No. 06-984

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

JOSE ERNESTO MEDELLIN

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

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BRIEF FOR RESPONDENT STATE OF TEXAS

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QUESTIONS PRESENTED[1]

1. Did the President of the United States exceed his constitutionally and statutorily defined authority when he unilaterally directed via executive memorandum that the states must comply with the International Court of Justice's judgment in *Avena* contrary to legal precedent and state judicial procedural default rules?

2. May the Texas Court of Criminal Appeals constitutionally refrain from effectuating the *Avena* decision in a case that judgment addressed, when giving effect requires the suspension of state procedural default rules?

[1]The petitioner in this action is Jose Ernesto Medellin. The respondent in this action is the State of Texas.

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BRIEF FOR RESPONDENT STATE OF TEXAS

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 223 S.W.3d 315 (2006). The federal denial of habeas is reported at *Medellin v. Cockrell*, Civ. No. H-01-4078, 2003 WL 25321243 (S.D. Tex. June 25, 2003). The Court of Criminal Appeals of Texas affirmation of conviction and sentence is reported at *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997).

JURISDICTION

Petition for certiorari was filed on January 16, 2007. Certiorari was granted on April 30, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 2254(*l*) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be 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.

U.S. Const. art. VI, cl. 2.

The Tenth Amendment to the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure provides in relevant part:

> Courts may not consider the merits of any claims raised on a subsequent application for a writ of habeas corpus or grant relief unless the applicant provides sufficient specific facts demonstrating that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or 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.

Tex. Code. Crim. Proc. Ann. art. 11.071 § 5(a)(1)

Article 36 of the Vienna Convention on Consular Relations provides in relevant part:

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

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969).

STATEMENT OF THE CASE

On June 24, 1993, Jose Medellin raped and killed sixteen-year-old Elizabeth Pena and her fourteen-year-old friend, Jennifer Ertman. Medellin and his gang were in the midst of inducting new members when they encountered the young girls walking along a set of railroad tracks. For over an hour, the gang repeatedly and viciously raped the two girls. When finished raping the girls, Medellin and another gang member strangled Elizabeth Pena to death with one of Medellin's shoestrings. Jennifer Ertman was strangled to death as well. At trial, when Medellin testified to participating in the rape and murder of both girls, the only remorse he expressed was that he did not have a gun at the time enabling him to kill the girls more quickly.

A jury found Medellin guilty of capital murder for his role in the raping and killing of Elizabeth Pena and Jennifer Ertman. In a separate penalty trial, evidence was offered of Medellin's violent character and past criminal offenses, including crimes executed with firearms and the possession of a weapon while incarcerated prior to trial. The findings of the jury in this proceeding required that Medellin receive the death penalty. The Court of Criminal Appeals denied Medellin's direct appeal from his conviction and sentence. *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997).

Medellin then filed a state application for habeas corpus relief. In this petition, Medellin claimed for the first time that his Article 36 rights under the Vienna Convention were violated because he had not been advised of his right to contact a Mexican Consular official after he was arrested. Article 36 provides that when law enforcement officials of a government party to the

Vienna Convention arrest a non-citizen, the "authorities shall inform the person concerned without delay of his rights" to consular access. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified be the United States on Nov. 24, 1969) [hereinafter Vienna Convention]. Medellin has lived in the United States for over 28 years, is fluent in English, and failed to notify the police that he was a non-citizen at the time of his arrest. Nonetheless, he claims that had he been able to contact the Mexican consulate prior to his questioning, he would not have confessed to the rape and murder of Elizabeth Pena and Jennifer Ertman. *Medellin v. Cockrell*, Civ. No. H-01-4078, 2003 WL 25321243 *11 (S.D. Tex. June 25, 2003).

The state habeas court found that Medellin's Article 36 claims were procedurally barred because he failed to raise them at his initial trial. In addition to this preliminary finding, the trial court went on to conclude that as a treaty among nations, the Vienna Convention does not confer rights on private individuals. Further, the court held that Medellin had failed to show any harm resulting from not being notified of his Article 36 rights because he received effective legal representation and all of his constitutional rights were safeguarded. On appeal, the Court of Criminal Appeals upheld the trial court's ruling, confirming the validity of Medellin's conviction and death sentence. *Ex Parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

After exhausting his avenues in state court, Medellin filed a federal petition for a writ of habeas corpus. During the course of these proceedings, Mexico brought suit against the United States in the International Court of Justice (ICJ). Mexico claimed that the U.S. violated the Vienna Convention by failing to notify various Mexican nationals, including Medellin, of their privilege to contact Mexican consular officials. The ICJ ruled in Mexico's favor, concluding that the Vienna Convention does create individually enforceable rights to consular access and that the

U.S. is required to provide review and reconsideration of the cases at issue to determine whether violations of the Convention resulted in “actual prejudice to the defendant.” *Case Concerning Avena and other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31). Further, the “ICJ specifically stated that review is required regardless of procedural default rules that would otherwise bar review.” *Ex parte Medellin*, 223 S.W.3d 315, 322 (2006). The Southern District of Texas denied Medellin federal habeas relief, *Medellin v. Cockrell*, Civ. No. H-01-4078, 2003 WL 25321243 (S.D. Tex. June 25, 2003), and subsequently denied Medellin’s application for a certificate of appealability. The Fifth Circuit also denied his application.

Medellin petitioned for a writ of certiorari which the Supreme Court granted. Before argument took place, the President issued a memorandum instructing state courts to provide the review and reconsideration called for by the ICJ in *Avena*. On the basis of this memorandum, Medellin filed a second writ of habeas corpus in the Court of Criminal Appeals of Texas. As a result of this action and the President’s memo, the Supreme Court dismissed Medellin’s case as improvidently granted. *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam).

After again reviewing Medellin’s claims in light of the President’s memorandum and Avena, the Court of Criminal of Appeals of Texas held that: (1) the memorandum issued by the President violated the separation of powers doctrine and could not preempt state procedural rules; (2) the ICJ decision was not binding federal law preempting state procedural default rules; and (3) neither the President’s memorandum nor *Avena* constituted a previously unavailable factual or legal basis warranting reconsideration of Medellin’s habeas petition under state law. In the aftermath of this decision, Medellin filed a second petition for certiorari, which this Court granted on April 30, 2007. *Ex parte Medellin*, 223 S.W.3d 315 (2006).

SUMMARY OF ARGUMENT

The President exceeded his constitutionally and statutorily granted power when he attempted to unilaterally alter the procedural rules of state courts by memorandum. This executive action is an unprecedented infringement on the principles of federalism that serve to protect specific domains of state sovereignty. The criminal law is such a domain, and this Court has repeatedly invalidated federal legislation infringing upon it. Further, while the President has extensive powers in international fora, power over internal affairs is distributed between the national government and the states. At a national level, domestic rules typically govern treaty implementation, and treaty interpretation is guided by respect for state prerogatives. While the request of the President is narrow in this case, validating the rationale justifying this action would allow the President to trump state procedural doctrine in the name of international affairs.

