienna Convention to provide consular notification to 51 Mexican nationals sentenced to death in nine U.S. states. As remedy, the ICJ ordered the United States to "review and reconsider" each case for actual prejudice, notwithstanding state procedural default rules. Medellín is one of the 51 Mexican nationals addressed in *Avena*. However, in its decision below, the Texas court decided that state procedural rules could still bar review and reconsideration of Medellín's Vienna Convention claim. This decision is contrary to federal law, since the President's Memo orders state courts to give effect to *Avena*, and since U.S. Treaties make *Avena* binding on state courts.

The President's Memo reflects an executive decision to enforce *Avena* by having state courts give effect to the decision for the 51 named Mexican nationals. This Memo does not confer a general right to review and reconsideration upon *all* detained foreign nationals whose

Vienna Convention rights have been violated, just those 51 nationals named in *Avena*. Furthermore, the Memo does not dictate how to resolve the merits of the 51 cases, but requires that state courts must provide review and reconsideration. Therefore, the Memo is a limited and constitutionally appropriate way for the President to fulfill U.S. Treaty obligations.

Since Congress has implicitly sanctioned the President's role in enforcing ICJ decisions, the President issued his Memo at the height of his authority. Several U.S. Treaties, as well as statutes like the U.N. Participation Act, empower the President to manage foreign relations with the United Nations and the ICJ. Since a failure to enforce *Avena* has consequences before the Security Council, these enactments indicate congressional deference to the President on how to secure U.S. compliance with ICJ decisions. Therefore, the President issued the Memo pursuant to an implied grant of congressional authority.

Even without congressional approval, the President would have had independent authority to issue his Memo. Article II of the Constitution makes the President the primary figure in foreign policy, and this Court has broadly construed the President's ability to make international agreements that bind state courts. In substance, the President's Memo operates as an agreement with Mexico as to how the U.S. will comply with *Avena*. Mexico pursued many diplomatic avenues in an effort to remedy Vienna Convention violations by the United States. One was filing suit before the ICJ. The United States chose to litigate and lost. In response, the United States agreed to comply with the judgment, and the President issued his Memo to state courts. A contextual understanding of the Memo reveals its functional similarity to other international agreements that this Court has upheld and given preemptive effect. Therefore, the President issued the Memo pursuant to his authority to make binding international agreements.

Giving the President's Memo preemptive effect in state court does not violate principles of state sovereignty. This Court has acknowledged that states have no role in foreign affairs.

Furthermore, the Supremacy Clause preempts state laws that conflict with international agreements or with the President's foreign policy. Therefore, if the President's Memo is valid under the *Youngstown* framework, state laws that obstruct its implementation must yield. Texas's procedural default and successive habeas rules, as applied to Medellin's Vienna Convention Claim, conflict with the President's memo and are preempted. Texas must grant Medellin a prejudice hearing.

Even if the President lacked authority to issue his Memo, state courts must enforce *Avena* in cases concerning the defendants named in that judgment. As discussed above, the Optional Protocol, the UN Charter, and the ICJ statute make *Avena* binding on the United States. Since this Court has long recognized the President's ability to give foreign tribunals the authority to issue binding judgments, this delegation to the ICJ by Treaty does not violate Article III. Therefore, *Avena* places a valid obligation on the United States to review and reconsider the 51 cases addressed in that judgment. Because the Supremacy Clause makes U.S. Treaty obligations binding on the states, Texas courts must also enforce *Avena*.

Actions by federal and state officials demonstrate an understanding that ICJ judgments have the force of federal law. For instance, the President and the State Department treated the Provisional Measures Order in *Avena* as a binding obligation, and took steps to prevent the execution of the three defendants named in that Order. Furthermore, the President's Memo demonstrates his view that ICJ decisions place international obligations on the United States, while his decision to withdraw from the Optional Protocol shows a desire to avoid this situation in the future. Finally, after *Avena*, the Governor of Oklahoma commuted the sentence of one of the 51 named defendants, and expressed his view that *Avena* is binding on state courts.

Under the Supremacy Clause, Texas must enforce an ICJ judgment that binds the United States. Therefore, to comply with *Avena*, Texas is required to review and reconsider Medellin's

conviction and sentence for actual prejudice, notwithstanding its procedural rules. The outcome of this prejudice hearing is not a foregone conclusion. Even though Medellín confessed to a brutal crime, consular officials could have been of substantial assistance, especially at the penalty phase. Such officials can help defendants obtain mitigation evidence within their native countries, and can assuage fears of deportation. While Medellín lived in Texas for an extended period, these factors could have impeded his ability to defend against a capital charge.

Even if Texas disagrees with the substance of the *Avena* decision, it may not modify or refuse to enforce it. First, the Treaties at issue provide no exceptions to the mandatory enforcement of ICJ judgments. However, even if enforcement is not mandatory, the law of judgments and international comity do not allow courts to modify or refuse to enforce judgments, simply because they disagree. Only if the judgment fails to accord with procedural fairness might a court have grounds to refuse enforcement. In *Avena*, however, the ICJ had jurisdiction over the claim and the parties, the judgment was supported by proper proof, the court followed reasonable procedures, and the parties had an opportunity to be heard. Therefore, Texas may not use state procedural rules to modify or refuse to enforce *Avena*. The lower court's decision to dismiss review of Medellín's claim violates federal law.

This Court's decisions in *Breard* and *Sanchez-Llamas* are not to the contrary. If this Court finds for Medellín, state courts may still generally apply their procedural default rules to Vienna Convention claims. However, in the limited case where the ICJ has issued a final judgment expressly ordering review and reconsideration, and expressly limiting the use of procedural default rules, the Supremacy Clause requires state courts to give effect to that judgment. Since Medellín's case falls within this limited subset, Texas may not execute him without providing the review and reconsideration outlined in *Avena*. Therefore, this Court

should reverse and remand to the state court, with instructions to conduct a prejudice hearing on Medellín's Vienna Convention claim.

ARGUMENT

I. The President acted within his constitutional and statutory authority when he issued a memorandum to enforce *Avena* in state courts.

After the ICJ decided *Avena*, the President issued a memorandum requiring state courts to review and reconsider the 51 cases addressed in that decision. The Memo's underlying purpose was to manage foreign relations, discharge U.S. Treaty obligations, and ease tensions with Mexico. Because this Memo was issued pursuant to the President's foreign affairs authority, Texas is required by the Supremacy Clause to comply. Therefore, Texas must grant Medellín review and reconsideration of his conviction and death sentence.

