

No. 04-10566

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

Spring 2006 Term

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MOISES SANCHEZ-LLAMAS,

Petitioner

v.

STATE OF OREGON,

Respondent.

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On Writ of Certiorari to the Supreme Court of Oregon

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BRIEF FOR PETITIONER

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## QUESTIONS

1. Does Article 36 of the Vienna Convention on Consular Relations confer an individually enforceable right to consular notification and access on detained foreign nationals?
2. When law enforcement officials violate Article 36 of the Vienna Convention on Consular Relations by failing to inform a detained foreign national of his right to consular notification and access, is suppression of the foreign national's post-arrest statements an appropriate remedy?

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## **OPINIONS BELOW**

The opinion of the Supreme Court of Oregon is reported at 338 Or. 267, 108 P.3d 573 (Or. 2005). The Supreme Court of Oregon affirmed the decision of the Court of Appeals of Oregon, 191 Or. App. 399, 84 P.3d 1133 (2004), which affirmed without opinion the unpublished judgment of the trial court.

## **JURISDICTION**

Petition for certiorari was timely filed with this Court on June 7, 2005. Certiorari was granted on November 7, 2005. 126 S. Ct. 620 (2005). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISION**

Article VI, Clause 2 of the United States Constitution provides:

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.

## **TREATY PROVISION**

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:
  - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers 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. 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.

Vienna Convention on Consular Relations, art. 36, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S.

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## STATEMENT OF FACTS

### I. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR], is a multilateral treaty which defines the functions of a consulate and governs consular relations between the signatory nations. The United States signed the Vienna Convention on April 24, 1963. *Id.* On October 22, 1969, the Senate unanimously gave its advice and consent, *see* 115 Cong. Rec. 30, 997 (1969), and on December 24, 1969, President Nixon ratified the Vienna Convention along with the accompanying Optional Protocol. *See* VCCR, *supra*, 21 U.S.T. at 185. To date, more than 160 countries have ratified the Treaty. *See* U.S. Dep't of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (1998), available at

[http://travel.state.gov/law/CNA\\_book.pdf](http://travel.state.gov/law/CNA_book.pdf) [hereinafter *State Department Handbook*].

Article 36 of the Vienna Convention on Consular Relations addresses the detention of foreign nationals by a signatory State.. *See* VCCR, *supra*, art. 36. The Article requires the detaining State to notify the appropriate consulate when it detains a foreign national and to facilitate access and communication between the detained foreign national and the consular officer. Addressing the rights of the detained foreign national, the Article provides that, if a detainee so requests, “the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is . . . detained.” *Id.*, art. 36(1)(b). The detaining authorities must also “inform the person concerned without delay of his *rights* under this sub-paragraph.” *Id.* (emphasis added).

## **II. The Violation of Petitioner’s Right to Consular Notification and Access**

Mexico is a signatory to the Vienna Convention, *see* VCCR, *supra*, and Petitioner Moises Sanchez-Llamas is a Mexican national. In December 1999, Mr. Sanchez-Llamas was involved in an incident in Oregon where he exchanged gunfire with police and wounded one officer in the leg. *State v. Sanchez-Llamas*, 108 P.3d 573, 574 (Or. 2005). After police arrested Mr. Sanchez-Llamas, they read him *Miranda* warnings but failed to inform him at any time of his right, under Article 36 of the Vienna Convention, to communicate with the Mexican consulate and to have the consulate informed of his arrest. *Id.* The police never did contact the Mexican consulate. *Id.* Court documents note that Mr. Sanchez-Llamas indicated later that he understood the *Miranda* warnings to mean “it would be better if I told the truth and everything.” *See Supreme Court to consider case from Medford*, Mail Tribune, Nov. 4, 2004.<sup>1</sup> Prior to trial, Mr. Sanchez-Llamas moved to suppress his post-arrest statements to the police on several grounds, including the

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<sup>1</sup> Under the rules of this Court, counsel may not cite the trial record, but may cite news sources to supplement the factual record. *See* Morris Tyler Moot Court of Appeals at Yale, *Manual for Competitors*, Rule V.D.8 (2006).

violation of his right to consular notification and access under the Vienna Convention on Consular Relations. *Sanchez-Llamas*, 108 P.3d at 574. The trial court denied the motion, and the jury convicted Mr. Sanchez-Llamas on a number of counts. *Id.* The Court of Appeals of Oregon affirmed the convictions on direct appeal; the Supreme Court of Oregon affirmed that decision. *Id.* Petitioner filed a timely petition for writ of certiorari with this Court, which was granted on November 7, 2005.

### SUMMARY OF ARGUMENT

The Vienna Convention on Consular Relations defines the relationships between signatory States and foreign consulates. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. Article 36 establishes the rights which apply when a foreign national is detained in a signatory State. VCCR, *supra*, art. 36. The Article requires the detaining State to notify the consulate of the detained national's State, if the detainee so wishes. *Id.* art. 36(1)(b). The Article also requires the detaining State to inform the detainee of his rights to contact and receive assistance from his consulate. *Id.* The plain meaning of the Article, then, confers individual rights on detained foreign nationals. This interpretation is supported by the Convention's text, its drafting history, and actions by the U.S. Executive Branch, both at the time of ratification and since. Many U.S. courts, other Convention signatories, and the International Court of Justice have all concluded that Article 36 confers individually enforceable rights to consular notification and access. Any other interpretation contradicts the plain meaning of the text.

Consular assistance provides foreign detainees with a "cultural bridge" to help them understand the detaining nation's unfamiliar laws and procedures. The rights to remain silent and consult counsel play very different roles in various nations' legal systems. Consular officers can

help ensure that a foreign national detained in the United States understands the relevance of his constitutional rights as well as the consequences of waiving those rights. Any other interpretation contradicts the plain meaning of the text. Moreover, Article 36 rights benefit not only foreign nationals detained in the United States, but also U.S. citizens abroad. The Vienna Convention, like all treaties, functions through reciprocity. The United States cannot expect other nations to honor the rights of Americans if we do not honor the same rights when we detain their citizens.

Despite our country's obligations under the Vienna Convention, federal and state law enforcement officials have persistently failed to inform detained foreign nationals of their Article 36 rights. These unchecked violations increase the likelihood that arrested foreign nationals will give statements to the police without properly understanding their constitutional rights. Judicial inaction in remedying these violations would legitimate the exploitation of foreign nationals' unfamiliarity with our laws.

To remedy Article 36 violations, this Court should create an exclusionary rule for statements obtained from foreign nationals who have not been informed of their consular notification rights. This Court has broad power to remedy violations of individual treaty-based rights. Federal courts have already created exclusionary rules for violations of federal statutes, and courts in other signatory nations have created similar remedies for violations of consular notification rights. This Court should suppress the statements of Mr. Sanchez-Llamas and other similarly situated foreign nationals for two reasons. Such an exclusionary rule will both promote the integrity of our criminal process and deter future violations of Article 36.

## ARGUMENT

### I. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS CONFERS INDIVIDUALLY ENFORCEABLE RIGHTS OF CONSULAR NOTIFICATION AND ACCESS ON DETAINED FOREIGN NATIONALS.

Article 36 of the Vienna Convention on Consular Relations establishes an interrelated regime of rights that enables consular officers to protect their countries' citizens when they are detained in foreign countries. *See* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The Article assigns rights to both consular officers and detained foreign nationals. Consular officers "have the right to visit a national of the sending State who is in prison, custody or detention." *Id.*, art. 36(c). With respect to detained foreign nationals, the Article provides, "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is . . .detained. . . . The said authorities shall inform the person concerned without delay of his *rights* under this sub-paragraph." *Id.*, art. 36(b) (emphasis added). As a signatory to the Convention, the United States has pledged to protect these rights for any foreign national detained in the United States.

