No. 04-5928

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR, ETC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

CAPITAL CASE

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Mississippi, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, and Virginia ("the *Amici* States") respectfully submit this brief as *amici curiae* in support of Respondent in accordance with Sup. Ct. R. 39.1. Like the State of Texas, the *Amici* States all have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. Of course, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the *Amici* States are, like Texas, subject to the requirements of Article 36 of the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T. 77, 100–01, 596 U.N.T.S. 261, 292–94 ("Vienna Convention," "Convention," or "VCCR"), when their law enforcement officials arrest foreign nationals.

According to a recent study, over 56,000 noncitizens were in state prisons in 2003. Paige M. Harrison & Jennifer C. Karbert, Bur. of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2003*, Bur. of Justice Statistics Bull. 5 (May 2004, rev. July 14, 2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf. According to one estimate, at least 120 foreign nationals have been convicted and are sentenced to death in the United States; of this number, 43 are in California, 27 in Texas, 22 in Florida, 5 in Arizona, 4 each in Nevada and Ohio, 3 in Louisiana, 2 in Pennsylvania, and 1 each in Alabama, Georgia, Mississippi, Montana, Nebraska, Oklahoma, Oregon, and Virginia. *See* Mark Warren, *Foreign Nationals and the Death Penalty in the United States*, http://www.deathpenaltyinfo.org/article.php?did=198&sci

d=31 (information as of Nov. 28, 2004) (last visited Feb. 25, 2005).[1]

In addition, thousands of residents of the *Amici* States live and travel abroad, where they may rely on the protections of the Vienna Convention when dealing with foreign governments. Accordingly, the *Amici* States have an interest in the proper interpretation and enforcement of Article 36 in this case and in the light of the judgments of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), and in the *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

SUMMARY OF ARGUMENT

The Constitution places treaties and federal statutes on the same footing. Where there is a conflict between a treaty and a federal statute, the later in time controls. The relief Petitioner seeks in this action, full "review and reconsideration" of his conviction and sentence under Article 36(2) of the Vienna Convention as interpreted in *Avena*, conflicts with important provisions of the subsequently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In this case, Petitioner is not entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2) because his Vienna Convention claim involves only an alleged violation of a treaty right, not a constitutional right.

In other cases, if not this one, however, mandatory "review and reconsideration" under Article 36(2) would

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[1] According to this list, two alleged foreign nationals in the federal prison system have also been convicted and sentenced to death. The list notes incomplete data from seven States and suggests that "[a] comprehensive list would likely include some 150 names . . . ." Warren, *supra*.

conflict with additional provisions of AEDPA. As this Court observed in 1998, habeas petitioners generally are not entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2) if they failed to develop the factual basis of a claim in state court. In some cases, AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1), bars "review and reconsideration." In still other cases, a habeas petition seeking "review and reconsideration" would be barred as a "second or successive" petition under 28 U.S.C. § 2244(b).

Furthermore, although the Vienna Convention may be self-executing in the sense that implementing legislation is not required (at least in most instances), judgments of the International Court of Justice—even those construing the Vienna Convention—are not self-executing. This understanding of ICJ judgments is consistent with the ICJ Statute, the United Nations Charter, and the decisions in *LaGrand* and *Avena* themselves. Treating judgments of the ICJ as non-self-executing also avoids serious constitutional questions that would arise from a contrary interpretation.

Because the relief Petitioner seeks conflicts with AEDPA and because judgments of the ICJ are not self-executing, the Court should defer to the political branches to decide how the United States should comply with the judgment in *Avena*. Even if this Court were to modify the procedural default rule as Petitioner requests, that would not provide him with the relief he seeks, because such relief is independently barred by AEDPA. Given the statutory barriers to relief, it would be best to allow the Executive Branch and the Congress to address implementation of the judgment in *Avena* in the first instance, where all of the issues raised by that judgment can be considered together.

ARGUMENT

I. ARTICLE 36 OF THE VIENNA CONVENTION IS SUBJECT TO THE SUBSEQUENTLY ENACTED PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

The relief sought by Petitioner in this case—"review and reconsideration of his conviction and death sentence without regard to the procedural default rules imposed by Texas law," Pet.'s Br. at 2, under Article 36(2) of the Vienna Convention—conflicts with important provisions of the subsequently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214. In *Whitney* v. *Robertson*, 124 U.S. 190 (1881), this Court observed that the Constitution places "a treaty . . . on the same footing . . . with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." *Id.* at 194. The Court went on to hold that, if a treaty and a federal statute "are inconsistent, *the one last in date will control the other* . . . ." *Id.* (emphasis added). Thus, "an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

The first conflict between AEDPA and the relief Petitioner seeks is that AEDPA, by its plain terms, does not authorize the issuance of a certificate of appealability for alleged violations of treaty rights. Under AEDPA, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (2000) (emphasis added). Importantly, Congress substituted the term "constitutional" for the term "federal" in § 2253(c)(2). This Court took "due note [of] the substitution" in *Slack* v.