However, the Texas court refused to reach the merits of Medellín's habeas petition and dismissed the case on procedural grounds. 223 S.W.3d at 332-33. The Texas court ruled that the President's Memo did not constitute binding law, since Congress had not acquiesced to this form of unilateral action, and since the President lacked independent authority to command state courts. *Id.* at 342-343, 348; *see also id.* at 353-54 (Keller, J. concurring) (raising a federalism concern). Therefore, the court ignored the obligations set forth in *Avena*.

Because the President's memo is a valid exercise of the executive authority, the Texas court's decision violates federal law. According to Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) the President acts within a framework of shared institutional powers. Presidential authority is (a) at its maximum when exercised with explicit or implicit congressional authorization; (b) in a "zone of twilight" when exercised under congressional silence; and (c) at its lowest ebb when exercised in the face of explicit or implicit congressional prohibition. *Id.* at 635-638. Here, Congress has implicitly empowered the

President to enforce ICJ judgments. Even if Congress is silent, the President still has constitutional authority to issue a narrowly crafted Memo in foreign affairs. So long as the President's action satisfies the *Youngstown* framework, state sovereignty is of no concern.

A. Because of its limited scope, the Memo is no more intrusive than necessary to accomplish the President's foreign policy objectives.

This Memo is a limited way for the President to accomplish an important foreign policy objective. The scope and effect of the Memo is limited in numerous respects. First, it applies only to the nine states and 51 Mexican nationals named in *Avena*. It does not confer a general right to "review and reconsideration" upon all detained foreign nationals whose Vienna Convention rights have been violated. Therefore, the intrusion into state judicial functions is no greater than necessary to enforce compliance with a final ICJ judgment. Second, the President's Memo invokes general comity principles, under which courts presume the enforcement of foreign decisions "to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong." *Hilton v. Guyot*, 159 U.S. 113, 165 (1895); *see also* Restatement (Third) of The Foreign Relations of The United States § 481 (1986).

Third, because the President's Memo affects only state courts, it does not conflict with the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). While *federal* courts are precluded by AEDPA from reviewing Vienna Convention claims not raised at trial, *see Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting 28 U.S.C. §§ 2254(a), (e)(2) (Supp. 1998)), AEDPA does not control the habeas decisions of *state* courts. *Breard* held that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375. The President's Memo constitutes a contrary statement in this case. *Id.* at 374-75 (considering a provisional ICJ judgment, whereas *Avena* is a final judgment).

In addition, because it affects only the judiciary, rather than the legislature or executive, the President's Memo does not violate prohibitions on the federal commandeering of state processes. *Compare New York v. United States*, 505 U.S. 144, 161 (1992) (stating that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (citation omitted), and *Printz v. United States*, 521 U.S. 898, 932 (1997) (holding that Congress lacked the power to compel state police officers to enforce the Brady Act), *with id.* at 907 ("[C]ourts should [be] viewed distinctively in this regard; unlike legislatures and executives, they appl[y] the law of other sovereigns all the time."). State courts must apply federal law, no matter the source.

Finally, by seeking to enforce *Avena*, the President's Memo does not dictate how the 51 cases should be resolved. It is the "review and reconsideration" itself that has diplomatic value. The Memo allows the President to avoid embarrassment and friction with an important ally. Improving relations with Mexico by ensuring state compliance with *Avena* is vital in light of NAFTA, a shared border, and joint immigration policy. Compliance may also generate goodwill within the international community, and promote the reciprocal rights of U.S. citizens abroad. *See Pink*, 315 U.S. at 230 (stating that too much judicial intrusion into foreign policy may undermine strained international relations, and that "[n]o such obstacle can be placed in the way of rehabilitation of relations between this country and another nation"). Furthermore, if Texas executes Medellín without the mandated review and reconsideration, the President's diminished diplomatic credibility may reduce his ability to negotiate future treaties. By granting judicial review of Medellín's case, Texas will help the President strengthen his diplomatic position.

B. The President acts with maximum authority because Congress has implicitly empowered him to enforce *Avena* in state courts.

Far from representing unfettered Executive power, the President's Memo is consistent with the doctrine of separation of powers. In *Youngstown*, a plurality held that President Truman did not have the authority to seize private steel mills, even if the looming steelworkers' strike threatened American interests in the Korean conflict. The dispositive issue was that Congress, when enacting the Taft-Hartley Act, "rejected an amendment which would have authorized such governmental seizures in cases of emergency." 343 U.S. at 586. Seizure of the steel mills thus fell into the third *Youngstown* category. By contrast, the President's action in this case has been implicitly authorized by treaties ratified by the Senate—the U.N. Charter, ICJ Statute, Vienna Convention, and Optional Protocol—and statutes enacted by Congress—the U.N. Participation Act, 22 U.S.C. § 4802(a)(1)(D), and the Hostage Act. Presidential power is therefore at its maximum, "for it includes all that he possesses in his own right plus all that Congress can delegate," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), and is thus "supported by the strongest of presumptions and the widest of latitude of judicial interpretation." *Id.* at 637.

To determine whether Congress implicitly consents to the presidential action, this Court looks to the "general tenor" of related treaties and statutes. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). Not only is the President's Memo consistent with the general tenor of U.S. Treaty obligations, but those obligations also require the President to enforce *Avena*. See Restatement (Third) of the Foreign Relations Law of the United States § 303 cmt. f (1987) (noting that treaties may delegate authority to the President to take action he could not otherwise take). The U.N. Charter establishes the ICJ as "the principal judicial organ of the United Nations," art. 92, 59 Stat. 1031, T.S. No. 93 (1945); presumes that all members will voluntarily comply with ICJ judgments, *id.* art. 94, para. 1; and makes all members parties to the Statute of

the ICJ (“ICJ Statute”), *id.* art. 93, para. 1. In turn, the ICJ Statute makes ICJ judgments binding on the parties to a case. ICJ Statute art. 59, June 26, 1945, 59 Stat. 1031. Furthermore, when *Avena* was decided, the United States belonged to the Optional Protocol, which gives the ICJ compulsory jurisdiction over Vienna Convention disputes.