The Presidential memorandum also violates the separation of powers among the executive, judiciary and legislature. The President attempts to force state courts to disregard their own jurisprudence and act contrary to this Court's precedent. Several federal courts have held that obligations under the Vienna Convention do not confer rights on individuals. *See, e.g.*, *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). This Court has held that the Vienna Convention cannot compel the suspension of procedural default rules. *Breard v. Greene*, 523 U.S. 371 (1998). The President is not a judicial entity and has no authority to overturn the precedent of the judiciary, whose constitutional duty includes determining the law's meaning.

In issuing the memorandum, the President acts at the lowest ebb of his authority, because he is in conflict with the stated will of Congress. Under *Youngstown Sheet & Tube Co. v. Sawyer*, presidential power is weakest when exercised contrary to Congressional intent. 343 U.S. 579, 637 (1952). The intent of Congress with respect to international agreements' effect on state

criminal law is evident both in the ratification of the Vienna Convention and in recent limitations on federal habeas corpus enacted by Congress. During ratification, the Senate Committee on Foreign Affairs declared its belief that the Vienna Convention did not benefit individuals, but only conferred inter-state obligations. Congress has also enacted the Antiterrorism and Effective Death Penalty Act, which restricts access to federal habeas corpus. While federal, this legislation demonstrates Congressional desire to ensure the finality of judgments and respect for state courts.

The President's limited power to enter into executive agreements in times of diplomatic exigency does not include the ability to interfere with state criminal proceedings. Executive agreements adopted without the advice and consent of the Senate have been confined to bilateral settlements occurring in the context of international crises, such as the Russian Revolution and Iranian hostage crisis. The limited Congressional acquiescence to these presidential powers does not authorize executive interference in state court criminal proceedings.

Even at the height of his powers, the President's actions would be contrary to the principles of federalism, the separation of powers and Congressional intent. Despite these facts, however, the President's memorandum has no legal force, and does not qualify as an Executive Order. Executive Orders or Presidential Promulgations designed to possess legal effect must be published in the Code of Federal Regulations, whereas this memorandum only appears on the White House website. Alongside formal defects, the memorandum lacks the language of legal obligation that preemption of state prerogatives requires. *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

Medellin's claims should also be dismissed because state courts may constitutionally refrain from honoring United States international obligations by effectuating *Avena*. The ICJ's

decision threatens the integrity of the United States judicial system. State courts are bound by the decisions of this Court, which has ruled and affirmed that obligations under the Vienna Convention do not trump procedural default rules. *Breard v. Greene*, 523 U.S. 371 (1998); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). This Court has also held that the opinions of the ICJ are entitled to "respectful consideration," leaving state courts free to ignore them, particularly when they require overruling this Court's clear precedent. *Avena* itself is incorrect for a number of reasons, including ignoring domestic procedural rules, elevating Vienna Convention principles over constitutional rights, and conflicting with the practice of other signatories to the treaty. Lastly, Medellin's case is factually and legally analogous to this Court's precedents. Only after having been duly convicted and sentenced, subsequent appeal and dismissal, did Medellin raise a claim under the Vienna Convention.

The structure and purpose of the ICJ also suggest that its decisions are not binding on United States courts. Structurally, the United Nations Charter creates an international political mechanism for the enforcement of ICJ decisions, when member states fail to comply. This Court's repeated determination that treaties should be enforced by the political branches buttresses this contention. The purpose of the ICJ, enshrined in its Charter, likewise indicates its role as a forum for settling international disputes, but not as an appeals court superior to domestic criminal courts. The United States' withdrawal from the Optional Protocol also suggests that the ICJ is not intended as binding on American courts.

Effectuating *Avena* would also undermine the adversarial system, which is fundamental to the criminal justice framework of the United States. Procedural default rules are critical to this system, encouraging parties to promptly raise claims and serving vital policy goals, such as the finality of judgments, the conservation of judicial resources and the integrity of trials. However,

procedural defaults are only one aspect of the procedural rules integral to the adversarial system, all of which would be threatened by the ICJ's approach to the Vienna Convention.

The federalist foundations of America's constitutional law are also undermined by *Avena*. Basic constitutional principles equally apply to the treaty-making power, meaning that this power cannot violate the sovereignty of states. However, that is exactly what *Avena* does, by requiring state courts to effectuate international judgments conflictive with state procedural rules. Through over-extension of the treaty-making power, the legitimate sovereignty of states over their criminal law is eroded. The federal courts also lack supervisory authority over state courts. If *Avena* bound the states, it would entail that an international judicial forum could supervise state courts, while this Court could not.

Even if the ICJ could bind state courts, it overstepped its jurisdiction in *Avena*. Rather than facilitating international relations, the ICJ acts as a superior court of criminal appeal in *Avena*, exceeding its mandate. Hence, the decision is not even entitled to the "respectful consideration" accorded in *Breard*. Canons of constitutional construction also counsel against compelling state courts to adhere to *Avena*. If several constructions of a treaty are possible, the one that raises no grave constitutional problems is to be chosen. Treating *Avena* as binding would threaten the judiciary's role, the adversarial system, and federalism, while affirming the lower court's decision would not. Neither the President's memorandum, nor the ICJ's decision in *Avena*, can compel state courts to set aside their procedural default rules and reconsider Medellin's conviction.

ARGUMENT

I. THE PRESIDENT EXCEEDED HIS CONSTITUTIONALLY GRANTED POWERS BY ATTEMPTING TO UNILATERALLY ALTER THE PROCEDURAL OPERATIONS OF STATE COURTS.

"[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). Attempting to address the availability of consular access to non-citizens constitutionally convicted in U.S. state courts, the President of the United States took actions unprecedented in the history of the interaction between the executive and judicial branches of the federal government, as well as in violation of the longstanding relationship between state and federal government. In response to the decision in *Avena*, the President of the United States issued a memorandum instructing states to disregard their duly enacted criminal procedural rules and implement the ICJ's ruling.[2] While the President failed to enumerate which specific constitutional powers authorized his action, his memorandum seeking to control the criminal proceedings of state courts violates the constitutionally enshrined principles of federalism and separation of powers. In addition to violating these foundational constitutional tenants, the President's action is contrary to Congress's original understanding of the Vienna Convention and exceeds the executive's limited ability to take actions affecting domestic law in the name of foreign relations.

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[2] The President's memorandum states: "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 inter-national obligations under the decision of the International Court of Justice 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." President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005), available at http:// www. whitehouse.gov/news/releases/2005 /02/20050228- 18.html [hereinafter Presidential Memorandum].

A. **<u>The President's Attempt to Alter the Operations of State Criminal Proceedings by Executive Memorandum Impermissibly Intrudes on State Sovereignty</u>.**

The President's action aimed at altering state court proceedings trespasses into the territory of state sovereignty, in violation of the principles of federalism. Every state has procedural rules that rigidly govern the administration of the judicial process. In the interest of judicial economy and ensuring finality in judgments, all state and federal jurisdictions have procedural default rules that prevent criminal defendants from raising claims on appeal not raised at trial. In Texas criminal proceedings, courts cannot consider claims raised on subsequent application for a writ of habeas corpus that were not raised during prior proceedings.