A treaty becomes the municipal law of the United States once it is ratified by the Senate, pursuant to the Supremacy Clause of the U.S. Constitution. *See Edye v. Robertson (Head Money Cases)*, 112 U.S. 580 (1884). The Supremacy Clause provides, in part, "[A]ll 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 (emphasis added). When the United States ratified the Vienna Convention on Consular Relations, the individual rights conferred under Article 36 became "the supreme law of the land," binding on government officials and enforceable in U.S. courts.

**A. The Individual Rights Under Article 36 Require No Implementing Congressional Legislation Because the Vienna Convention on Consular Relations Is a Self-Executing Treaty.**

In order for an individual right conferred in a treaty to be enforceable in U.S. courts, Congress must have either enacted implementing legislation or the treaty must be self-executing. The Vienna Convention on Consular Relations is a self-executing treaty. In one of the first cases to consider whether treaties are not self-executing, this Court stated, “Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.” *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). *See also United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); *Head Money Cases*, 112 U.S. at 598-99 (“A treaty, then is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.”)

The Restatement (Third) on Foreign Relations Law of the United States (1987) [hereinafter Restatement] lists three different ways in which a treaty might be non-self-executing, none of which apply to the Vienna Convention. First, the agreement could “manifest[] an intention that it shall not become effective as domestic law without the enactment of implementing legislation.” Restatement, *supra*, § 111(4)(a). In the Vienna Convention, there is no provision specifying that the rights conferred under Article 36 may not become effective without implementing legislation. Rather, Article 36(2) states, “The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State,” indicating that the Article should be enforced with existing domestic law. The second way a treaty could be non-self-executing is if, “the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation.” *Id.* § 111(4)(b). When the Senate ratified the Vienna Convention, there was no discussion of requiring implementing legislation. In

fact, during the Senate hearings, a State Department official testified that the Convention is “entirely self-executive [sic] and does not require any implementing or complementing legislation.” Hearing Before the Senate Comm. on Foreign Relations, 91st Cong. 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Admin., U.S. Dep’t of State). Finally, a treaty could be non-self-executing if implementing legislation is constitutionally required.” Restatement, *supra*, §111(4)(c). The Constitution does not require any implementing legislation for the provisions of the Vienna Convention. Thus, the Convention, and by inclusion Article 36, is self-executing.

Lower courts have also recognized the Vienna Convention as self-executing. *See, e.g.*, *Jogi v. Voges*, 425 F.3d 367, 377 (7th Cir. 2005); *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979); *Standt v. New York*, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77 (D. Mass. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 677 (D.V.I. 1999). Moreover, the U.S. government recently acknowledged “the accepted understanding that the Vienna Convention is self-executing” in a brief to this Court. Brief for United States as Amicus Curiae supporting Respondent at 26, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928).

When the Vienna Convention became the “law of the land,” the individual rights conferred by Article 36 became enforceable in the courts of the United States without the need for additional legislative action.

**B. Article 36 of the Vienna Convention on Consular Relations Was Intended to Confer an Individual Right to Consular Notification and Access.**

The Framers declared treaties “the supreme law of the land” precisely to make them operative on individuals and enforceable in domestic courts. *See generally* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082,1097-1110

(1992) (discussing Framers’ intent and history of Supremacy Clause). Alexander Hamilton wrote in The Federalist No. 22 that “[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, *as far as respects individuals*, must like all other laws, be ascertained by judicial determinations” at 150 (Clinton Rossiter ed., 1961) (emphasis added). Indeed, in this Court’s first major treaty decision, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Court established that when a treaty creates an obligation on a State with respect to individuals, that obligation may be enforced in domestic courts by such individuals.

In the 200 years since *Ware*, this Court has regularly recognized that treaties can create individually enforceable rights. *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655, 664-70 (1992) (*Alvarez-Machain I*); *Argentine Republic v. Amerada Hess Ship. Corp.*, 488 U.S. 428 (1989); *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Clark v. Allen*, 331 U.S. 503 (1947); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817). The Vienna Convention on Consular Rights is such a treaty. Article 36 of the Convention confers on detained foreign nationals an individual right of consular notification and access.

**1. The plain meaning of the text of Article 36 confers individual rights to consular notification and access.**

Treaty interpretation begins “with the text of the treaty and the context in which the written words are used.” *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-535 (1991) (citation omitted). The Vienna Convention on the Law of Treaties, of which the United States is a signatory, directs states to interpret treaties “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679. The text should be read as a whole, in context, in light of the object and purpose of the treaty, and in consideration of subsequent agreements and practices regarding interpretation of the treaty or applications of its provisions

and relevant rules of international law. *Id.* art. 31(1). *Accord Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996); Restatement, *supra*, § 325(1).

The language of Article 36 of the Vienna Convention on Consular Relations clearly establishes an individual right to consular notification. The Article provides that the authorities of the detaining State “shall inform the person concerned without delay of his *rights*. . . .” VCCR, *supra*, art. 36(1)(b) (emphasis added) . The Article also makes the consulate’s right to have access to and communicate with detainees conditional on the will of the detainee. *Id.* art. 36(1)(a). The detaining State is required to notify the consular post of the sending State only if the detainee requests, after being informed of his rights. *Id.* art. 36(1)(b). Consular officers are directed to refrain from action on behalf of the national “if he expressly opposes such action.” *Id.* Both the direct reference to foreign nationals’ rights and the grant of control over the question of notification clearly indicate an intent to confer individual rights

Indeed, this Court has previously noted that Article 36 “arguably confers on an individual the right to consular assistance following arrest.” *Breard v. Greene*, 523 U.S. 371, 376 (1998). *See also Medellin v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O’Connor, J., dissenting from dismissal of writ of certiorari as improvidently granted) (“[I]f a statute were to provide, for example, that arresting authorities ‘shall inform a detained person without delay of his right to counsel,’ I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed”). A number of lower courts have also concluded that the text clearly confers an individually enforceable right. *See, e.g., Jogi*, 425 F.3d at 384; *Calderon-Medina*, 591 F.2d at 531; *Standt* 153 F. Supp. 2d at 425; *Hongla-Yamche*, 55 F. Supp. 2d at 77; *Superville*, 40 F. Supp. 2d at 677.

Article 36 demands that detaining officials inform foreign nationals of their rights under

the Vienna Convention. When an individual is denied his consular notification rights, the individual suffers. *See infra* Part II.A. The language of the Convention confers a private right to seek judicial remedies when a foreign defendant is not notified of his right to contact his consulate. To argue that an individual cannot seek judicial enforcement of his rights under Article 36 is to ignore the plain language of the treaty.

**2. The language in the Preamble is consistent with an individually enforceable right to consular notification and access.**

The Preamble of the Vienna Convention refers to rights of individual consular officers and does not contradict the clear assertion of individual rights in Article 36. *See* VCCR, *supra*, at ¶ 5. However, even if the language in the Preamble did actually conflict with the language of Article 36, the plain language of Article 36 should be decisive. Courts should look to materials such as preambles and titles only when the text of the provision in question is ambiguous. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (noting that clear statutory text “eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself”) (quotation omitted); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000) (rejecting language of the preamble of a local ordinance as definitive for a First Amendment challenge); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) (looking to the preamble only for the administrative construction of the regulation, to which deference is due). When, as here, the plain meaning of the text is clear, the Court need not consider the language of the Preamble.

However, an examination of the language of the Preamble nonetheless fails to reveal any inconsistency with the individually enforceable rights conveyed under Article 36. The Convention outlines the functions, privileges, and immunities of consular officers. These privileges and immunities are granted to enable consular officers to perform their enumerated

functions, not to benefit the officers personally. Accordingly, the Preamble refers to “*consular relations, privileges, and immunities*” VCCR, *supra*, at ¶ 5.(emphasis added) and states that, “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.” *Id.* The word “individuals” refers here to individual consular officers, not individual foreign nationals. While the Preamble thus limits the individual rights of consular officers, the language establishes no bar to the individual rights conferred on detained foreign nationals under Article 36.