Taken together, these treaties demonstrate the intention of Congress to give the President broad authority to enforce U.S. obligations to the U.N. and to ICJ decisions. Under the U.N. Charter, the President has a legitimate foreign policy interest in enforcing *Avena* to avoid confrontation within the Security Council. *See* U.N. Charter, art. 94, para. 2 (“[I]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ], the other party may have recourse to the Security Council”). Confrontation could embarrass the President and undermine his diplomatic credibility. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (“[I]n the maintenance of our international relations, embarrassment . . . is to be avoided”). While the Vienna Convention does not explicitly grant the President power to enforce *Avena* in state courts, its general tenor makes this action reasonable in light of other U.S. Treaty obligations. After all, the ICJ Statute and U.N. Charter mandate compliance with ICJ judgments, but Congress has not codified a protocol by which the President can ensure such compliance from state courts. The President must therefore have the flexibility to craft innovative ways to achieve such compliance.

Several federal statutes also give implied consent to the President’s action. Most importantly, the U.N. Participation Act empowers the President to manage foreign relations with the UN, ICJ, and Security Council. *See* 22 U.S.C. § 287 (stating that representatives to the UN “shall, at all times, act in accordance with the instructions of the President”). Congress therefore anticipated that the President would take the lead on enforcing ICJ decisions. Furthermore, in 22 U.S.C. § 4802(a)(1)(D), Congress gave the Secretary of State and President the authority to

protect “foreign missions, international organizations, and foreign officials and other foreign persons in the United States.” By ensuring that the United States complies with its U.N. and international obligations, the President’s Memo serves the purposes envisioned by both statutes.

The Hostage Act also provides implicit congressional authorization to the President’s Memo. By expanding the President’s authority to secure the release of U.S. citizens taken hostage abroad, the Hostage Act grants the President general authority to protect U.S. citizens who travel overseas. *See* 22 U.S.C. § 1732 (2006). Though the Act’s legislative history was primarily concerned with the forced repatriation of U.S. citizens, *Dames & Moore*, 453 U.S. at 676, proponents argued that “the President ought to have the power to do what the exigencies of the case require to rescue a citizen from imprisonment.” *Id.* at 678. The Vienna Convention places reciprocal obligations on all its members to provide consular assistance to detained foreign nationals, and the President’s Memo was designed to ensure future protection for U.S. citizens. Therefore, the President’s authority to issue his Memo is implicitly endorsed by the Hostage Act’s general purpose of protecting U.S. citizens abroad.

C. Even without congressional authorization, the President has independent authority to issue a binding memorandum to enforce *Avena*.

Even if the President lacks implied consent, congressional silence does not preclude his authority to enforce *Avena* through a binding memorandum. In the *Youngstown* framework, congressional silence places Presidential authority in a “zone of twilight,” where the President may exercise his own independent foreign affairs authority. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 429 (2003) (stating that “congressional silence is not to be equated with congressional disapproval”). This Court granted certiorari in 2004, and the President’s Memo could not have escaped the notice of Congress. However, Congress did not respond. Such “congressional inertia, indifference or quiescence may . . . [confer] independent presidential

responsibility.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Not only could Congress have enacted legislation clarifying what effect to give ICJ judgments within U.S. borders, but it also could have repealed the Vienna Convention, the Hostage Act, or other treaties and statutes. *See Whitney v. Robertson*, 124 U.S. 190, 195 (1888) (holding that treaties are “subject to such acts as Congress may pass for its enforcement, modification, or repeal”). An historical analog would be Congress’ decision to enact the Foreign Sovereign Immunities Act (“FSIA”) to replace the President’s interpretation of sovereign immunity, which courts previously applied. *See Ex parte Republic of Peru*, 318 U.S. 578, 590 (1943). FSIA set up new judicial rules for extending sovereign immunity, and removed Executive prerogative over the issue. *See* 28 U.S.C. §§ 1602-1611 (2006). Here, Congress could have similarly endorsed, modified, or revoked the President’s authority to enforce *Avena*.

The President’s Memo is a valid exercise of his inherent authority over foreign affairs. Article II of the Constitution makes the President the primary foreign policy authority. By virtue of his Executive power, U.S. Const. art. II, § 1, his power to make treaties and nominate ambassadors, *id.* § 2, and his duty to faithfully execute the laws, *id.* § 3, the President is the face of U.S. policy vis-à-vis the rest of the world. *See Garamendi*, 539 U.S. at 414 (stating that “in foreign affairs the President has a degree of independent authority to act”); *Curtiss-Wright*, 299 U.S. at 320 (stating that the President’s authority in foreign affairs “does not require as a basis for its exercise an act of Congress”). In fact, this Court could well usurp the President’s constitutional role by refusing to uphold his decision to enforce *Avena*. *See Pink*, 315 U.S. at 230 (stating that the Court “would usurp the executive function if [it] held that” the President’s settlement of claims “was not final and conclusive in the courts”).

This Court has broadly construed the President’s foreign affairs power, such that the “historical gloss on the ‘executive Power’ . . . has recognized the President’s ‘vast share of

responsibility for the conduct of our foreign relations.” *Garamendi*, 539 U.S. at 414 (citation omitted); *see also Curtiss-Wright*, 299 U.S. at 320 (stating that the President is “the sole organ of the federal government in the field of international relations”). As such, this independent authority allows the President to act in foreign affairs without congressional oversight or approval. *See Belmont*, 301 U.S. at 330 (stating that the President’s international “agreements . . . [do] not . . . require the advice and consent of the Senate”); *Salé v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (holding that the President has “unique responsibility” for the conduct of “foreign and military affairs”). Though not a constitutional blank check, Article II gives the President expansive authority to make foreign policy.

The President exercised this independent constitutional authority when he issued his Memo to enforce *Avena*. This Memo is similar in purpose to the international compacts previously affirmed by this Court in *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*. The Texas court was wrong to distinguish these cases on the grounds that they involved bilateral “executive agreements,” *Ex parte Medellín*, 223 S.W.3d at 342, since the President’s Memo was similarly the outcome of a deliberative process with another nation. The Texas court, finding no direct settlement with Mexico to enforce *Avena*, dismissed the President’s Memo as “a unilateral act executed in an effort to achieve a settlement with Mexico.” *Id.* In so doing, it claimed that the President could not make binding foreign policy in the absence of a *formal* bilateral agreement. *Id.* at 343-44 (“The absence of an executive agreement between the United States and Mexico is central to our determination that the President has exceeded his inherent foreign affairs power by ordering us to comply with *Avena*.”).