While the President possesses the "powers of government necessary to maintain an effective control of international relations," that power must "be exercised in subordination to the applicable provisions of the constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Among those guiding principles is the separate sovereignty of the state and federal governments embodied in the structure of the constitution itself. *Alden v. Maine*, 527 U.S. 706, 714 (1996); *see* U.S. Const. art. I, § 2 (members of the House of Representatives elected by people "of the several States"), § 3 (Senate composed of two senators from each state), § 10 (specific prohibitions against the states), IV, § 1 (full faith and credit between states), § 4 (duties of U.S. government to its states), V (state ratification of amendments proposed by Congress). In addition to the division of power codified in the constitution's construction, any "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States or to the People." U.S. Const. Amend. X. The President's assertion of executive power invades state criminal procedural practice and exceeds the federal government's limited ability to intrude upon state sovereignty.

1. The Federal Government has Only Limited Ability to Mandate State Action in Domestic Affairs.

Under the United States constitution, the states retain "residuary and inviolable sovereignty" that insulates them from excessive federal interference. *Alden v. Maine*, 527 U.S. 706, 715 (1996) (quoting The Federalist No. 39, at 245). This Court has repeatedly recognized the limited ability of the federal government to compel state action. Refusing to allow the federal government to impose obligations on state officials in the promotion of federal regulatory schemes, this Court has invalidated federal laws mandating the actions of state and local law enforcement agents. *Printz v. United States*, 521 U.S. 898, 914 (1997) (striking down federal legislation requiring state and local law enforcement officials to conduct background checks on prospective handgun purchasers); *see also New York v. United States*, 505 U.S. 144 (1992) (invalidating a federal law mandating the way in which states dealt with hazardous waste). In the case of Medellin, the President seeks to force states to conduct judicial proceedings they would not otherwise undertake in violation of their own legislatively enacted procedures. Doing so impermissibly imposes federal obligations on state officials.

While the federal government's ability to dictate state action is limited in general, it is even more constrained in areas that are considered the domain of the states. "States possess the primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). In recognition of this fact, this Court has repeatedly invalidated Congressional acts seeking to control the state's administration of criminal justice; a longstanding area of state authority. *Lopez*, 514 U.S. at 626 (invalidating laws criminalizing gun possession in areas surrounding schools). The President's attempt to intervene in the state administration of criminal justice directly contravenes these judicially articulated principles.

Just as Congress has a limited ability to affect the state administration of criminal law, this Court has adopted a general policy against allowing federal injunctive interference in ongoing state criminal court proceedings. *Younger v. Harris*, 401 U.S. 37, 45-54 (1971) (holding that there is a national policy forbidding federal courts to stay or enjoin pending state court proceedings); *see also Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding federal courts ability to alter, or intervene in, state judicial proceedings "is limited to enforcing the commands of the United States Constitution"). The President does not have an independent authority to mandate the course of Texas state criminal proceedings that exceeds the abilities of Congress and the Supreme Court. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

2. The President's Ability to Compel State Action In the Furtherance of Foreign Affairs is Limited, and Does Not Encompass the Authority to Control State Courts By Executive Memorandum.

When the President works alone to promote foreign relations, as opposed to in tandem with Congress, the ability of the federal government to mandate the actions of state officials is even more constrained. The President's belief that his actions are justifiable under his ability to foster relations with foreign countries disregards important first principles fundamental to the structure of American constitutional government. "Governmental power over internal affairs is distributed between the national government and the several states." *United States v. Belmont*, 301 U.S. 324, 330 (1937). In recognition of this fact, "the procedural rules of domestic law generally govern the implementation of an international treaty." *Breard*, 523 U.S. at 375. This maxim holds true in the current case, the procedural rules of Texas courts holding worthier title to the territory of state criminal proceedings than the President's proclamation of power.

The President's ability to alter the internal domestic practices of states by entering into international agreements is severely limited by this Court's holding that "[t]reaties with foreign

nations will be carefully construed so as not to derogate from the authority and jurisdiction of the states of this nation." *United States v. Pink*, 315 U.S. 203, 230 (1942). In accordance with this adage, state law issued in a domain historically occupied by the states, such as criminal laws specifying procedural default rules, is generally not preempted by treaties and executive agreements. When confronted with executive actions related to foreign affairs potentially in conflict with state laws issued in an area of traditional state competency, this Court has avoided interpreting federal acts in a way that preempts valid state legislation. *Todok v. Union State Bank*, 281 U.S. 449, 454-55 (1930) (holding that a commerce treaty executed by the President did not preempt state homestead laws); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142-43, (1938) (holding that an executive agreement with a foreign government assigning economic claims did not preempt a state statute of limitations). The President cannot rely on his foreign relations powers to justify his intrusion into a state's sovereign domain.

3. Allowing the President to Alter State Criminal Procedural Rules by Executive Memorandum Issued Pursuant to an International Agreement Grants the Executive Unprecedented, Far-Reaching Power Over the States.

As the Texas Court of Criminal Appeals appropriately recognized, creating a new set of presidential powers that allow the executive to unilaterally intervene in state criminal proceedings in the name of an international agreement would have significant consequences for the operation of state courts. In this particular instance, while the President's intrusion into state criminal proceedings is far-reaching and unprecedented, its request is narrow: provide review and reconsideration of certain cases specified in *Avena* to determine if failing to comply with Article 36 prejudiced any of the criminal defendants. While this Presidential memorandum only directly affects a small number of state court cases, the principle for which it stands threatens to undermine the body of procedural rules that state courts rely upon for their fair and efficient

operation. Allowing the President to trump state criminal procedural rules in the name of the Vienna Convention implies that the President has the power to set aside state law to comply with any of the tens of thousands of international agreements to which the United States is a party. *See* Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2006. United States Department of State Publication 11331, Office of the Legal Adviser, Released January 2006. Granting the President the power to set aside state procedural default rules in the name of acquiring Article 36 compliance can be construed as granting the executive authority to order states to set aside "statutes of limitations and prohibitions against filing successive habeas petitions." *See Sanchez-Llamas*, 126 S.Ct. at 2686. The United States Constitution simply does not grant the President the authority to unilaterally alter the operations of state courts in the name of promoting foreign relations.

B. The President Does Not Have the Authority to Overturn Judicial Precedent and Practice by Executive Memorandum.

While the President cannot single-handedly erase the boundaries of sovereignty to control state criminal law, he also lacks the ability to assume the power of the judiciary to overturn established court precedent. The President's actions in response to *Avena* violate the codified separation of powers enshrined in the constitution by trespassing on the functions of the judiciary. As this Court has recognized, it is critical to the continued success of democratic governance that "the judiciary remains truly distinct from both the legislative and the executive" branches. *Plaut v. Spendtrhift Farm, Inc.*, 514 U.S. 211, 223 (1995). The Supreme Court, and not the President, has the power to "say what the law is" including interpreting a treaty as a "matter of federal law." *Sanchez-Llamas*, 126 S.Ct. at 2684 (quoting *Marbury v. Madison*, 5 U.S (1 Cranch.) 137, 177 (1803)). Numerous federal courts have held that, as a general rule, international agreements do not create individually enforceable rights. *See United States v.*

Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). Some courts have held specifically that Article 36 of the Vienna Convention does not create individual rights enforceable in U.S. courts. *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). This Court has already determined that Vienna Convention claims are not exempt from the procedural requirements of state courts. The President cannot reverse these decisions by issuing a memorandum containing directions that run counter to judicial precedent.