This interpretation is supported by similar language of the Privileges and Immunities Clause in the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, *available at* [http://untreaty.un.org/English/CTC/Volume\\_1.asp](http://untreaty.un.org/English/CTC/Volume_1.asp), which states: “Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations.” Art. IV, 14, at 5. In the Convention on the Privileges and Immunities of the United Nations there is no question that the individuals who are not intended to benefit personally are consular officers. This Court may reasonably infer that the same language in the Vienna Convention on Consular Relations has similar meaning. The Preamble to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3229, 1961 U.S.T. LEXIS 883, which has almost identical language as the Preamble to the VCCR, also supports this interpretation. A resolution adopted at the conclusion of that Conference suggests that this preamble merely establishes that consular privileges and immunities should be used sparingly and not to protect individual consular officers from being punished for their personal

misconduct.<sup>2</sup> Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 594-95 (1997). Again, this Court may reasonably conclude that the two preambles convey the same meaning. Indeed, a number of courts have similarly concluded that the language in the Preamble to the Vienna Convention on Consular Relations refers to individual consular officers. *See, e.g., Jogi*, 425 F.3d at 381; *Standt*, 153 F. Supp. 2d 417; *United States v. Rodrigues*, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999).

Finally, this Court has held that “if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.” *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933). *Accord United States v. Stuart*, 489 U.S. 353, 368 (1989); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924). Under this doctrine, even if this Court were to find another interpretation plausible, the more liberal interpretation of the Article should prevail. Respondent’s interpretation would deny the individual rights conferred by the plain language of Article 36. There is no question that an interpretation which grants these rights is the more liberal.

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<sup>2</sup> The resolution provides:

Taking note that the Vienna Convention on Diplomatic Relations adopted by the Conference provides for immunity from the jurisdiction of the receiving State of members of the diplomatic mission of the sending State,

Recalling that such immunity may be waived by the sending State,

Recalling further the statement made in the preamble to the convention that the purpose of such immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,

Mindful of the deep concern expressed during the deliberations of the Conference that claims of diplomatic immunity might, in certain cases, deprive persons in the receiving State of remedies to which they are entitled to by law,

Recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.

Kadish, *supra*, at 595, n.188 (citing Resolution II, Consideration of Civil Claims, Apr. 14, 1961, 500 U.N.T.S. 218.)

**3. The drafting history of Article 36 shows that its framers intended to confer individual rights to consular notification and access.**

An examination of the committee and plenary debates surrounding the adoption of Article 36 further demonstrates that the Article confers individual rights to consular notification and access. “Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, [this Court has] traditionally considered as aids to its interpretation the negotiating and drafting history . . . and the postratification understanding of the contracting parties.” *Zicherman*, 516 U.S. at 226 (citation omitted). *Accord Factor*, 290 U.S. at 294-95 (“In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter.”); Vienna Convention on the Law of Treaties, *supra*, art. 32.

Article 36 was the subject of extensive debate before it was finally approved. Discussion focused primarily on the question of foreign nationals’ rights. *See* 1 United Nations Conference on Consular Relations: Official Records, at 3, U.N. Doc. A/Conf. 25/6, U.N. Sales. No.63.X.2 (1963) [hereinafter U.N. Official Records]; *see also* Luke Lee, *Vienna Convention on Consular Relations* 107-14 (1996). The positions of the delegates from the United Kingdom and Australia are demonstrative of the dominant view among the delegates.<sup>3</sup> The delegate to the United Kingdom objected to the proposal that a consul be notified only if the detained national so requested, because “it could well make the provisions of Article 36 ineffective because the person arrested might not be aware of his rights.” U.N. Official Records at 83-84; *see also id.* at 339, 344. The Australian delegate stated that “there was no need to stress the extreme importance

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<sup>3</sup> *See* U.N. Official Records at 37 (statement of Soviet delegate); *id.* at 37, 82, 85, 339, 345 (statements of Tunisian delegate); *id.* at 38 (statement of Congolese delegate); *id.* at 339 (statement of Greek delegate); *id.* at 338 (statement of the Korean delegate); *id.* at 332, 344 (statement of Spanish delegate); *id.* at 81, 339, 340-01 (statement of the Indian delegate); *id.* at 82, 332 (statement of the French delegate); *id.* at 84 (statement of the Federal Republic of Germany); *id.* (statement of the delegate of Brazil); *id.* at 331 (statement of the delegate of Venezuela); *id.* at 332 (statement of the delegate of Kuwait); *id.* at 335 (statement of the Swiss delegate); *id.* at 336 (statement of the delegate of New Zealand); *id.* at 343 (statement of the delegate of Ecuador).

of not disregarding, in the present or any other international document, the rights of the individual.” *Id.* at 331. In fact, the U.S. delegate proposed an amendment to Article 36(1)(b) requiring consular notification to be made at the request of the national, “to protect the rights of the national concerned.” *Id.* at 337. The United Kingdom submitted the amendment that became the final version of paragraph (b)(1), requiring the detaining nation to inform the detained foreign national of his right to consular access. The amendment was adopted 65 votes to 2, with 12 abstentions. The United States delegate voted with the majority in favor of the amendment. *See Report of the United States Delegation to the United Nations Conference on Consular Relations* at 60, *reprinted in Vienna Convention on Consular Relations*, S. Exec. Doc. No., 91-9 (1969) [hereinafter *Vienna Report*].

The Letter of Submittal from the Secretary of State to the President further illuminates the United State’s original understanding of the rights conferred under Article 36. Letter from William P. Rogers, Secretary of State, to President Richard Nixon, Apr. 18, 1969 (quoted in *United States v. Li*, 206 F.3d 56, 74 (1st Cir. 2000) (Torruella, J., dissenting)). In this letter Secretary Rodgers reported that Article 36(1)(b) “requires that authorities of the receiving State inform the person detained of his *right* to have the fact of his detention reported to the consular post concerned and his *right* to communicate with that consular post.” *Id.* (emphasis added).

Attached to the Letter of Submittal was the U.S. Vienna Report, which states:

[T]he final sentence of subparagraph 1(b) . . . requires authorities of the receiving State to inform the person detained of *his right to have the fact of his detention reported to the consular post concerned and of his right to communicate with that consular post*. This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same, is useful to the consular service of the United States in the protection of our citizens abroad.

*Vienna Report* at 60 (emphasis added). At the time of the adoption of the VCCR, the relevant authorities clearly acknowledged the individual rights of foreign nationals under Article 36.

**4. Actions taken by the Executive Branch suggest that Article 36 was intended to confer individual rights to consular notification and access.**

In the years since the United States ratified the Vienna Convention on Consular Relations the U.S. Executive Branch has taken several actions which indicate an understanding that Article 36 confers individual rights. These actions are instructive, as “[c]ourts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters.” Restatement, *supra*, § 112(c).

Describing the provisions of Article 36 in its Foreign Affairs Manual, the State Department has noted that “Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee’s *right* to communicate with the American consul.” U.S. Dep’t of State, 7 *Foreign Affairs Manual* (FAM) 421.1 (2004) (emphasis added). The State Department has also distributed a bulletin to local law enforcement agencies, reminding them of their obligations under Article 36. The bulletin states, “[t]he arresting official should in all cases immediately inform the foreign national of his *right* to have his government notified concerning the arrest/detention. If the foreign national asks that such notification be made, you should do so without delay by informing the nearest consulate or embassy.” United States Department of State Notice, October 1986 (quoted in Kadish, *supra*, at 599 n.214) (emphasis added).

In January 1998 the State Department issued a handbook to law enforcement agencies establishing the procedures to be followed when a foreign national is detained. *See State Department Handbook*. The handbook begins by summarizing the requirements when detaining a foreign national: “When foreign nationals are arrested or detained, they must be advised of the *right* to have their consular officials notified.” *Id.* at 2 (emphasis added). The handbook

continues, “There should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances. Once foreign nationality is known, advising the national of the *right* to consular notification should follow promptly.” *Id.* at 20 (emphasis added).