However, the President’s Memo is functionally identical to a bilateral agreement. When Mexico complained about Vienna Convention violations by the United States, the two nations could have negotiated a settlement directly. However, the United States chose to litigate before

the ICJ. When the ICJ ruled in Mexico's favor in *Avena*, the United States faced a Treaty-based obligation to comply. Only then did the President decide to issue his Memo, agreeing to enforce *Avena* through the state courts. *See Sanchez-Llamas v. Oregon*, 126 Ct. 2669, 2685 (2006) (recognizing the President's Memo as an agreement to "discharge [] international obligations"). The Texas court's failure to situate the President's Memo in this deliberative context is its fundamental error. *See* 223 S.W.3d at 343 (stating that a "necessary component of any executive agreement is the *negotiation process* that precedes it, *which ensures that each sovereignty is represented and heard*") (emphases added). In context, the President's Memo satisfies the Texas court's own test. The President's Memo was the culmination of a back-and-forth exchange between the United States and Mexico. Though there was no formal negotiation, Mexico and the United States engaged in a process that gave each nation an opportunity to be heard.

The President's Memo is thus entitled to the same deference granted to the executive agreements in *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*, where this Court upheld the President's authority to bind state courts through international compacts. In *Garamendi*, for instance, this Court held that California's Holocaust Victim Insurance Relief Act (HVIRA), requiring insurers to disclose information about all policies sold in Europe between 1920 and 1945, interfered with the President's policy of encouraging European governments and companies to volunteer related settlement funds. 539 U.S. at 234. The President's foreign agreement preempted HVIRA because the President had the authority to decide U.S. policy regarding Holocaust recovery. *See also Belmont*, 301 U.S. at 333 (upholding the Litvinov Agreement with the Soviet Union, assigning all Russian claims to assets within American territory to the United States). Because the President has the authority to decide U.S. policy regarding Vienna Convention obligations, the President's Memo should have a similar preemptive effect over the criminal procedure rules that barred review of Medellín's case.

This Court has also approved of other cases where the President has given courts guidance on how to comply with U.S. Treaty law. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), this Court determined that the act of state doctrine, which precludes domestic review of a foreign sovereign's acts within its own territory, should not bar an American bank's claim resulting from the expropriation of property in Cuba. The Court "conclude[d] that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." *Id.* at 768. Similarly, in *Ex parte Republic of Peru*, the Court enforced the State Department's request that a Peruvian vessel be declared immune from domestic suit. 318 U.S. 579; *id.* at 588 (stating that "courts are required to accept and follow the executive determination that the vessel is immune"). In *Pink*, this Court held that the Supremacy Clause barred New York from seizing the assets of a state branch of a nationalized Russian insurance company, because the Litvinov Assignment gave the federal government the right to these assets. 315 U.S. at 234. The President's Memo should similarly serve to advise state courts regarding their obligation to comply with the ICJ's *Avena* decision.

Finally, this Court has not emphasized form when upholding Executive agreements. While the Texas court "assume[d], without deciding, that the memorandum constitutes an executive order," 223 S.W.3d at 333, such an assumption is unnecessary. The Memo is a representation of the President's foreign policy decision regarding the *Avena* treaty obligation. The expression of the President's foreign policy in *Pink* was similarly mundane and without ceremony: The Legal Adviser of the State Department simply "advised" the Court of the President's "position." 315 U.S. at 764. In *Crosby v. National Foreign Trade Council*, the Court held that Executive "representations," involving little more than remarks by the Assistant

Secretary of State and assertions made in the government’s brief, were enough to demonstrate that the state law “complicated its dealings with foreign sovereigns.” 530 U.S. 363, 383-84 (2000); *cf. Wolsey v. Chapman*, 101 U.S. 755, 770 (1879) (stating that “[a] proclamation by the President . . . is his official public announcement of an order to that effect” and that “[n]o particular form of such an announcement is necessary”). Since this Court has frequently enforced unilateral expressions of foreign policy as binding federal law, the form of the President’s Memo is irrelevant to this case.

D. The President’s Memo does not violate state sovereignty.

Since the President has national foreign policy authority, his Memo does not violate state sovereignty. *See Burnet v. Brooks*, 288 U.S. 378, 396 (1933) (stating that the federal government possesses exclusive power in foreign affairs); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (noting that states are forbidden to manage foreign affairs). As a foreign policy decision made by the Executive, the President’s Memo preempts conflicting state policies under the Supremacy Clause, including procedural default and successive habeas petition rules that would otherwise preclude “review and reconsideration” in the cases of the 51 Mexican nationals named in *Avena*. *See, e.g.*, Texas Code Crim. Proc. art. 11.071 § 5 (Vernon 2003). This preemptive effect is meant to ensure uniformity in foreign affairs. *See The Federalist No. 44* (James Madison); *see also Curtiss-Wright*, 299 U.S. at 319 (stating that the “nature of transactions with foreign nations, moreover, requires caution and unity of design”).

Federal supremacy in foreign affairs is mandated by the Constitution, which “imperatively requires that federal power in the field . . . be left entirely free from local interference.” *Hines*, 312 U.S. at 63; *see also Pink*, 315 U.S. at 223 (stating that international

compacts “cannot be subject to any curtailment or interference on the part of the several states”); *Belmont*, 301 U.S. at 331 (“[T]he external powers of the United States are to be exercised without regard to state laws or policies.”). As such, this Court has frequently held that U.S. Treaties and the President’s foreign policy preempt state law. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (preempting state inheritance laws); *Sanitary District of Chicago v. United States*, 266 U.S. 405, 432 (1925) (enjoining the Sanitary District of Chicago from diverting water from Lake Michigan in amounts that impaired the navigability of Canadian boundary waters in violation of a treaty with Great Britain). In *Belmont*, the Court noted that “state lines disappear” with respect to foreign policy, and that the President’s compact with the Soviet Union trumped New York’s public policy concern, since for “such [international] purposes the State of New York does not exist.” 301 U.S. at 331. Similarly, Texas rules cannot obstruct the President’s decision to enforce *Avena* through state judicial processes.

This Court has recognized that the President’s enforcement of foreign policy mandates through state courts does not violate state sovereignty. In *Pink*, for instance, the Court observed:

No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become *wholly irrelevant* to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

315 U.S. at 233-34 (emphasis added). Thus, even if Texas courts commonly apply procedural default rules, these courts must reconsider once U.S. foreign policy intervenes. The *Avena* decision, coupled with the President’s Memo, is one such instance.

Finally, the President’s Memo does not violate the *Younger* abstention principle, under which federal courts cannot enjoin *pending* proceedings in state courts. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The cases of the Mexican nationals named in *Avena* are no longer pending.

Indeed, these Mexican nationals were tried, convicted and sentenced without any notification of their Vienna Convention rights, and *Avena* requires that state courts “review and reconsider” those cases over which they retain jurisdiction. Therefore, under this Court’s precedents, the President’s foreign policy decision preempts the procedural rules that bar review and reconsideration of Medellín’s case. This Court should remand to the Texas court with instructions to conduct a prejudice hearing.