1. The President Cannot Issue an Executive Memorandum Creating an Individually Enforceable Article 36 Right Under the Vienna Convention that Federal Courts have Ruled Does Not Exist.

The President does not have the power to overturn the decisions of the judicial branch of the federal government by issuing a memorandum that creates a private cause of action in U.S. courts based on an international agreement. It is a well understood tenant of international law that "international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987). While the Supreme Court has not squarely addressed the question, numerous United States federal courts have concluded that international treaties do not normally create private rights of action. *Sorto v. State*, 173 S.W.3d 469, 478 n. 31 (Tex. Crim. App. 2005) (citing *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (Selya & Boudin, JJ., concurring); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.1975); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986); *see also United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (holding that "courts presume that the rights created by an international treaty belong to a state and that a

private individual cannot enforce them."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) (stating that "[b]ecause treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty."); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties."). The President does not have the constitutional power to issue orders overturning these judicially rendered interpretations of federal law and grant Medellin an individual cause of action under Article 36.

2. The President Cannot Overturn Supreme Court Precedent Holding State Procedural Default Rules Apply to Article 36 Claims.

Just as the President cannot create rights under international agreements that federal courts have ruled do not exist, he also lacks the constitutional authority to alter the judicially defined relationship between international treaties and state law. While international agreements do not generally create individual causes of action that can be pursued by individuals in U.S. courts, what rights, if any, are conferred on individuals by treaties are subject to the same procedural rules as any other claim. This Court has held on multiple occasions that procedural default rules apply to claims made under the Vienna Convention. In both *Sanchez-Llamas* and *Breard*, this Court stated that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural rules that apply generally to other federal-law claims." *Sanchez-Llamas*, 126 S.Ct. at 2685; *see also Breard*, 523 U.S. at 376. Medellin is barred by Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure from bringing any federal law claims on appeal, or a subsequent petition for habeas review, that he did not bring at trial. As such, this Court's rulings bar Medellin from raising new claims based on international law on

appeal that he failed to pursue at trial. The President's attempt to circumvent *Sanchez-Llamas* and *Breard* in order to grant Medellin a vehicle through which to pursue these claims impermissibly disregards this Court's authoritative rulings.

C. <u>The President is Acting at the Lowest Ebb of His Executive Authority in This Case as His Actions are Contrary to the Stated Will of Congress</u>.

In addition to casting aside federalism and violating the boundaries of the separation of powers, the directives of the presidential memorandum are also directly at odds with Congress's stated will. The President's "power is at its lowest ebb" when he "takes measures incompatible with the express or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). When the President takes actions in opposition to Congressional will, those acts "must be scrutinized with caution, for what is at stake is the equilibrium established by our Constitution." *Youngstown Sheet & Tube*, 343 U.S. at 637. In adopting the Vienna Convention, Congress expressly stated that the agreement did not create individual rights or affect domestic law. Recent federal legislation dealing with habeas corpus reform displays Congress's implied will that claims made under international agreements receive no special treatment in U.S. courts. Viewing the President's actions through the lens of skepticism required by *Youngstown* in this instance makes the President's violation of the principles of separation of powers and federalism that much more egregious.

1. Congress Did Not Intend for the Vienna Convention to Create Individually Enforceable Rights or to Affect the Operation of State Criminal Justice Systems.

"In the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co*., 343 U.S. at 587. The President's attempt to create individual rights under an international agreement enforceable in U.S. state courts is an illegitimate attempt to unilaterally legislate that

runs counter to the Senate's understanding of the Vienna Convention at the time it was ratified. As the Senate Committee on Foreign Affairs noted when considering the Convention, its purpose is clearly specified in the treaty's opening language. S. Exec. Rep. No. 91-9, 2. (91st Cong., 1st Sess. 1969). "The general functional approach of the Convention is pointed out by the following preambular statement: 'the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States.'" S. Exec. Rep. No. 91-9, 2. (91st Cong., 1st Sess. 1969) (quoting the Vienna Convention) (emphasis added). The Senate read the Vienna Convention to mean exactly what it says and did not believe that it was creating a set of individually enforceable rights.

This interpretation of the Senate's reading of the Convention is reinforced by the anticipated effect the Senate Foreign Affairs Committee thought the treaty would have on United States domestic law. In recommending ratification, the Committee stated that a factor weighing in its decision was that "[t]he Convention does not change or affect present U.S. laws." S. Exec. Rep. No. 91-9, 2. (91st Cong., 1st Sess. 1969). In light of these Congressional statements at the time the Vienna Convention was ratified, the President's actions stand to undermine the original understanding of the treaty's application. The President's attempt to create individual rights under the Vienna Convention that affect U.S. state laws is "incompatible with the express . . . will of Congress." *Youngstown Sheet & Tube*, 343 U.S. at 637.

2. Recent Legislation Passed By Congress Reaffirms Their Intention that United States Obligations Under International Treaties Have No Special Status in State Courts.

The President's attempt to require that state courts provide additional review of criminal cases in the name of an international agreement also runs counter to congressional will. In 1996, in order to "vindicate the State's interest in the finality of its criminal judgments," Congress

passed the Antiterrorism and Effective Death Penalty Act (AEDPA). *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Both the federal and state governments had become concerned about "the abuse of the statutory writ of habeas corpus" in the aftermath of state capital convictions. House Conference Report No. 104-518, 4 U.S.C.C.A.N. 944 (104th Congress, 1996). "[T]o further the principles of comity, finality and federalism" Congress passed legislation limiting the availability of the federal writ of habeas corpus following a denial at the state level. *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Among its many provisions, the AEDPA provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will typically not be afforded additional process related to that claim if he "failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2) (2000).

While the AEDPA deals with how the federal government treats habeas petitions, the motivation behind its enactment is exemplary of Congress's perspective on the autonomy of state judicial proceedings and the importance of the finality of judgments. The Joint Explanatory Statement issued by Congress along with the AEDPA states that one of its goals is to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Rep. No. 104-518, at 4 (1996) *as reprinted in* 4 U.S.C.C.A.N. 944, 946. Toward that end, the provisions contained in the AEDPA "require[] deference to the determinations of state courts" in the conduct of criminal proceedings. House Conference Report No. 104-518, 4 U.S.C.C.A.N. 944 (104th Congress, 1996). The President's attempt to require states to provide additional consideration to a case that has already received full state and federal habeas review undermines Congress's purpose in enacting the AEDPA.

D. The President's Limited Power to Enter Executive Agreements to Resolve Disputes With Foreign Nations Does Not Encompass the Ability to Bind State Criminal Courts By Executive Memorandum.

"[T]he President does have some power to enter into executive agreements without the advice and consent of the Senate," but that power is constrained to the settlement of significant disputes between national governments. *United States v. Pink*, 315 U.S. 203, 211 (1942). This limited power does not extend to the issuance of executive agreements made by the President alone, in the absence of diplomatic efforts, regulating the internal criminal proceedings of states. Unlike cases in which this Court has recognized the President's ability to impact state government when conducting foreign relations, there is no executive agreement between nations at issue here. Additionally, there is no history of Congressional acquiescence accepting the President's ability to alter the operations of state courts by executive memorandum.