Both the Department of Justice and the Department of Homeland Security have also issued regulations concerning consular notification for detained foreign nationals. *See* 28 C.F.R. § 50.5 (DOJ); 8 C.F.R. § 236.1(e) (DHS). Both regulations highlight the individual right to notification. The DOJ regulation asserts that the United States has an affirmative obligation to notify the appropriate consul when one that nation’s citizens are detained. The regulation also notes that if the applicable treaty requires the foreign national’s permission, then the arresting officer must inform the detainee of the treaty provisions and may only notify the consul upon the detainee’s request. 28 C.F.R. § 50.5. The DHS regulation requires that the detained foreign national be notified that he may communicate with his consular. 8 C.F.R. § 236.1(e).

Former Attorney General John Ashcroft also recently acknowledged that Article 36 confers individual rights. In a letter to Ambassador Carlos de Icaza of Mexico, he wrote:

Consistent with the opinion of the International Court of Justice in *Mexico v. United States of America* (Case Concerning Avena and Other Mexican Nationals), Mr. Guerrero is free to argue in the trial court that his *rights* under Article 36 of the Vienna Convention were violated by a failure to inform him of his *right* to contact his consulate. . . .

Letter of Attorney General John Ashcroft to His Excellency Carlos de Icaza, Ambassador of Mexico, June 3, 2004. (cited in *United States v. Cisneros*, 397 F. Supp. 2d 726, 731-732 (D. Va. 2005)) (emphasis added).

The Executive Branch’s actions strongly suggest an acknowledgement of an individual right. The plain language of Article 36, the drafting history of the Article, and subsequent actions by the U.S. Executive Branch all establish that Article 36 was intended to, and in fact does, confer individually enforceable rights of consular notification to detained foreign nationals.

**C. This Court Should Give Respectful Consideration to the International Court of Justice’s Holdings in *LaGrand* and *Avena* that Article 36 Confers Individual Rights to Consular Notification and Access.**

The International Court of Justice (ICJ) has held that Article 36 confers an individual right. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27). In *LaGrand* the ICJ noted that Article 36(1)(b) of the Vienna Convention refers to the obligation to notify “the person concerned without delay of his rights under this subparagraph” and that Article 36(1)(c) provides the national with the right to refuse consular assistance. *LaGrand* at 77. Accordingly, the ICJ concluded that the “ordinary meaning” of the language of Article 36 “admits of no doubt” that the Article confers individual rights. *Id.* More recently, in *Avena*, the ICJ reconfirmed its holding from *LaGrand*. The United States is bound by these holdings under the Vienna Convention’s Optional Protocol. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 21 U.S.T. 326, 596 U.N.T.S. 487.

When the U.S. ratified the Vienna Convention on Consular Relations, it also chose to ratify the Optional Protocol, 21 U.S.T. 325 (1963). The Optional Protocol states “Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice ....” *Id.* art. 1. This language clearly states that ICJ holdings are binding on signatory states, meaning that the United States is bound by the ICJ’s holdings in *Avena* and *LaGrand*.<sup>4</sup>

However, even if this Court does not view the ICJ’s holdings as binding, it should consider the holdings as persuasive authorities. *See* Restatement, *supra*, § 112, cmt. b. This Court

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<sup>4</sup> The United States withdrew from the Optional Protocol on March 7, 2005. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, Wash. Post., May 10, 2005, at A1. However, as the United States was still party to the Optional Protocol when Mr. Sanchez-Llamas was denied his rights to consular notification and access, the Optional Protocol, and the ICJ holdings, apply to this case.

has endorsed the view that courts should “give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it].” *Breard v. Greene*, 523 U.S. 371, 375 (1998). *See also Medellin v. Dretke*, 125 S. Ct. 2088, 2105 (2005) (opinion of O’Connor, dissenting from dismissal of writ of certiorari as improvidently granted) (discussing whether ICJ’s interpretation of Article 36 should be taken as authoritative); *Torres v. Mullin*, 540 U.S. 1035, 1037 (2003) (opinions of Stevens, J., and Breyer, J., dissenting from the denial of certiorari) (discussing same). Respectful consideration of the ICJ’s holding lends additional support to the conclusion that the VCCR confers individually enforceable rights.

**D. Recognizing that Article 36 Confers Individual Rights to Consular Notification and Access Is in the Best Interests of the United States and Its Citizens Traveling Abroad.**

The Vienna Convention on Consular Relations was enacted to enable countries to aid their citizens when they travel abroad. Signatories of the Convention agreed to honor the rights of foreign nationals when they are detained with the goal of protecting their own citizens through reciprocity. As this Court once said, “One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). By honoring its obligations under the VCCR the United States will be better able to protect our citizens abroad.

The Framers’ experience with the Articles of Confederation taught them that a country’s ability to conduct foreign relations is crippled when that country does not honor its treaty obligations. The severely limited treaty power under the Articles of Confederation created a number of foreign relations problems for our young country. When individual U.S. states violated national treaty obligations, important allies refused to honor their reciprocal treaty obligations and would not enter into new commercial treaties with the United States. *See*

generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000). The Framers enacted the Supremacy Clause both to give our country the ability to enforce treaty compliance within the several states and to give our country credibility abroad.

As this Court recognized long ago, “international law obligations are of necessity reciprocal in nature” and “what is law for one is, under the same circumstances, law for the other.” *United States v. Arjona*, 120 U.S. 479, 487 (1887). Presently, the United States routinely demands notice when its citizens are detained by foreign authorities. In fact, the State Department requires consular officials to notify the Department and lodge a protest if a country, party to the Vienna Convention, fails to notify the U.S. consul within 72 hours of detaining a U.S. citizen. 7 FAM 426.2-1 (2004). The United States has condemned other nations in the past for denying American nationals their consular notification rights and invoked the Vienna Convention on their behalf, perhaps most notably during the Iranian hostage crisis of 1979. *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24). In 1986, the United States explicitly invoked the Vienna Convention to obtain consular access to American detained in Nicaragua. *See Superville*, 40 F. Supp. 2d. at 676 n.3.

The United States cannot reasonably expect other countries to respect U.S. citizens’ consular rights if our government persists in violating the same rights of detained foreign nationals. Several other signatories of the Vienna Convention currently recognize the individual rights created by the Convention in their domestic codes. *See, e.g.*, Crimes Act 1914 (Cth) Part 1C § 23P (Austl.); Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (S.I. No. 119/1987) § 14 (Ir.) *available at* <http://www.irishstatutebook.ie/ZZSI119Y1987.html> (last visited April 19, 2006); Police and

Criminal Evidence Act of 1984 (PACE), Code C, Section 7.1 *et seq.* (U.K.). If the United States disregards the important rights created under the Vienna Convention it runs the chance of other countries following suit, to the detriment of U.S. citizens.

The importance of protecting the rights of U.S. citizens abroad cannot be overstated. According to State Department estimates, approximately 4 million Americans currently live abroad, and Americans make about 60 million international trips each year. U.S. Dep't of State, 192 *Performance and Accountability Report* (2005), available at [www.state.gov/documents/organization/58298.pdf](http://www.state.gov/documents/organization/58298.pdf). The State Department also reports that over 2,500 Americans are arrested abroad annually. Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Dep't of State, *Department of State Publication 10252, Overseas Citizens Services*, available at [http://www.pueblo.gsa.gov/cic\\_text/state/overseas\\_citizens.html](http://www.pueblo.gsa.gov/cic_text/state/overseas_citizens.html) (last visited Apr. 19, 2006). When the United States, or an individual state, disregards Article 36 obligations, it puts every one of those Americans at risk.