II. State courts are bound by the Constitution and U.S. Treaties to give effect to *Avena* in cases concerning the defendants named in that judgment.

Even if the President lacked authority to issue his Memo, the Constitution and U.S. treaties require state courts to enforce *Avena* in cases concerning the defendants named in that judgment. By ratifying the Optional Protocol, the United States gave the ICJ authority to issue judgments binding on the parties to a particular case. Therefore, *Avena* places a Treaty-based obligation on the United States to “review and reconsider” the 51 cases addressed in that judgment, regardless of the state’s procedural default rules. If a Treaty requires the United States to fulfill certain obligations, the Supremacy Clause places the same obligation on the states. *See Missouri v. Holland*, 252 U.S. 416, 434 (1920) (stating that Treaties are “as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States”). Therefore, by federal law, the states cannot execute any of the 51 Mexican nationals named in *Avena*, unless they first conduct a hearing for actual prejudice.

Texas is thus required by *Avena* to address the merits of Medellín’s Vienna Convention claim. This case is distinguishable from *Breard* and *Sanchez-Llamas*, in that Medellín is one of the 51 defendants named in a final judgment by the ICJ. State courts may apply, as a general matter, their procedural default rules to bar Vienna Convention claims. However, in the limited case where the ICJ has issued a final judgment expressly ordering review and reconsideration,

and restricting procedural default, the Supremacy Clause requires state courts to give effect to the judgment. Since Medellín falls within this limited subset of cases, Texas may not execute him without first providing the review and reconsideration outlined in *Avena*.

A. *Avena* is binding on state courts in the cases that decision addressed.

1. By joining the Optional Protocol, the United States granted the ICJ authority to issue binding final decisions in Vienna Convention cases.

The Optional Protocol gives the ICJ jurisdiction over Vienna Convention disputes. The text of the Protocol states that “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ].” 21 U.S.T. 326. Both the Convention and the Optional Protocol are self-executing. See *Torres v. Mullin*, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissent from denial of *certiorari*) (citing Vienna Convention, Hearing Before Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, at 5 (1969) (statement of State Department Deputy Legal Adviser J. Edward Lysterly) (testifying that the Treaty is “entirely self-executive and does not require any implementing or complementing legislation”)). Therefore, at the time *Avena* was decided, the Optional Protocol and related Treaties were “supreme Law,” binding on “the Judges in every State.” U.S. Const. art. VI, cl. 2.

Under U.S. Treaty law, a valid ICJ judgment binds the parties in a particular case. According to Article 94(1) of the U.N. Charter, each member of the United Nations has agreed to comply with the decisions of the ICJ “in any case to which it is a party.” 59 Stat. 1051, T.S. No. 933 (1945). Furthermore, the ICJ Statute states that ICJ decisions are binding on the parties to a case, with respect to that particular case. See ICJ Statute, art. 59 (explaining that “the decision of the [ICJ] has no binding force *except between the parties and in respect of that particular case*”) (emphasis added); Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, at 1655-56 (3d ed. 1997) (stating that an ICJ judgment “creates a *res judicata*”). Therefore,

by placing Vienna Convention disputes within the compulsory jurisdiction of the ICJ, the United States gave the ICJ authority to issue binding judgments against the United States.

Taken together, the U.N. Charter, the ICJ Statute, and the Optional Protocol require the United States to give effect to ICJ judgments. *See Sanchez-Llamas*, 126 S. Ct. at 2680 (stating that “where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. . . . Courts must apply the remedy as a requirement of federal law”) (citing *United States v. Giordano*, 416 U.S. 505, 524-25 (1974)). Because these Treaty obligations invest the ICJ’s *Avena* judgment with the force of federal law, state courts with jurisdiction over the 51 cases addressed in the decision must comply with the ICJ’s remedy. Therefore, Texas must grant Medellín’s prejudice hearing.

2. Actions by federal and state officials demonstrate their understanding that ICJ judgments have the force of federal law.

Several institutional actors have treated ICJ orders and judgments as binding federal law. For instance, the U.S. response to the Provisional Measures Order in *Avena* demonstrates that the Executive Branch understood itself bound to comply with an ICJ order. On February 5, 2003, the ICJ ruled that the United States had to “take all measures necessary to ensure” that three Mexican defendants not be executed pending final judgment in *Avena*.⁴ *See* Provisional Measures Order of 5 February 2003, ICJ Reports 2003, ¶ 59.

Mexico requested these provisional orders at the same time as it filed its application to institute proceedings against the United States. Previously, in *Breard* and *LaGrand*, Virginia and Arizona had executed foreign nationals from Paraguay and Germany, respectively, before the ICJ could decide the merits. *See Breard*, 523 U.S. at 374; *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999). In so doing, the United States violated ICJ Provisional

⁴ The defendants included Cesar Roberto Fierro Reyna, Boerto Moreno Ramos, and Osvaldo Torres.

Measure Orders connected to those cases, which it claimed were not binding. *See* Brief for the U.S. as Amicus Curiae, at 51, in *Breard*, 523 U.S. 371, 1997 LEXIS U.S. Briefs 1390, at *51. However, the ICJ subsequently held that provisional measures orders “have binding effect” under Article 41 of the ICJ Statute, and thus create “a legal obligation for the United States.” *LaGrand*, 2001 I.C.J ¶¶ 109-110. Therefore, when the ICJ issued its Provisional Measures Order in *Avena*, the United States understood that the order was a binding obligation.

The United States took several actions to ensure compliance with the Order. In a letter to the ICJ, the United States stated that it had informed the relevant state authorities of Mexico’s case, obtained information from the states about the status of all 51 defendants, and confirmed that none had been executed. *Avena*, 2004 I.C.J. ¶ 3. Furthermore, the State Department sent letters to state officials and made remarks before the National Association of Attorneys General, emphasizing the need to ensure compliance with the Vienna Convention. *See* Taft Remarks (noting that the State Department had a number of conversations with government lawyers in both states affected by *Avena*’s Provisional Measures Order). As a result, the states did not execute any of the 51 defendants before the ICJ could decide *Avena*.