1. The Situations in Which This Court Has Allowed Executive Action to Impact State Sovereignty Are Wholly Distinguishable From This Case.

This Court has recognized that the President has a limited ability to form executive agreements without consulting the Senate in certain extreme diplomatic circumstances. *Pink*, 315 U.S. at 211. In 1936, the President of the United States and the Soviet government formed an executive agreement aimed at settling potential claims between the two nations resulting from Russia's nationalization of resources following the Russian Revolution. *United States v. Belmont*, 301 U.S. 324 (1937). Through the exchange of diplomatic correspondence, the Soviet government agreed to assign all debts it was owed by United States nationals to the United States in exchange for its recognition as a sovereign nation. When challenged under the premise that the Soviet nationalization of assets resulted in the confiscation of property that could be challenged in U.S. courts, the Supreme Court ruled that "in respect of our foreign relations" state claims were barred by the international compact. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

The Court reaffirmed its interpretation of this U.S.-Soviet pact when a New York state court ordered the State Superintendent of Insurance to pay creditor claims with assets from the

nationalized First Russian Insurance Company. *Pink*, 315 U.S. at 211. The Supreme Court held that these assets were the property of the United States government per executive agreement and state attempts to procure these funds were an encroachment on federal authority. Within this limited set of circumstances, the Court stated that "state law must yield when it is inconsistent with, or impairs the policy or provisions of . . . an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230 (1942). The presidential action challenged in both *Belmont* and *Pink* was taken in response to problems created by the Russian Revolution. There is no such world-changing event driving the President's actions in this case. Additionally, the President's actions are not the product of diplomatic negotiations resulting in an executive agreement. The cases legitimating the President's diplomatically formed agreement with Russia do not justify his current attempt to nullify state criminal procedural default rules.

As part of an effort to free American hostages held in Iran in 1980, the President issued orders pursuant to an executive agreement formed with Iran under the International Emergency Economic Powers Act (IEEPA). 50 U.S.C. § 1701 (1976). The IEEPA gave the President "broad authority . . . to act in times of national emergency with respect to the property of a foreign country." *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981). In this instance, the President froze Iranian assets under U.S. control in an attempt to motivate the Iranian government to facilitate the release of American hostages. As part of an agreement requiring the United States and Iran to undergo binding arbitration to ascertain damages related to the hostage crisis, the President ordered that all Iranian assets in U.S. markets were to be transferred to a federal bank to pay against any judgment levied against Iran. When the constitutionality of the President's orders was challenged, the Supreme Court held that IEEPA specifically authorized a number of the President's actions, and those that were not specifically authorized were legitimized by

"congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case." *Dames & Moore*, 453 U.S. at 677. The presidential actions challenged in *Dames & Moore* were authorized by a specific Congressional statute, enacted pursuant to an executive agreement, and taken in response to an international hostage crisis. None of these necessary legitimating conditions are present in Medellin's case.

In an international attempt to compensate the victims of the holocaust, the President entered into an agreement with the German Chancellor and German companies to create a victim compensation fund. As part of this executive agreement, the President agreed that contributors to the fund would be shielded from lawsuits in United States courts. *American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003). Before this settlement was reached however, California had amended its civil code to allow suits based on wrongs suffered by its citizens during the Holocaust. When California vowed to enforce its law despite the President's agreement, insurance companies challenged the state law in federal court. This Court held that Congress had acquiesced to the President's power to enter agreements to settle claims on behalf of U.S. nationals against foreign governments. *Garamendi*, 539 U.S. at 415-16. However, this precedent cannot justify the President's actions in response to *Avena* as there is no diplomatically formed executive agreement compelling his actions in Medellin's case. There is limited congressional acceptance of the President's ability to enter into executive agreements to settle international disputes. However, that conditional power does not extend to permitting the President to alter state criminal procedure by unilateral executive action.

2. There is No History of Congressional Acquiescence With Respect to The President's Ability to Issue Memoranda Controlling State Courts.

While this Court has recognized limited congressional acceptance of the President's ability to take actions on the international stage in response to international crises without its

express approval, there is no equivalent sanction of the President's ability to unilaterally issue memoranda requiring actions by state criminal courts. The inconsistency of the executive branch's response to ICJ rulings generally, and Article 36 issues specifically, runs counter to the idea that there is a "long-continued practice, known to and acquiesced in by Congress" legitimizing the President's actions. *Dames & Moore*, 453 U.S. at 686 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States), 1986 I.C.J. 14, 25 I.L.M. 1023 (1986), the United States refused to take part in the international proceedings after the ICJ rejected U.S. objections to the court's jurisdiction over the matter. Additionally, the executive branch refused to concede in that case that any decisions rendered by the ICJ had any binding effect at all on the United States. Congress could not have acquiesced in the President's ability to unilaterally respond to ICJ rulings affecting domestic courts when the executive has refused to participate in those proceedings and denied that they have any binding effect.

Furthermore, in dealing with ICJ cases pertaining specifically to Article 36 of the Vienna Convention in the past, the executive branch has undertaken to affect much less extraordinary remedies than in the present case. Article 36 deficiencies have historically been addressed by extending a formal apology to the government concerned (not the individual or their family) and educating law enforcement officers about the Vienna Convention. Brief for the Department of State, United States v. Li, 206 F.3d 56 (1999). In response to an ICJ order staying the execution of Angel Breard, the President simply sent a *request* to the Governor of Virginia to stay Breard's execution. As the Solicitor General stated in that case, "[t]he measures at [the United States'] disposal under [the] constitution may in some cases include only persuasion . . . and not legal

compulsion." Brief for the United States as Amicus Curiae Supporting Respondent, Breard v. Greene, 523 U.S. 371 (1998). Congress could not have acquiesced to a continued presidential practice of dealing with ICJ decisions related to Article 36, when such a practice did not exist.

E. The Presidential Proclamation at Issue is an Internal Memorandum Having No Legal Force, and Contains Language that Does Not Require Action by State Courts.

The principles of federalism and separation of powers prevent the President from issuing an executive order mandating the actions of state courts in the name of an international agreement. Despite these facts, the President's memorandum requesting that state courts give effect to *Avena* should not even be afforded the same weight as an executive order incorporated into federal law. The President's memorandum was issued in the form of an internal communiqué, having no binding force on state judiciaries. Additionally, regardless of its form, the President's memo does not contain any specific mandatory language requiring state courts to ignore controlling legal precedents or circumvent legislatively enacted procedural default rules.

Presidential executive orders are required by federal law to be drafted, reviewed, and promulgated in accordance with specifically enumerated guidelines. 44 U.S.C. § 1505(a)(1) (2000). Section 1505(a)(1) states that all "Presidential Proclamations and Executive Orders, *except those not having general applicability and legal effect* . . ." are required to be published by Congress in the Code of Federal Regulations (CFR). (emphasis added). "Documents having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation." 1 C.F.R. § 1.1 (2003). The President's memorandum concerning *Avena* purports to *confer a right* of private action based on consular access provisions of an international agreement and to *impose an obligation* on state courts to evaluate if that right was violated. In accordance with a congressionally enacted statute, orders issued by the President

seeking to have legal effect must be published in the CFR. As the Court of Criminal Appeals of Texas identified, the President's memo is not published in the CFR; "the only public publication of this memo . . . is on the White House Press Release Internet website." *Ex parte Medellin*, 223 S.W.3d 315, 360 (2006) (Cochran, J., Johnson, J. and Holcomb, J. concurring).