Oregon and other states' persistent noncompliance with Article 36 of the Vienna Convention<sup>5</sup> has resulted in diplomatic failures such as those which originally inspired the Supremacy Clause. Former U.S. diplomats have recently asserted that continuing noncompliance will "damage a number of existing treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States' ability to negotiate new diplomatic covenants." Brief for Former United States Diplomats as Amici Curiae Supporting Petitioner at 20, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). These

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<sup>5</sup> Numerous cases decided in the last year alone feature defendants whose consular notification rights were violated after the 1998 publication of the State Department's *Consular Notification and Access* booklet. See, e.g., *Cubas v. State*, No. AP-74953, 2005 WL 3956312 (Tex. Crim. App. 2006); *United States v. Camacho-Hernandez*, No. CR-05-60055-01-AA, 2006 WL 752544 (D. Or. 2006); *State v. Linnik*, No. CA2004-06-015, 2006 WL 456792 (Ohio App. 12 Dist., 2006); *People v. Sanchez*, 362 Ill. App. 3d 1093, 841 N.E.2d 478 (Ill. App. 1 Dist. 2005); *United States v. Cisneros*, 397 F. Supp. 2d 726 (E.D.Va. 2005); *Bradley v. United States*, No. Civ-A-03-6211, 2005 WL 1607019 (D.N.J. 2005).

diplomats report that present noncompliance has already “threatened the physical safety of our U.S. diplomats and embassy staff,” *id.*, and “disrupted important national foreign policy interests by impairing the ability of diplomats to carry out critical initiatives with foreign governments and international organizations.” *Id.* at 4-5. Moreover, the United States has damaged its international human rights reputation and credibility. *See, e.g.*, Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough* (May 1, 1998), <http://web.amnesty.org/library/Index/engAMR510271998> (quoting Paraguayan Deputy Foreign Minister Rachid: “There is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . The United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights.”)

The United States should be a world leader when it comes to establishing and protecting individual rights. Our country should serve as a role model to expand the values of liberty and justice—not restrict them. As Justice Brandeis once observed, “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). This Court now has the chance to set such an example and hold that the state of Oregon violated an individually enforceable right under Article 36 of the Vienna Convention on Consular Relations when its officials failed to inform Mr. Sanchez-Llamas of his right to consular notification and access.

## **II. THE SUPPRESSION OF A FOREIGN NATIONAL’S POST-ARREST STATEMENTS IS AN APPROPRIATE AND NECESSARY REMEDY FOR THE FAILURE TO INFORM HIM OF HIS RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS.**

The Vienna Convention on Consular Relations creates “baseline” obligations that signatories must meet in their treatment of foreign nationals within their borders. *State*

*Department Handbook, supra*, at 42. Article 36 of the Convention requires law enforcement officials to inform any detained foreign national “without delay” of his right to have his consular officers notified of his detention and to communicate with them. VCCR, *supra*, art. 36(1)(b). Therefore, regardless of the detaining State’s particular criminal laws and procedures, the Article 36 right to consular notification and access acts as a universal procedural safeguard. Consular notification rights ensure that consular officers can fulfill their traditional function as a “cultural bridge,” 7 *FAM* 401 (1984), helping explain to a detainee the relevance and importance of his particular rights under the detaining State’s unfamiliar legal system.

Upon ratification, the Vienna Convention became “the law of the land” in the United States. *See* U.S. Const. art. VI, cl. 2. By signing the treaty, the United States obligated itself to respect the consular notification rights of detained foreign nationals, in return for reciprocal protection of Americans detained abroad. However, federal and state officials throughout this country routinely violate the Convention by neglecting to inform detained foreign nationals of their Article 36 rights. *See supra* note 5. By failing to remedy the clear violation of Petitioner Sanchez-Llamas’s individually enforceable rights, the Supreme Court of Oregon disregarded the “settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

Just as this Court has previously created exclusionary remedies for law enforcement officials’ persistent violations of individual constitutional rights, *see, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court should apply a similar exclusionary remedy to statements obtained during custodial interrogations of foreign nationals

who were not informed of their consular notification rights.<sup>6</sup> Left undeterred, these violations threaten our nation’s ability to credibly protest future denials of Americans’ rights when they are detained abroad, and undermine the integrity of the criminal process by permitting unchecked violations of individual rights. Through an exclusionary remedy, U.S. courts can compel respect for the procedural protections conferred by Article 36 of the Vienna Convention.

**A. Consular Notification Rights Provide Foreign Nationals with Important Procedural Protections During Custodial Interrogation.**

International obligations such as the Vienna Convention are necessarily reciprocal by nature. The United States is bound to protect the rights of foreign nationals under Article 36 just as other nations are equally bound by the Convention in their treatment of American nationals. *See Arjona*, 120 U.S. at 486 (“[W]hat is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States, as the representatives of this nation, are bound to protect”). The right to consular assistance is equally—and perhaps more—important in the pre-trial context as in the trial setting. Few Americans would likely be familiar with the nature of their pre-trial criminal rights if they were to be detained in a foreign country, even in legal systems that share a common heritage with our own. For example, in the United States, trial judges may not adversely comment on a criminal defendant’s refusal to take the stand, *Griffin v. California*, 380 U.S. 609 (1965), nor may a defendant who does testify be impeached by his post-arrest exercise of the right to silence. *Doyle v. Ohio*, 426 U.S. 610 (1976). In contrast, British trial judges may instruct juries to draw adverse inferences about defendants who refuse to testify or who do testify but did not tell police, at the time of their arrests, of facts they rely upon in their defense. Criminal Justice and Public Order

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<sup>6</sup> This Court has used both the terms “exclude” and “suppress” in the context of statements taken during custodial interrogations. “Suppression of statements” will be discussed as the effect of the “exclusionary rule” sought in this case. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 441 (2000) (discussing “*Miranda* exclusionary rule” (quotation omitted)).

Act, 1994, c. 33, §§ 34-35 (Eng.).

Similarly, while most Americans will have an intuitive understanding of the role that a defense attorney plays in our criminal system, individuals from inquisitorial civil law jurisdictions such as France or Mexico may not. Under the French system, investigating magistrate judges are responsible for protecting a suspect's pre-trial rights to silence and counsel, since detainees may be questioned by police for up to forty-eight hours without a lawyer prior to being formally arraigned. *See* Jeffery K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. Sch. J. Int'l & Comp. L. 1, 19-21 (1993). A citizen of a civil law country arrested in the United States may easily fail to comprehend that defense attorneys, and not investigating magistrates, are responsible for protecting his pre-trial rights and may therefore not understand the consequences of waiving his right to counsel.<sup>7</sup> *See, e.g., People v. Mata-Madina*, No. 97CR307, slip. op. (Colo. Dist., Div. B, May 7, 1998) (finding Article 36 violation and also suppressing English-speaking Mexican national's custodial statements as involuntary because, notwithstanding his apparent waiver of counsel, he had indicated to officers that "he wanted to talk to a judge or someone"). Consular assistance can play a crucial role in the early moments following an arrest, before a lawyer has even been retained or appointed, where the foreign national may find himself in a system of unfamiliar local rules and rights.

**1. Consular notification rights provide protections that are distinct from those protections provided under the detaining nation's domestic laws.**

The right to consular notification and access supplements whatever protections the detaining nation offers—or withholds from—all its criminal suspects. *See State Department Handbook, supra*, at 19-20 (noting consular notifications rights are distinct from *Miranda*

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<sup>7</sup> In addition, the only confessions now admissible in Mexico are those given to a judge while in the presence of defense counsel. *Constitución Política de los Estados Unidos Mexicanos, as amended*, art. 20(B)(II), 2006 (Mex.). A Mexican national detained here may therefore readily waive his right to counsel during interrogation, mistakenly believing that his statements would therefore be inadmissible.

rights). When individuals are first detained in a foreign country, contact with a consular officer can help prevent them from being mistreated or abused by detaining authorities. 7 FAM 422(c) (2004). In places where abuse is routine or legal, consular notification rights give foreign nationals a higher baseline of protections than the detaining country's own citizens, because prompt consular intervention may protect detained foreign nationals from beatings or torture while that country's own citizens lack anyone to step in on their behalf.