The President’s Memo regarding compliance with *Avena* further indicates his understanding that the United States must give effect to ICJ decisions. Even if this Court decides that the President lacked the authority to give his Memo the force of law, it is still illustrative of the President’s legal judgment that *Avena* binds the United States. Furthermore, the fact that the President decided to withdraw from the Optional Protocol after *Avena* demonstrates a desire to avoid a recurrence of this situation. Together, the Memo and his decision to withdraw show that the President wants to comply with the U.S. Treaty obligations now, but does not want to be bound by ICJ decisions in the future. Since this Court generally defers to Executive interpretations of Treaty obligations, this Court should recognize that *Avena* binds state courts.

The President is not the only relevant official who has demonstrated a belief that *Avena* represents a binding Treaty obligation. On May 13, 2004, the Oklahoma Court of Criminal Appeals gave effect to *Avena* by staying the execution of Osvaldo Torres and remanding his case for a prejudice hearing. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004). That same day, Oklahoma's Governor, Brad Henry, mooted the issue by commuting Torres's sentence to life imprisonment. See Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1. Governor Henry noted that he had considered the Vienna Convention violation and *Avena* in making his determination, and he expressed his view that, "[u]nder agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts." *Id.*

3. The Constitution allows the President to give the ICJ authority to issue binding judgments in Vienna Convention cases.

This delegation of judicial authority to the ICJ is valid under the Constitution. First, Article III only constrains Congress's ability to give a non-Article III court jurisdiction over cases to which the judicial power of the United States extends. It is not obvious that providing the ICJ with authority to adjudicate disputes between nations implicates this constraint, since Article III does not currently extend judicial power to cases between two nations. However, because Mexico brought its ICJ case on behalf of 51 individuals, one may still view the case as a private suit against the United States, which would be covered by Art. III, § 2 ("Controversies to which the United States shall be a party . . ."). Even then, however, the President may constitutionally allow the ICJ to decide Vienna Convention cases with binding effect.

The President has independent authority to shift Vienna Convention cases to the ICJ. According to Article II, the President has the power, "to make Treaties." Art. II, § 2, cl. 2. This

Court held in *Missouri v. Holland* that the President's Treaty Powers were not constrained by the Constitution in the same manner as the powers of Congress. 252 U.S. at 435. In the words of Justice Holmes, "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." *Id.* at 433. While acknowledging that there were "qualifications to the treaty-making power," the Court noted that there were matters of "the sharpest exigency for the national well being that an act of Congress could not deal with," but that a Treaty could. *Id.*

This Court approved of the President's power to shift adjudication to non-Article III courts during one such exigent circumstance. In *Dames & Moore*, this Court upheld an executive agreement to end the Iran Hostage Crisis, which terminated "all litigation as between the Government of each party and the nationals of the other" and placed all pending claims into binding arbitration before the Iran-United States Claims Tribunal. 453 U.S. at 665. The agreement made awards by the Claims Tribunal "final and binding" and "enforceable . . . in the courts of the nation in accordance with its laws." *Id.* Although this executive agreement did not even qualify as a Treaty, the Court nonetheless confirmed the President's ability to move these private claims into non-Article III courts. As the Court noted, claims by nationals of one country against the government of another country often cause "friction between two sovereigns," and there is thus a long history of nations entering into agreements to settle such claims. *Id.* at 679. In fact, Presidents have long exercised the power to settle the claims of U.S. nationals by executive agreement. *See Id.* at 679 n.8 ("[D]uring the period of 1817-1917, no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens.") (citation omitted). Often, such settlements were made without the consent of those affected. *Id.* at 680 (citing Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against

a foreign state . . . [even] without the consent of the [injured] national’’)).

By joining the Optional Protocol, the President validly shifted disputes over the Vienna Convention to the ICJ. These disputes had the potential to cause “friction between two sovereigns,” and as such, the President legitimately decided to move their adjudication into a neutral forum like the ICJ. In addition, the President has broad authority to protect U.S. citizens abroad. *See Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (stating that duty to protect the “lives or property of the citizen” must “rest in the discretion of the president”). Because the Vienna Convention committed the United States to a reciprocal set of duties with other nations, the President also made this delegation of judicial authority to the ICJ pursuant to his inherent authority to protect U.S. citizens abroad.

However, even if the President’s Treaty Power is limited to what Congress can do under the Constitution, shifting Vienna Convention cases to the ICJ would not violate the Constitution. Congress has the power, in many contexts, to delegate judicial authority to non-Article III courts. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (acknowledging that non-Article III courts historically handled court-martials, territorial matters, and public rights cases). In *Thomas v. Union Carbide Agricultural Products Co.*, this Court upheld Congress’ decision to channel all disputes over pesticide compensation into binding, mandatory arbitration. 473 U.S. 568 (1985). Furthermore, in *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court held that an agency created by Congress and charged with adjudicating claims by commodities customers could also hear state common law counterclaims. In a pragmatic opinion, the Court approved of the narrow delegation of the power to hear claims, stating that it would be unlikely to threaten the separation of powers.

Providing the ICJ with jurisdiction to decide Vienna Convention cases is an even narrower grant of authority. By its terms, the Optional Protocol only places cases concerning the

interpretation and application of the Vienna Convention with the ICJ. In fact, *Avena* is the first final judgment the ICJ has rendered in a Vienna Convention case affecting the United States. Therefore, the President’s decision to grant the ICJ power to issue binding judgments in Vienna Convention cases does not violate the Constitution.

4. This Court has approved of another Treaty—the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards—that gives foreign judgments binding effect in state courts.

While this Court has not addressed the proper treatment of Treaty-ratified judgments in the ICJ context, another useful analog exists in the mandatory enforcement of foreign arbitration awards in U.S. courts under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). 21 U.S.T. 2517 (1970) (implemented as U.S. law by 9 U.S.C. §§ 201-208 (2000)). The New York Convention provides that contracting states “shall recognize arbitral awards as binding and enforce them” on the same terms as domestic awards. *Id.* at Art. III. This Court recognized that the goal of the Convention “was to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced” in the United States. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (citing S. Exec. Doc. E, 90th Cong., 2d Session (1968)). The particular problem addressed by the Treaty was of local courts declining to enforce arbitration agreements and judgments “on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.” *Id.* (citation omitted). Therefore, the New York Convention required U.S. courts to recognize foreign arbitral judgments as binding federal law.