Besides lacking the form required of an executive order to compel action, the President's memorandum lacks the mandatory language necessary to require states to act contrary to their own criminal procedures. The President's memo states that the "United States will discharge its inter-national obligations under the decision of the International Court of Justice in ... [Avena], by having State courts give effect to the decision." Presidential Memorandum. The President's memo does not order states to embark upon any specific course of action, let alone require them to set aside longstanding procedural default rules or recognize individually enforceable rights in violation of judicial precedent.

While the text of the President's memorandum does not require specific action, it also lacks the "clear and manifest" language necessary to preempt state criminal law. *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co*., 514 U.S. 645, 655 (1995). When the federal government attempts to act in a field traditionally occupied by the states, there is a presumption against the preemption of state law. *United States v. Locke*, 529 U.S. 89, 108 (2000). As "[s]tates possess the primary authority for defining and enforcing the criminal law," the presumption against preemption applies. *Lopez*, 514 U.S. at 561 n.3. The President has not clearly articulated a preemptive intent in his memorandum to abrogate state procedural default rules.

Even if the language of the President's memo was construed as giving clear instructions to states, those instructions should be interpreted in a way that avoids creating conflicts among

the President, the judiciary and the states. If there is any reasonable alternative reading of the President's memorandum that does not require impermissibly trumping state criminal law, this Court is "obligated to construe the [memorandum] to avoid constitutional problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001). *See also Crowell v. Benson*, 285 U.S. 22, 62 (1932) (holding that the Court should accept constructions of a statute that do not raise constitutional questions when such a reading is "fairly possible"). Since it is "fairly possible" that states could review convictions of non-citizens who raised Article 36 claims for prejudice in ways that do not present constitutional problems, such as state executive clemency proceedings, the Court should avoid reading the President's memo in a way that requires more. *Cromwell*, 285 U.S. at 62.

II. STATE COURTS MAY CONSTITUTIONALLY REFRAIN FROM HONORING UNITED STATES INTERNATIONAL OBLIGATIONS THROUGH EFFECTUATING *AVENA*.

A. <u>State Courts are Constitutionally Bound by the Supreme Court's Interpretation of the Vienna Convention, Which Contradicts *Avena*</u>.

The decisions of this Court are binding on all state courts, and in *Sanchez-Llamas v. Oregon* this Court held that United States obligations under the Vienna Convention fail to trump state procedural default rules. 126 S. Ct. 2669 (2006). Moreover, the *Avena* decision of the ICJ is only entitled to "respectful consideration," *Breard v. Greene*, 523 U.S. 371 (1998), and is in any case, incorrect. Hence, Medellin's claims, which are analogous to those in *Breard* and *Sanchez-Llamas*, are procedurally defaulted and should be dismissed.

1. The Supreme Court Has Determined that Vienna Convention Obligations Do Not Trump State Procedural Default Rules.

State courts are bound to follow this Court's precedent, which holds that claims under the Vienna Convention do not trump procedural default rules. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Breard v. Greene*, 523 U.S. 371 (1998). Under the Supremacy Clause of the

Constitution, the states are bound by the Constitution itself and by federal law, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." U.S. Const. art. VI, cl. 2.

The authoritative expositor of the meaning of the Constitution and federal law is this Court, whose duty is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803); *see also Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Determining the meaning of the law is thus "emphatically the province and duty of the judicial department" whose ultimate head is the "supreme Court" by which the lower courts are bound. *Ibid*. Recently, this Court has reiterated that "At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government and independent from the separate authority of the several States—to interpret federal law." *Williams v. Taylor*, 529 U.S. 362, 378-379 (2000).

When the President, with the advice and consent of the Senate, ratifies a treaty, it becomes part of the federal law of the United States. This also occurs pursuant to the Supremacy Clause, which specifies that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. Indeed, a treaty stands on exactly the same footing as legislation enacted by the United States Congress. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Because treaties are federal law, this Court is charged with determining their meaning and the state courts are bound by this determination. In *Sanchez-Llamas* and *Breard* this Court decided and then affirmed its decision that the Vienna Convention on Consular Relations does not require the suspension of procedural default rules.

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006); *Breard v. Greene*, 523 U.S. 371 (1998). These decisions are controlling in the present case.

2. ICJ Decisions are Only Entitled to Respectful Consideration.

This Court has held that the decisions of the ICJ do not possess binding legal force, but merely demand "respectful consideration." *Breard*, 523 U.S. at 375; *Sanchez-Llamas*, 126 S. Ct. at 2683. Consequently, state courts are not obliged to effectuate such judgments, particularly, when as in this case, the ICJ's decision directly contradicts precedent of this Court. Following *Breard*, the ICJ issued opinions in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (Judgment of June 27) (*LaGrand*) and the *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31) (*Avena*). In *Avena*, a case dealing with Petitioner, the ICJ held that the Vienna Convention invested foreign nationals with individual rights to consular assistance. Further, the ICJ held that the violation of these rights by the United States required the suspension of federal and state procedural default rules in order to give "full effect to these rights." *Avena* consequently stands in direct contradiction to the precedents of this Court.

In *Sanchez-Llamas*, this Court held that the United States is not obligated by *Avena* to follow the ICJ's interpretation of the Vienna Convention or to revisit *Breard*. 126 S. Ct. at 2683. Instead, 'the ICJ's interpretation deserves "respectful consideration" . . . [but] does not compel us to reconsider our understanding of the Convention in *Breard*." *Sanchez-Llamas*, 126 S. Ct. at 2683. Following the ICJ would require "overruling *Breard*'s plain holding that the Convention does not trump the procedural default doctrine." *Sanchez-Llamas*, 126 S. Ct. at 2683.

This Court did not cabin its holding that ICJ decisions are merely entitled to "respectful consideration" and thus cannot bind this Court, compelling it to overturn its precedent. This

Court also included no caveat that ICJ decisions directly addressing the defendant in the instant case would receive any greater consideration, and this Court should not revisit its precedent. If the ICJ could compel this Court to overrule *Breard* and *Sanchez-Llamas* then the ICJ would be a judicial forum that creates rules of decision for all United States courts. However, ever since *Marbury*, this Court has recognized its role as the ultimate arbiter of the meaning of federal law, including treaties such as the Vienna Convention. If this Court were to overturn its recent precedent because of an ICJ ruling, it would abdicate its constitutionally mandated role and would establish the ICJ as a higher judicial authority. It simply cannot be the case that an international judicial forum can compel this Court to overturn its own precedent.

3. *Avena* was Incorrectly Decided, Notwithstanding "Respectful Consideration."