Consular officers can also serve as a "cultural bridge," explaining basic legal terms, concepts, and consequences in an intelligible context. 7 FAM 401 (1984). In countries such as the United States where strong procedural safeguards exist to protect criminal suspects, this cultural bridge puts a foreign national on even footing with the detaining country's own citizens. Consular assistance can compensate for foreign nationals' inherent disadvantage of being unfamiliar with the relevance and importance of local legal rights and options. In particular, consular officers can explain the role of defense attorneys and the right to silence in the detaining nation's criminal system, as well as provide lists of reputable local legal assistance so that the detainee does not select an incompetent or exploitative lawyer. 7 FAM 422(e) (2004). By helping their nationals understand local rights and procedures at the outset of the criminal process, consular officers can help them make fully informed decisions "at a time when such information is most useful." *Id.* at 422(f), 423.4.

In this country, all criminal suspects who are detained incommunicado must receive various warnings to protect their privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution. *Miranda*, 384 U.S. at 444. Recognizing that "custodial interrogation . . . trades on the weakness of individuals," *id.* at 455, this Court requires that these warnings help dispel the "inherently compelling pressures" of the custodial environment by apprising suspects

of their constitutional rights to silence and counsel, as well as the consequences of forgoing these rights. *Id.* at 467. Federal law may supplement these baseline constitutional safeguards. *Id.* For example, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042, imposes specific obligations upon officials who detain juvenile criminal suspects, including parental notification requirements. *See infra* Part II.B.2. U.S. law enforcement officials have similar obligations towards detained foreign nationals under Article 36 of the Vienna Convention. Consular notification rights thus reinforce the fundamental values underlying *Miranda* warnings by offering separate but parallel protections for arrested foreign nationals.

**2. Consular assistance helps ensure that all waivers of constitutional rights are knowing and intelligent.**

An individual's unfamiliarity with his constitutional rights can be exploited upon his arrest when he is "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Miranda*, 384 U.S. at 457. Although being informed of one's constitutional rights is the "threshold requirement" for intelligent decisions about how to exercise them, *id.* at 467, foreign nationals—for whom the entire U.S. legal system can be an "unfamiliar atmosphere"—often lack the frame of reference necessary to understand the relevance and importance of these rights. Consular assistance is therefore especially relevant during the early post-arrest phase when suspects must make knowing and intelligent decisions about whether to waive their rights to silence and counsel before speaking with the police. *See id.* at 444 (ruling that waiver must be made "voluntarily, knowingly and intelligently"). Recognizing the disadvantages that foreign nationals face in our legal system, the Foreign Ministry of Mexico has created a special consular division to train new consular officers in American law, so they can better advise Mexican nationals "about the right not to give any statement without an attorney being present, as well as the legal differences between Mexico and the United States. . . ."

Application Instituting Proceedings, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. Pleadings (Jan. 9) ¶¶ 22-23, available at [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iapplication\\_20030109.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF).

For some foreign nationals, such consular assistance may be the only way they can attain what this Court has described as the requisite “comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). This may be true of even foreign nationals who live or work in the United States. *See, e.g., Mata-Madina*, No. 97CR307 (noting that defendant lived and worked in this country); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (reversing conviction and ordering suppression of statements made by defendant, educated in U.S. high school); *United States v. Short*, 790 F.2d 464, 469 (6th Cir. 1986) (vacating conviction because of “serious question” whether knowing and intelligent *Miranda* waiver was given by American serviceman’s German wife); *United States v. Nakhoul*, 596 F. Supp. 1398, 1401-02 (D. Mass. 1984) (suppressing statements taken from Boston-residing Lebanese national during his second interrogation, despite valid waiver during first interrogation), *aff’d sub nom. United States v. El-Debeib*, 802 F.2d 442 (1st Cir. 1986) (unpublished table disposition). Consular notification rights thus help ensure that foreign nationals can make legal decisions upon their detention that are as equally informed as the detaining country’s own nationals could make.

**B. This Court Has the Power to Create an Exclusionary Remedy for Violations of Foreign Nationals’ Consular Notification Rights.**

When government actors violate individual rights created by treaties, state and federal courts alike must be prepared to enforce the treaty and remedy the violations. *See Maiorano v. Baltimore & O.R.R.*, 213 U.S. 268, 272-273 (1909) (“A treaty. . . is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by

them in the litigation of private rights”); *United States v. Rauscher*, 119 U.S. 407, 419 (1886) (noting that where government violated treaty, courts must “enforce in any appropriate proceeding rights of persons growing out of that treaty”).

**1. This Court has broad powers to remedy violations of treaty-based individual rights raised as a defense against law enforcement.**

While the Vienna Convention does not specify a remedy for violations of Article 36, this Court may create one, just as it has previously done when individuals have raised treaty violations as a defense against the enforcement of federal and state laws.<sup>8</sup> See *Cook v. United States*, 288 U.S. 102 (1933) (ordering dismissal of libel proceedings against master of ship seized by U.S. Customs within offshore statutory jurisdiction but in violation of jurisdiction set by treaty with Great Britain); *Asakura*, 265 U.S. 332 (restraining enforcement against Japanese citizen of municipal law prohibiting non-citizens from engaging in pawnbroking, under penalty of fine or imprisonment, where law violated treaty with Japan); *Rauscher*, 119 U.S. at 430 (ordering dismissal of indictment where extradited defendant was charged in violation of extradition treaty with Great Britain); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (reversing and annulling conviction and sentence under Georgia law that violated federal government’s treaty with Cherokee Nation). Unlike previous remedies that invalidated or modified the scope of domestic law, the suppression of statements would simply create an evidentiary doctrine similar to those already developed by this Court.

**2. Federal courts have created exclusionary remedies for all forms of federal law.**

An exclusionary rule can be justified “by an over-riding public policy expressed in the

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<sup>8</sup> State supreme courts have also permitted defendants to raise treaty terms as successful defenses in their criminal prosecutions. See, e.g., *Respublica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. 1788) (dismissing attainder of treason, for aiding Britain during Revolutionary War, as violating Treaty of Paris); *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (affirming dismissal of charges against foreign consul because consul was performing official function and therefore immune from prosecution under Article 43 of Vienna Convention on Consular Relations).

Constitution or the law of the land.” *Nardone v. United States*, 308 U.S. 338, 340 (1939) (emphasis added). Although this Court has frequently spoken of exclusionary principles in the context of constitutional violations, it has also applied such remedies to federal officials’ violations of other federal provisions. *See, e.g., Mallory v. United States*, 354 U.S. 449 (1957) (holding inadmissible confessions obtained in violation of prompt presentment requirements of Federal Rules of Criminal Procedure 5(a)); *Miller v. United States*, 357 U.S. 301 (1958) (excluding evidence obtained during search of dwelling after officers entered in violation of “prior announcement” statute); *Sabbath v. United States*, 391 U.S. 585 (1968) (same). These exclusionary remedies are created through “judicial implication” because no such remedies exist in the text. *See, e.g., Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (noting absence of any remedy in text of Fourth Amendment).

The Court has also applied an exclusionary remedy to federal and state law enforcement officials’ violation of federal statutes, where those violations did not implicate a constitutional right. In the two cases of *Nardone v. United States*, 302 U.S. 379 (1937) (“*Nardone I*”); 308 U.S. 338 (1939) (“*Nardone II*”), the Court suppressed statements and derivative evidence obtained by federal agents in violation of an anti-wiretapping provision of the Federal Communications Act (FCA) of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*). At the time, neither the Fourth Amendment nor its exclusionary rule applied to wiretapping. *See Olmstead*, 277 U.S. at 464. Although the FCA contained a provision threatening fines and imprisonment for such violations, the Court determined that an exclusionary remedy was necessary “to effectuate the policy which Congress has formulated.” *Nardone II*, 308 U.S. at 340 (emphasis added). In *Lee v. Florida*, 392 U.S. 378 (1968), this rule was extended to state violations of the anti-wiretapping provision, because the FCA had

previously been held to apply to intrastate communications.<sup>9</sup> *See id.* at 382 n.6. Finding that no law enforcement officer had ever been prosecuted under the associated penal provision, the Court ruled that a mandatory exclusionary remedy would “compel respect for the federal law ‘in the only effectively available way—by removing the incentive to disregard it.’” *Id.* at 386-87 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Because the Vienna Convention is equivalent in force to a federal statute, *see Head Money Cases*, 112 U.S. at 598-99, this Court may similarly remedy violations of Article 36 rights.