The lower courts have overwhelmingly held that the New York Convention requires the enforcement of foreign arbitral judgments. *See, e.g., Waterside Ocean Navigation Co. v. International Navigation, Ltd.*, 737 F.2d 150 (2d. Cir. 1984) (affirming the enforcement of five London arbitration awards); *Polytek Engineering Co., Ltd. v. Jacobson Co.*, 984 F. Supp. 1238,

1242 (D. Minn. 1997) (stating that “this Court *must* confirm the foreign arbitration award” issued in China) (emphasis added); *Gulf Petro Trading Co. v. Nigerian Nat’l Petroleum Corp.*, 288 F. Supp. 2d 783 (N.D. Tex. 2003) (stating that the New York Convention did not allow the court to set aside or modify the final award). State courts are also required to enforce foreign arbitral decisions. As one commentator puts it, “[a]rbitral awards rendered in nations adhering to the U.N. Convention will, under the terms of that convention and its preemptive effect under the Supremacy Clause of the Constitution, be entitled to recognition and enforcement in the states of the Union.” Eugene F. Scoles et al., *Conflict of Laws* 1342 (4th ed. 2000).

This Court has approved of the fact that the New York Convention sometimes requires U.S. courts to relinquish control over disputes they would normally have jurisdiction to decide. *See Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (allowing international arbitration over Sherman Act antitrust claims). In the Court’s words, the “utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.” *Id.* at 639 n.21. Acknowledging that the purpose of the New York Convention was to expand the use of international arbitration, this Court urged domestic courts to shake off “their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.” *Id.* at 638.

These foreign arbitration cases thus demonstrate another instance in U.S. law where a Treaty has: (a) made certain disputes contestable in another forum, and (b) made the resulting judgments binding on U.S. courts.⁵ The Optional Protocol should have an analogous effect.

⁵ As noted in *Dames & Moore*, the United States has delegated disputes to foreign tribunals and provided their judgments with preclusive and binding effect throughout history. *See, e.g., Comegys v. Vasse*, 26 U.S. 193, 212 (1828) (“The object of the treaty with Spain . . . was to invest the commissioners with full power and authority to . . . decide . . . claims upon Spain, for damages and injuries. Their decision . . . is conclusive and final, and is not re-

Like the New York Convention, the Optional Protocol makes certain disputes—over the interpretation and application of the Vienna Convention—contestable in another forum (the ICJ), and the Optional Protocol, ICJ Statute, and U.N. Charter make the resulting judgments binding on parties to a particular case. Under the Supremacy Clause, state courts are required to enforce foreign arbitral awards, and they should also be bound to enforce ICJ judgments. While states would understandably prefer to maintain sole authority in criminal cases, U.S. Treaty obligations make Vienna Convention decisions by the ICJ binding on state courts.

B. The Texas court must address the merits of Medellín’s Habeas Petition.

As discussed above, the *Avena* judgment places binding Treaty obligations on the United States as a whole. Foremost among these is the obligation to provide judicial “review and reconsideration” of all 51 cases, regardless of whether procedural default rules would otherwise bar relief. The Texas Court of Criminal Appeals failed to fulfill this U.S. Treaty obligation when it held that Section 5(a) of the Code of Criminal Procedure precluded consideration of Medellín’s habeas petition. 223 S.W. 3d at 315. This Court should therefore remand to the Texas Court, with instructions to conduct a hearing for actual prejudice.

1. The Texas court may not refuse to enforce *Avena*

Texas may not refuse to enforce an ICJ judgment that binds the United States. This Court has long held that state courts must give full force and effect to U.S. Treaty obligations. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (asserting the supremacy of federal Treaty obligations in the face of inconsistent state law); *Asakura v. Seattle*, 265 U.S. 332 (1924). Furthermore, it is a fundamental principle of international law that political subdivisions of a nation are bound by that nation’s international responsibilities. *See* Article 4 of the Draft

examinable. The parties must abide by it, [and] A rejected claim cannot be brought again . . . in any judicial tribunal.”); *Frelinghuysen v. Key*, 110 U.S. 63 (1884) (discussing the United States-Mexico Claims Commission).

Articles on Responsibility of States for Internationally Wrongful Acts (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”). Therefore, in deciding Medellín’s habeas petition, the Texas court had no authority to ignore the Treaty obligations set forth in *Avena*. Its refusal to provide a hearing for actual prejudice violates the Constitution and international law.

Furthermore, Texas has no authority under the relevant Treaties to modify or refuse to enforce the *Avena* judgment. As discussed above, neither the Optional Protocol nor the ICJ Statute provide any exceptions to the mandatory enforcement of an ICJ judgment by parties to a particular case. By useful contrast, the New York Convention allows courts to refuse enforcement of foreign judgments that fall within limited exceptions provided by the Convention itself. See 9 U.S.C. § 207 (2006) (stating that a court must “confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention”); *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us*, 126 F.3d 15, 23 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (stating that “when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention”). Since none of the ICJ Treaties provide for similar exceptions, the Texas court has no Treaty-based justification for its failure to enforce *Avena*.

Even if Texas believes that the ICJ judgment was mistaken in fact or law, the binding nature of judgments and international comity forbid Texas from modifying or refusing to enforce the decision. In general, the law of judgments establishes that “a judgment entitled to recognition will not be reexamined on the merits by a second court.” 544 U.S. at 670 (Ginsburg, J., concurring in the dismissal of certiorari) (citing ALI, Recognition and Enforcement of Foreign

Judgments: Analysis and Proposed Federal Statute § 2, cmt. d, (2005)); *see also* Restatement (Second) of Judgments § 17 (1980); Restatement (Second) of Conflict of Laws § 106 (1969) (“A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment”). The Court endorsed these general principles in *Hilton v. Guyot*, stating that where a foreign judgment is entitled to recognition, “the merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact.” 159 U.S. at 202-203. Because U.S. Treaty obligations require state courts to give effect to the *Avena* judgment, the Texas court may not refuse enforcement on the basis that it disagrees with the judgment.

However, even if this Court rejects mandatory enforcement by Treaty, the *Avena* judgment is still enforceable on the basis of international comity. *See Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (stating that comity and the recognition of judgments made by foreign tribunals “fosters international cooperation and encourages reciprocity”). Under the law set forth by this Court in *Hilton*, courts may only deny enforcement of foreign judgments entitled to comity if: (a) the court that rendered judgment lacked jurisdiction, (b) the judgment was not supported by proper allegations and proof; (c) the parties lacked an opportunity to be heard; and (d) the foreign court did not follow civilized procedural rules. *See* 159 U.S. at 205-06.