Even after *Avena* is accorded "respectful consideration," the ICJ's decision remains incorrect for a number of reasons. First, there is the principle of international law that "the procedural rules of domestic law generally govern the implementation of an international treaty." *Sanchez-Llamas*, 126 S. Ct. at 2685; *see also Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1998); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 286 U.S. 694, 700 (1988); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987). At both the federal and state levels, procedural default doctrine is a rule of United States law, *Wainright v. Sykes*, 433 U.S. 72 (1977), and thus presumptively governs the application of the Vienna Convention, "absent a clear and express statement to the contrary." *Breard*, 523 U.S. at 375. The text of the Vienna Convention itself enshrines the principle that international obligations should be specified by domestic law. Article 36 states that obligations under the Convention "shall be exercised in conformity with the laws and regulations of the receiving

State" with the proviso that "full effect . . . be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), 21 U.S.T., at 101.

Second, procedural default doctrine applies to rights conferred by the Constitution itself, which demonstrates that conferring full effect on an entitlement is compatible with it being procedurally defaulted. Effectuating *Avena* would endow foreign nationals with a complement of rights greater than those possessed by United States citizens, since obligations under the Vienna Convention would require the suspension of procedural default rules that apply to alleged violations of constitutional rights. *See Engle v. Isaac*, 456 U.S. 107 (1982). Effectuating *Avena* would confer on the obligations of the Vienna Convention a greater status than "many of our most fundamental constitutional protections." *Sanchez-Llamas*, 126 S. Ct. at 2688.

For instance, *Miranda* rights are subject to procedural default. *Miranda*, 384 U.S. 436, 479 (1966); *see also Dickerson*, 530 U.S. 428, 435 (2000). *Miranda* holds that the Constitution requires police officers to advise suspects of certain rights, including the right to remain silent during interrogation and to be advised by a lawyer. However, if these rights are violated and counsel fails to object to this omission at trial, subsequent claims based on *Miranda* may be procedurally defaulted. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *see also Wainright v. Sykes*, 433 U.S. 72, 87 (1977). Indeed, "it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State's procedural default rules, but defendants not told of Article 36 rights would face no such hindrance." *Sanchez-Llamas*, 126 S. Ct. 2688 (Ginsburg, J., Concurring).

Giving effect to *Avena* produces an entire new review process for foreign nationals. If the initial trial and appeal resulted in a conviction, *Avena* would entail that a convicted criminal who had not been notified of her Vienna Convention privileges was entitled to reconsideration by

state courts, notwithstanding procedural default rules. In the instant case, a convicted murderer, who has already employed the United States' complex process of appeals, would be given another round of review denied any American citizen. This thwarts a central purpose of the procedural default system, which is to prevent defendants from strategically avoiding raising claims in order to extend review following a conviction. *Wainright*, 433 U.S. at 89.

Fourth, "the contemporary practice of other signatories," *Sanchez-Llamas*, 126 S. Ct. at 2685, indicates that other party states fail to confer individual rights based on the Vienna Convention. This Court has determined that "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984). Decisions of numerous foreign courts have indicated that the practice of states party to the Vienna Convention is not to view its obligations as conferring individual rights. *See R v. Abbrederis*, (1981) 51 F.L.R. 99, 116 (Australia); *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by the Italian Court of Cassation, Feb. 19, 1973). After extensive research, the State Department claimed that it "found no indication that other states party have remedied such [notification] failures by granting remedies in the context of their criminal justice proceedings." U.S. State Department, Answers to Questions by First Circuit at A-8, A-9 (2000).

4. *Sanchez-Llamas* and *Breard* Require that Medellin's Claims are Dismissed as Procedurally Defaulted.

In *Breard* and *Sanchez-Llamas* this Court held that procedural defaults are not trumped by Vienna Convention obligations. Accordingly, Medellin's claims under the Vienna Convention fail and must be dismissed, for the factual and legal contexts of this Court's precedents are analogous to the instant case. In *Breard*, Paraguayan national Angel Francisco Breard was

convicted of attempted rape and murder and sentenced to death. After appealing at both the state level and Supreme Court, Breard filed a motion for federal habeas relief, raising for the first time a claim under the Vienna Convention. A federal District Court denied the motion on the basis that Breard had procedurally defaulted any Vienna Convention claim by failing to raise it while in state court. *Breard v. Netherland*, 949 F. Supp. 1255, 1266 (ED Va. 1996). This Court affirmed that decision, holding that "It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention" and that his contention that the Convention trumped procedural default doctrine was "plainly incorrect." *Breard*, 523 U.S. 535.

Similarly, in *Sanchez-Llamas*, the Supreme Court held that the Vienna Convention does not trump *state* procedural default rules, concluding that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." 126 S. Ct. at 2687. Honduran national Mario Bustillo was arrested and charged with murder, without being informed of his privileges under the Vienna Convention, and was subsequently convicted. After already appealing, Bustillo filed a state habeas petition based on alleged violations of United States obligations under the Vienna Convention. Analogously, Medellin was convicted of murder, sentenced and had both his conviction and sentence affirmed upon appeal. *Ex parte Medellin*, 223 S.W.3d 315, 321-322 (2006). Only afterward did Medellin file an application for a writ of habeas corpus, raising for the first time a claim under the Vienna Convention. *Id*. The facts and posture of Bustillo and Medellin's case are sufficiently similar that for *Avena* to be followed, this Court would have to overturn its recent precedent.

B. <u>The Structure and Purpose of the ICJ Suggests that Its Decisions are Not Binding on United States Courts</u>.

Both the structure and purpose of the ICJ indicate that its opinions were not intended to bind the courts of member states. Structurally, "the Charter's procedure for noncompliance—

referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies." *Sanchez-Llamas*, 126 S.Ct. at 2685, referring to United Nations Charter, Art. 94(2), 59 Stat. 1051, T. S. No. 933 (1945). Rather than contemplating a judicially mandated solution to enforcement of ICJ decisions, the Charter foresees an international political mechanism as the appropriate remedy.

This structural feature of the ICJ is supported by this Court's repeated determination that a treaty's enforcement typically occurs through the political branches of government. A treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations . . . [but] with all this the judicial courts have nothing to do and can give no redress." *The Head Money Cases*, 112 U.S. 580, 598 (1884); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). Indeed, this Court has declared that with respect to a treaty violation, the "courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified . . . are not matters for judicial cognizance." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Consequently, effectuation of ICJ decisions should occur through the political branches of the national government using the type of particularly international means contemplated by the UN Charter. For instance, the President could assemble a board of state attorney generals in order to provide review of the cases of the 51 Mexican nationals or establish executive clemency proceedings.

The basic purpose of the ICJ is declared in the Preamble of the statute that creates it, which declares the ICJ "as the principal judicial organ of the United Nations." Statute of the International Court of Justice, Art. 59, 59 Stat. 1055, T. S. No. 993 (1945). Thus, the ICJ is meant to function as a method by which members of the United Nations settle disputes in a

judicial forum, or as this Court has put it, the "ICJ's principal purpose is to arbitrate particular disputes between national governments." *Sanchez-Llamas*, 126 S. Ct. at 2684. This is reflected in the limitation the ICJ sets for its potential litigants, "Only states may be parties in cases before the Court." Art. 34, *id*. at 1059.

Neither in terms of its purpose of arbitrating disputes among nations, nor in its characteristically international structure is there a suggestion that the ICJ is mandated to interfere in the functioning of domestic legal systems. As this Court has put it, "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." *Sanchez-Llamas*, 126 S. Ct. at 2684. Additionally, the United States enters into treaties within a specific context in which the United States Supreme Court acts to determine the meaning of those treaties, and it "is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ." *Sanchez-Llamas*, 126 S. Ct. at 2684.