In addition, lower courts have suppressed statements for violations of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042, which protects juvenile criminal suspects upon their detention. One provision of the Act requires officials to advise a detained juvenile of her legal rights in language she can understand and to immediately notify “the juvenile’s parents, guardian, or custodian of such custody.” 18 U.S.C. § 5033. This requirement, like consular notification requirements, is distinct from an arrested suspect’s rights under the Constitution. *See, e.g., United States v. Juvenile (RRA-A)*, 229 F.3d 737, 744-46 (9th Cir. 2000) (ordering suppression of confession, despite valid *Miranda* waiver, for § 5033 violation); *United States v. Female Juvenile (Wendy G.)*, 255 F.3d 761, 768 (9th Cir. 2001) (same).

In much the same way as consular officials can help foreign nationals make informed decisions about unfamiliar legal rights, notifying a juvenile detainee’s parents “seeks to alert a more knowledgeable and responsible adult not only of the arrest and the charges, but also of the juvenile’s constitutional rights, in order to protect the defendant from himself.” *United States v. Nash*, 620 F. Supp. 1439, 1443 (S.D.N.Y. 1985) (suppressing statements obtained in violation of § 5033 despite suspect’s apparent familiarity with criminal system). *Cf. United States v. Kerr*,

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<sup>9</sup> Earlier that term, the Court overturned *Olmstead* in *Katz v. United States*, 389 U.S. 347 (1967). However, *Lee* was decided without reference to *Katz*.

120 F.3d 239, 241-42 (11th Cir. 1997) (affirming conviction despite § 5033 violation where defendant had previously received and waived parental notification rights given under state law). Much like a juvenile, who needs “counsel and support” if he is not to become “an easy victim of the law,” *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), a foreign national is at a similarly stark disadvantage when detained in another country.

**3. Courts in other signatory nations have already applied an exclusionary remedy to violations of foreign nationals’ consular notification rights.**

Courts in the United Kingdom and Australia, two Vienna Convention signatories that share our common law heritage, have already suppressed statements taken in violation of detained foreign nationals’ consular notification rights.<sup>10</sup> The courts’ analyses reflect the U.S. State Department’s conclusion that consular officers serve as a “cultural bridge” for foreign detainees. In the U.K, the right to consular notification and access is codified in Code C, Section 7.1 of the U.K. Police and Criminal Evidence Act of 1984, which states that a foreign national “must be informed of this right as soon as practicable” even if being held incommunicado, and may exercise the right at any time. In *R. v. Bassil and Mouffareg* (1990) 28 July, Acton Crown Court (reported in *Legal Action* 23, Dec. 1990), a trial court suppressed statements from two Lebanese nationals because police failed to give them their consular notification rights during incommunicado detention. Despite their written waivers of their rights to silence and counsel, the court was unconvinced that these “particularly vulnerable defendants” had understood their rights. Their unfamiliarity with the English language and criminal system was compounded by

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<sup>10</sup> The infrequent use of exclusionary remedies in civil law inquisitorial systems like France and Germany can be explained by those countries’ lack of a jury trial tradition. See James G. Apple & Robert P. Deyling, Fed. Judicial Ctr., *A Primer on the Civil-Law System* 27-28 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/\\$file/civillaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/$file/civillaw.pdf) (last visited April 8, 2006). Exclusionary rules presume that laymen jurors will not be as adept in disregarding unreliable or invalidly obtained evidence once it has been introduced. Civil systems, lacking a jury in most instances, have far fewer restrictions on the admissibility of evidence. *Id.*

the fact that in Lebanon, “an arrested suspect is perceived to have no rights, or at least that it is dangerous to insist on any rights.” *Id.* The court found that if they had been given their rights, they could have received assistance in their native tongue from someone who would have helped them “reach an informed decision about their position, and might well have advised them to obtain the services of a solicitor and an interpreter before being interviewed.” *Id.* See also *R. v. Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court (reported in *Legal Action* 12 (Sept. 1991)) (suppressing Dutch nationals’ statements and reasoning that apparent English fluency was irrelevant to suspects’ need for consular assistance since suspects “might wish to appear more sophisticated and worldly wise” than they are).

In Australia, consular notification rights are codified in the Crimes Act 1914, Part 1C § 23P, which prohibits interrogation until a foreign national has been informed of these right and has had “reasonable time to, or to attempt to, communicate with [a] consular office.” § 23P(1)(f). One Australian criminal appeals court suppressed a foreign national’s otherwise voluntary statements, having found that if the suspect’s consular notification rights had not been violated, consular advice would likely have led him to assert his right to silence, or at least change the nature of his responses. *Tan Seng Kiah v. R.* (2001) N.T.C.C.A. 1, 160 F.L.R. 26 (Northern Territories Court of Criminal Appeals). See also *R. v. Tan* (2001) W.A.S.C. 275 (Supreme Court of Western Australia) (ruling suppression was warranted for violations of suspect’s consular notification rights while detained during search of hotel room).

### **C. An Exclusionary Remedy Would Preserve the Integrity of the Criminal Process.**

Because consular assistance can be essential for a foreign national’s comprehension of his rights under the U.S. Constitution, continued judicial inaction in remedying violations of consular notification rights serves to sanction the exploitation of foreign nationals’ unfamiliarity with our laws. The admission at trial of evidence obtained in violation of an individual’s rights

“has the necessary effect of legitimizing the conduct which produced the evidence.” *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Suppressing the statements of Petitioner Sanchez-Llamas and other similarly situated foreign nationals will preserve the integrity of U.S. courts by declining to give judicial sanction to the violation of rights that our nation has obligated itself to protect. “[N]o court, state or federal, may serve as an accomplice in the willful transgression of the Laws of the United States, laws by which the Judges in every State are bound.” *Lee*, 392 U.S. at 385-86 (1968) (quotation marks omitted). *See also McNabb v. United States*, 318 U.S. 332, 345 (1943) (“[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful [sic] disobedience of law”).

When a foreign national is arrested but not given his consular notification rights, this denial—like all violations of a criminal suspect’s rights—can also have a direct effect upon how he fares within the judicial process. Violations of foreign nationals’ right to consular notification and access can deprive them of the consular assistance they need to make a valid *Miranda* waiver. *See, e.g., State v. Ramirez*, 732 N.E.2d 1065, 1068, 1070-71 (Ohio App. 11 Dist. 1999), *appeal dismissed upon settlement*, 725 N.E.2d 1154 (Ohio 2000) (reversing Mexican national’s conviction due to invalid *Miranda* waiver and noting that compliance with Article 36 would have pre-empted police error by ensuring presence of competent translator during interrogation and proper explanation to defendant of American legal system’s nuances). Unchecked violations of consular notification rights will therefore increase the likelihood that some arrested foreign nationals will give statements to the police without a proper understanding of their right to silence or the legal consequences of their decisions to speak. Suppressing such statements would therefore preserve the integrity of the criminal process. Law enforcement officials’ compliance

with Article 36 can also increase their ability to demonstrate that foreign nationals have given knowing and intelligent *Miranda* waivers. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (noting that government bears burden of proving that suspect’s waiver was knowing and intelligent). Reducing the number of invalid *Miranda* waivers will also conserve judicial resources, because a *Miranda* waiver’s validity requires a detailed inquiry into the facts and circumstances of each particular case. *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Even though an exclusionary rule “may appear as a technicality that inures to the benefit of a guilty person” in a given case, “the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.” *Miller*, 357 U.S. at 313. This Court has already commented upon the minimal cost and significant benefits of requiring that all criminal suspects receive their *Miranda* rights, regardless of their perceived need for them: “[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.” *Miranda*, 384 U.S. at 468-69. Because informing a foreign national of his Article 36 rights requires only a few sentences, *see State Department Handbook* at 25-39 (providing suggested statements, in 14 languages, for informing detained foreign national of consular notification rights), law enforcement officials’ persistent failure to do so is all the more inexcusable.