Here there is no contention that the ICJ’s adjudication in *Avena* violated norms of procedural fairness. First, the ICJ had jurisdiction to decide the case. Under the ICJ Statute, the court has jurisdiction over “all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” ICJ Statute, art. 36(1). Because the United States ratified the Optional Protocol, the ICJ had jurisdiction to address the interpretation of the Vienna Convention and “the nature or extent of

the reparation to be made for the breach of an international obligation.” *Id.* art. 36(2)(d). As Mexico noted, the United States itself invoked the jurisdiction of the ICJ to decide a Vienna Convention case during the Iran Hostage Crisis. *See United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3 (Judgment of May 24). Furthermore, the ICJ Statute gives the Court the power to decide its own jurisdiction. *See Id.*, art. 36(6) (“In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the [ICJ].”). Therefore, the ICJ correctly decided that the Optional Protocol gave it jurisdiction to decide *Avena*. 2004 I.C.J. ¶¶ 26-35. Second, *Avena* is supported by strong evidence. Even the United States concedes that the states failed to inform the 51 defendants of their Vienna Convention rights. Third, the ICJ gave Mexico and the United States a full opportunity to be heard. In fact, the United States litigated its position by filing a 249-page brief and engaging the Court in oral proceedings from Dec. 15-19. Finally, the ICJ is a neutral tribunal created by the United Nations, which has decided 122 contentious cases since 1947. As a creation of U.S. Treaty, it may be assumed to follow civilized procedural rules.

Therefore, it would violate domestic law, international law, and the general law of judgments for the United States to litigate its case fully, and then refuse to give effect to an adverse decision. The Texas court is obligated by the Constitution, by U.S. Treaty, and by international comity to make good on the United States’ obligation to enforce *Avena*. This Court should not allow Section 5(a) of the Texas Code of Criminal Procedure, or the state’s procedural default rule, to bar this relief. *See Henry v. Mississippi*, 379 U.S. 443 (1965) (stating a willingness to displace state procedural default rules in the interest of substantive federal law). The Texas court must review and reconsider of Medellín’s conviction for actual prejudice.

2. The outcome of Medellín’s prejudice hearing is not a foregone conclusion.

Medellín has never received the adjudication required by *Avena*. At no point has a state or federal court determined whether Medellín suffered actual prejudice from the violation of his Vienna Convention rights. The prospect of clemency relief is not sufficient, since review and reconsideration must take place by means of “a procedure which guarantees that full weight is given to the violation of . . . the Vienna Convention,” and since “it is the judicial process that is suited to this task.” *Avena*, 2004 I.C.J. ¶¶ 143. Texas must conduct a prejudice hearing.

The outcome of such a hearing is not a foregone conclusion. First, it is important to note that the mandated review and reconsideration is required for both the conviction and the sentence. *Id.* ¶ 138. Although Medellín was convicted of a brutal crime, consular assistance could have made a substantial difference in his case, particularly during the penalty phase. Consular officials can help foreign defendants overcome common obstacles, such as language, cultural misconceptions of the criminal justice system, and isolation from family, friends, and their community. *See* Memorial of Mexico at 11-38; U.S. Dep’t of State, *7 Foreign Affairs Manual* 400 (noting that “[p]ractical considerations make it imperative that the consular officer be notified immediately by local authorities whenever a U.S. citizen is arrested”). Furthermore, consular officials are uniquely positioned to help defendants obtain mitigation evidence within their native countries, and to assuage fears of deportation. While Medellín himself has lived in the United States for an extended period, fear of deportation and isolation from family may still have been impediments to his ability to adequately defend against a capital charge.

U.S. courts have confirmed the importance of consular assistance by finding prejudice in cases where the state has violated the Vienna Convention. *See, e.g., State v. Reyes*, 1999 WL 743598, *3 (Del. Super. 1999) (finding prejudice where the State violated the Convention and the defendant made incriminating statements); *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App.

2002) (resentencing upon finding a reasonable probability that the jury would not have imposed the death penalty if defendant had consular assistance). Therefore, considering the assistance consular officers can provide to foreign nationals, Medellín may have suffered prejudice at the trial or penalty phase of his case. The best way to find out is to conduct a hearing.

3. Requiring the Texas court to conduct a prejudice hearing in Medellín's case would not require this Court to revisit *Breard* or *Sanchez-Llamas*.

Ruling for Medellín would not require this Court to revisit its recent precedent. Medellín's case is readily distinguishable from *Breard* and *Sanchez-Llamas*, in that Medellín is one of the 51 Mexican nationals named in *Avena*. Providing Medellín with a prejudice hearing is not a matter of the individual defendant raising a Vienna Convention claim, but a matter of the state court deciding Medellín's habeas petition in a manner consistent with U.S. Treaty obligations. Since *Avena* is binding on the United States, state courts with jurisdiction over the 51 cases must grant review and reconsideration in order to comply with federal law.

Therefore, this Court's two recent precedents do not control this case. *Breard* stands for the simple proposition that Vienna Convention claims, as a general matter, may be foreclosed through procedural default rules, while *Sanchez-Llamas* merely permitted procedural default against a Honduran national, Mario Bustillo, who had failed to raise his consular notification claim at trial or on appeal. While the Court stated in *Sanchez-Llamas* that ICJ opinions were entitled to no more than "respectful consideration," 126 S. Ct. at 2683, it did so in reference to using *Avena* as a rule of law in a completely *separate* case. While conceding that ICJ decisions cannot serve as precedent in *different* cases, the Optional Protocol and ICJ Statute make them binding on the parties to a *particular* case. *Avena* thus has an entirely different effect on the cases of the individuals actually named in the judgment. Since the ICJ ordered review and reconsideration of the 51 cases at issue in *Avena*, the state courts with jurisdiction over these

cases are required to provide this remedy as a matter of domestic law. Therefore, Texas must grant Medellín a prejudice hearing, notwithstanding its procedural default rule.

The ruling urged on this Court would help the U.S. comply with its Treaty obligations, while placing a minimal burden on state courts. Under *Breard*, state courts will still be able to apply their procedural default rules to bar untimely Vienna Convention claims. However, in the limited case where the ICJ has issued a final judgment expressly ordering review and reconsideration, while expressly limiting the availability of such procedural default, the Supremacy Clause obligates state courts to give effect to the judgment, and to reach the merits of the defendant's claim. Since the U.S. has withdrawn from the Optional Protocol, the number of cases that fit these criteria is capped at 51 for the foreseeable future. Medellín, however, is within this limited subset. Texas may not execute him without first conducting a hearing on whether he suffered actual prejudice from the violation of his Vienna Convention rights.

CONCLUSION

This Court should reverse the Court of Criminal Appeals of Texas and remand with instructions to review and reconsider Medellín's conviction and sentence for actual prejudice.

Respectfully submitted,

Counsel for Petitioner
December 3, 2007