Action by the ICJ that constitutes unprecedented intervention into a nation's judiciary contravenes this ratificatory background. That *Avena* was unprecedented and unexpected is underlined by the recent action of the United States Executive. Soon after *Avena*, the United States withdrew from the Optional Protocol. This Court has stated that "Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States." *Sanchez-Llamas*, 126 S. Ct. at 2685.

C. Requiring State Courts to Give Effect to *Avena* Undermines the Adversarial System.

State courts cannot be bound by *Avena*, because permitting international decisions to trump state procedural default rules would undercut the "basic framework of [the] adversary

system." *Sanchez-Llamas*, 126 S. Ct. at 2686. First, procedural default rules are critical to the functioning of the adversarial system in the United States. An adversarial system, unlike the inquisitorial system of many civil law countries, "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas*, 126 S. Ct. at 2685; *see also Castro v. United States*, 540 U.S. 375, 386 (2003). Adversarial systems attribute the failure to raise a claim to the parties, as opposed to the legal system itself. *Sanchez-Llamas*, 126 S. Ct. at 2686. Precluding the operation of procedural defaults severely disrupts the adversarial system, which relies on such rules to encourage parties to raise claims during trial.

Procedural default rules also serve important policy goals. They promote "the law's important interest in the finality of judgments" and improve the efficiency of the judiciary, by allowing the courts to "conserve judicial resources." *Massaro v. United States*, 538 U.S. 500, 504 (2003). This feature of the adversarial system serves all parties concerned, since both "the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 24-25 (1963); *see also Engle v. Isaac*, 456 U.S. 107, 127 (1982). Besides ensuring finality to judgments, limitations on appeal promote the justice of trials themselves. Conversely, "Liberal allowance of the writ [of habeas corpus] . . . degrades the prominence of the trial itself. . . . Rather than enhancing these [constitutional trial] safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself." *Engle,* 456 U.S. at 127. The policies of finality of judgments, efficient judicial decision-making, and the integrity of trials are all eroded by the suspension of procedural default rules.

Procedural default rules are only part of the procedural framework underlying the adversarial system, all of which is threatened by *Avena*. There is no principled reason as to why giving full effect to Vienna Convention obligations would require abrogation of procedural default rules, but not of other laws designed to limit when parties may raise legal claims. Accordingly, "The ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system." *Sanchez-Llamas*, 126 S. Ct. at 2686. It threatens to suspend "statutes of limitations and prohibitions against filing successive habeas petitions . . ." *Sanchez-Llamas*, 126 S. Ct. at 2686. Requiring states to give effect to *Avena* would set United States courts against the substance of their own legal system.

D. <u>Federalism Forbids Requiring State Courts to Effectuate ICJ Decisions Contradicting State Law</u>.

Requiring state courts to give effect to ICJ decisions would violate the sovereign domain of the states carved out by United States federalism. As discussed above, the United States is a system of dual sovereignty between national and state governments, in which "States unquestionably do retain a significant measure of sovereign authority." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). This Court has shown itself to be a defender of the balance between these two sovereigns, invalidating encroachments upon state sovereignty. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000). Among the traditional domains of state sovereignty is the criminal law, which the "States possess primary authority for defining and enforcing." *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 263-265 (1973). Hence, the proper sovereignty of the states would be violated if they were required by the national government to modify their laws of criminal procedure.

The Vienna Convention was duly enacted under the federal government's treaty-making power, but the basic principles of federalism apply to this power as well. *Reid v. Covert*, 354

U.S. 1, 17 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836). As this Court puts it, "the government of the United States . . . is one of limited powers" and it cannot "enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." *New Orleans*, 35 U.S. (10 Pet.) at 736 (1836). Indeed, a "treaty cannot change the Constitution." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

Further, as this Court has stated, "It is beyond dispute that [federal courts] do not hold a supervisory power over the courts of the several States." *Dickerson v. United States*, 530 U.S. 428, 438 (2000).There is "no supervisory power over state judicial proceedings and [this Court] may intervene only to correct wrongs of constitutional dimension." *Smith v. Philips*, 455 U.S. 209, 221 (1982). If state courts were bound to defer to *Avena*, it would endow an international judicial body with a supervisory authority over state criminal proceedings that even this Court is denied. This cannot be the case, for this Court is the head of the United States judiciary. *Marbury*, 5 U.S. (1 Cranch.) 137, 177 (1803).

Finally, the executive cannot be permitted to accomplish through international judicial fora what the federal judiciary of the United States cannot accomplish. Nevertheless, this is exactly the consequence that would result from requiring state courts to defer to ICJ decisions. While the Supreme Court could not dictate what procedural rules states should adhere to, an international judicial institution could perform such a function. This would have the perverse effect of allowing the national government to interfere with traditional state functions through international means, while it could not do so using its domestic authority.

E. Because the ICJ Exceeded its Jurisdiction in *Avena*, the Decision is Not Binding on United States Courts.

Even if the decisions of the ICJ could bind United States courts, *Avena* would not, because it exceeds the jurisdiction of the ICJ. The United States challenged the authority of the

ICJ in *Avena*, and while ignored by the ICJ, these contentions persuasively undermine its jurisdiction. The Preamble of the Vienna Convention declares its primary purpose, which is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." 21 U.S.T. at 79. The Vienna Convention thus concerns itself with international affairs and relations. Mexico's submissions to the ICJ however, and the decision in *Avena* assume a very different posture towards states party to the Vienna Convention. *Avena*'s remedy directly interferes with the United States' domestic judicial system. The ICJ thus comes to function as an additional court of criminal appeal, something very different from what it was intended to do. Because the ICJ exceeds its jurisdiction, *Avena* is not even entitled to the "respectful consideration" accorded the ICJ's decision in *Sanchez-Llamas*. In *Breard*, it is made clear that such consideration should only be given "to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret." 523 U.S. at 375.

F. "Constitutional Doubt" Counsels Against Holding that State Courts are Bound by *Avena*.

Canons of constitutional construction also counsel against holding that state courts are compelled to follow the ICJ in *Avena*. "The doctrine of constitutional doubt" is such a canon, and requires courts "to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 32 (1998). Indeed, 'if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible" [this Court is] obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (omitting citation); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., Concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). In general, federal

laws are "to be so construed as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). Moreover, this Court has applied this very canon to the interpretations of treaties. *Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Several grave constitutional questions would be raised were state courts required to defer to *Avena*, and all such issues could be avoided by a contrary ruling. Compelling state courts to follow *Avena* would require this Court to alter the constitutional scheme in which it sits as the absolute authority determining the meaning of federal law. It would violate the principles of federalism, disrupt the adversarial system, and elevate a contested international obligation over cherished United States constitutional rights. Conversely, no grave constitutional issues are raised by denying that state courts are compelled to adhere to *Avena*. This decision follows the precedents of *Breard* and *Sanchez-Llamas*, preserves federalism and domestic procedural rules, and treats United States obligations under the Vienna Convention on the same plane as other federal claims. The doctrine of constitutional doubt favors such a route.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be **AFFIRMED**.

Respectfully submitted,

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