**D. An Exclusionary Remedy Is Necessary to Deter Law Enforcement Officials’ Violations of Foreign Nationals’ Consular Notification Rights.**

Law enforcement officials must follow the law when they enforce the law. This Court has created various exclusionary remedies to deter law enforcement officials’ persistent violations of federal law. A similar pattern of violations is readily apparent with respect to Article 36 rights.

The suppression of statements obtained from foreign nationals whose consular notification rights have been violated will remove any incentive for officials to ignore their legal obligations.

**1. Non-judicial attempts have failed to create compliance with Article 36.**

“[E]ffective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention.” Counter-Memorial of the United States of America, *LaGrand (F.R.G. v. U.S.)*, 2000 I.C.J. Pleadings (Mar. 27) ¶ 20, available at [http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS\\_ipleadings\\_toc.htm](http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS_ipleadings_toc.htm). However, the Executive Branch’s various attempts to foster compliance within our federal system of government have failed. Despite the amendment of federal arrest and detention procedures to comply with Article 36, *see supra* Part I.B.4, these regulations are regularly violated. *See, e.g., Li*, 206 F.3d at 76 (Toruella, J., concurring in part) (noting both DOJ and immigration regulations were violated during appellants’ arrests); *Hernandez v. United States*, 280 F. Supp. 2d 118, 124 (S.D.N.Y. 2003) (finding violation of DOJ regulations); *United States v. Briscoe*, 69 F. Supp. 2d 738, 747 (D.V.I. 1999) (finding violation of immigration regulations).

Some lower courts have declined to create an exclusionary remedy, believing it unnecessary in light of the State Department’s attempts to secure compliance through instructing law enforcement officials about their Vienna Convention obligations. *See, e.g., State v. Navarro*, 659 N.W.2d 487, 493-94 (Wis. App. 2003); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887-88 (9th Cir. 2000) (en banc). However, instruction alone is insufficient to protect criminal suspects in the inherently coercive environment of custodial interrogation. Despite the fact that police officers nationwide have been instructed to give *Miranda* warnings, which are now embedded in routine police practice, *Dickerson v. United States*, 530 U.S. 428, 430 (2000), this Court has not done away with *Miranda*’s exclusionary rule.

Even if effective instruction could preclude the need for such an exclusionary remedy for

violations of Article 36, the State Department's efforts have been entirely ineffective. In 1993, the State Department sent a notice to the governor and attorney general of each state as well as the mayors of large cities, instructing all law enforcement personnel of their Vienna Convention obligations upon the arrest of a foreign national. U.S. Dep't of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals*, Apr. 20, 1993 (quoted in William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 274-75 (1998)). Yet in 1997, in New York City alone, official records indicated that the police had arrested over 53,000 foreign nationals and consular notification had taken place only in four cases. Foreign Nationals and the Death Penalty in the United States, *Consular Rights, Foreign Nations and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited April 23, 2006).. In January 1998, the State Department published its *Consular Notification and Access* booklet and a small pocket reference card, see *State Department Handbook, supra*, which instructs federal, state, and local officials on the importance of consular notification rights. Yet officials across the country have continued to violate foreign nationals' consular notification rights. See *supra* note 5. While Congress may legislate on this issue pursuant to its treaty power, see *Missouri v. Holland*, 252 U.S. 416 (1920), the fact that it *might* so legislate in the future does not preclude the need for an exclusionary remedy in the present.<sup>11</sup> See *Dickerson*, 530 U.S. at 440.

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<sup>11</sup> Even the few states that have passed specific legislation instructing law enforcement officials to inform foreign nationals of their Article 36 rights have either left the question of remedies open for judicial determination, see Cal. Penal Code § 834c (1999) (providing no enforcement mechanism), or have precluded legal liability and judicial remedies altogether. See Or. Rev. Stat. § 426.228(9)(b) (2003) (immunizing officer from civil and criminal liability for failure to inform foreign detainee of Article 36 rights and disclaims violation as grounds for suppression of statements); Fla. Stat. § 901.26 (2000) (precluding the use of failure to inform detainee of consular notification rights as trial defense or reason for discharge from custody).

**2. Domestic violations of these rights jeopardize reciprocal respect for the rights of Americans detained abroad.**

Communication between foreign nationals and their consular officers “is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations.” Memorial of United States (*U.S. v. Iran*), 1980 I.C.J. Pleadings (*United States Diplomatic and Consular Staff in Teheran*) at 174. An exclusionary remedy would deter violations of the treaty and protect the public policy interests underlying the United States’ ratification of the Vienna Convention. See *Goldstein v. United States*, 316 U.S. 114, 120 (1942) (justifying exclusionary rules for violations of Fourth Amendment or FCA on grounds that “policy and purpose” of those provisions “might be thwarted”). Indeed, the State Department has argued that “no one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.” 7 *FAM* 401 (1984).

Domestic officials’ unchecked disregard for their obligations under Article 36 may result in similar disregard for Americans’ consular notification rights when they are detained abroad. See 7 *FAM* 421.2-3 (2004) (warning U.S. consular officers that foreign government officials may raise claims of U.S. non-compliance during State Department attempts to obtain prompt notification about American detainees). This risk is particularly relevant here, as Mexico is one of the countries that detains the largest numbers of Americans abroad. Press Statement by James P. Rubin, Spokesman, U.S. Dep’t of State (Apr. 15, 1998), available at <http://secretary.state.gov/www/briefings/9804/980415db.html>. Mexican law enforcement officers often inform detained U.S. nationals of their consular notification rights, with officers in some districts regularly stopping interrogations upon a detainee’s request for consular notification. See Declaration of Ambassador Maura A. Harty Concerning State Practice in Implementing Article 36(1) of the Vienna Convention on Consular Relations, ¶¶ 44, 46 (cited in Annex 4 to the

Counter-Memorial of the United States, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. Pleadings (Nov. 2003)). As Secretary of State Madeleine Albright has noted, the United States' ability to protect Americans abroad "is heavily dependent. . . on the extent to which foreign governments honor their consular notification obligations to us. . . . [W]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad." Letter to Governor George W. Bush, November 27, 1998) (quoted in Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002)).

**3. Exclusionary remedies are specifically intended for situations where law enforcement officials persistently violate individual rights.**

Prohibiting the use of statements obtained where the police have violated a foreign national's consular notification rights will protect the Article 36 rights of all detained foreign nationals through a general deterrent effect on law enforcement officials. *See United States v. Calandra*, 414 U.S. 338, 347-48 (1974) (noting that the purpose of the exclusionary rule in the Fourth Amendment context is "its deterrent effect, rather than a personal constitutional right of the party aggrieved"). This case fits squarely within the fact pattern for which this Court has created and applied such remedies: a police officer has violated a defendant's individual right, the defendant faces criminal sanctions, and evidence bears out that law enforcement officials are generally inclined to ignore that right. *See Leon v. United States*, 468 U.S. 897, 916-18 (1984) (discussing criteria for exclusionary rule and declining to apply rule to magistrate's mistaken issuance of warrant).

Because the purpose of excluding evidence is to deter police conduct that either willfully or negligently deprives suspects of their individual rights, *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), suppression of Petitioner Sanchez-Llamas's statements is particularly appropriate here,

where law enforcement officials' violations have been ongoing despite efforts by the State Department to educate them about their Vienna Convention obligations. Just as this Court applied an exclusionary remedy to both federal and state officials' violations of a federal statute, *see Nardone*, 308 U.S. at 341; *Lee*, 392 U.S. at 386-87, so should this Court create a similar remedy for statements obtained in violation of Article 36. The suppression of such statements would "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447.

### CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed and remanded for proceedings consistent with the foregoing reasons.

Respectfully submitted,

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April 24, 2006