McDaniel, 529 U.S. 473, 483 (2000), holding that "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a *constitutional* right . . . ." *Id.* at 483–84 (emphasis added). As the Fourth Circuit has held, Petitioner's "argument that his rights under the Vienna Convention were violated does not satisfy section 2253(c)(2)'s requirement because even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights." *Murphy* v. *Netherland*, 116 F.3d 97, 99–100 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997).[2] Thus, Petitioner is not entitled to a certificate of appealability under § 2253(c)(2), a necessary prerequisite to a reversal of the district court's judgment denying his habeas petition and remand to that court for further proceedings.

The relief Petitioner seeks would also conflict with additional provisions of AEDPA in other cases, if not this one. The Court discussed one of these conflicts in *Breard* v. *Greene*, 523 U.S. 371 (1998) (*per curiam*). *See* 28 U.S.C. § 2254(e)(2) (2000). Namely, AEDPA "provides that a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will, as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.' " *Id.* at 376 (quoting 28 U.S.C. § 2254(a) & (e)(2)). As in *Breard*, other habeas petitioners' "ability to

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[2] As the United States noted in *Slack*, "[s]ome courts of appeals have suggested that the substitution of 'constitutional' for 'federal' was not intended to alter the pre-AEDPA standard," but "[t]he language of Section 2253(c)(2) makes that view untenable." Brief for the United States as Amicus Curiae at 20 n.11, *Slack* v. *McDaniel*, 529 U.S. 473 (2000) (No. 98-6322). "The reference to a 'constitutional' right in Section 2253(c)(2) requires that the underlying petition for collateral relief raise a constitutional claim, rather than a claim based on a federal statute or treaty . . . ." *Id.* at 20.

obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Id.* Most significantly, § 2254(e)(2)

> prevents [a habeas petitioner] from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, [a petitioner] cannot establish how the Consul would have advised him, [or] how the advice of his attorneys differed from the advice the Consul could have provided . . . .

Id.

Another conflict involves AEDPA's statute of limitations for habeas claims. Under 28 U.S.C. § 2244(d)(1) (2000), "[a] 1-year statute of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." AEDPA's one-year limitations period barred relief in another of the *Avena* cases, that of César Roberto Fierro Reyna (*Avena* case no. 31). *See Fierro* v. *Cockrell*, 294 F.3d 674 (5th Cir. 2002), *cert. denied*, 538 U.S. 947 (2003). Mexico discussed Fierro's case at some length in its Memorial in *Avena*, representing the Fifth Circuit's decision applying the statute of limitations as another instance of a Vienna Convention claim being "denied as 'procedurally defaulted,' without any consideration of its merits." *See* Memorial of Mexico 44 ¶ 112 (June 20, 2003), http://icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20030620_memorial_03.pdf. The ICJ concluded that the United States had breached its obligations under Article 36(2) with respect to Fierro (in addition to breaching Article 36(1)(a), (b) & (c)). *Avena*, *supra*, ¶¶ 114, 153(8). AEDPA's statute of limitations has barred relief in other Vienna Convention cases, as well. *See, e.g.*, *Fuentes* v. *Benik*, No. 04-C-763-C, 2005 WL 83830, at *2–*3 (W.D.

Wis. Jan. 3, 2005) (holding Vienna Convention claim untimely and alleged recent discovery of claim did not toll one-year limitations period); *Williams* v. *Taylor*, No. CIV.A.02-18-JJF, 2002 WL 1459530, at *3 (D. Del. July 3, 2002) (holding Vienna Convention claim untimely and equitable tolling not applicable). A rule requiring reconsideration of the conviction and sentence of foreign nationals in the light of asserted violations of Article 36 of the Vienna Convention would necessarily require the statute of limitations in § 2244(d)(1) to be set aside in many cases.

Finally, the relief Petitioner seeks would, in many cases, require the filing of a "second or successive habeas corpus application," prohibited by 28 U.S.C. § 2244(b) (2000) except in special circumstances. Section 2244(b)(1) bars the claims of habeas petitioners who presented consular notification claims in prior habeas proceedings and lost. The *LaGrand Case* provides an example of this. In *LaGrand* v. *Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999), the Ninth Circuit held that Karl LaGrand's Vienna Convention claim, which had been presented in a prior habeas petition and held to be procedurally defaulted, was barred by § 2244(b)(1). The ICJ referred to this decision in its judgment in *LaGrand*, 2001 I.C.J. at 478 ¶ 29.

For those habeas petitioners who did not present their consular notification claims in prior habeas proceedings, a "second or successive" petition is barred unless: (i) this Court announces a new, retroactive "rule of constitutional law," § 2244(b)(2)(A); or (ii) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts would be sufficient to establish that the factfinder would not have found the defendant guilty, § 2244(b)(2)(B). *See, e.g.*, *Villafuerte* v. *Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998) (holding Vienna Convention claims barred under § 2244(b)(2)(A) and (b)(2)(B)). Only in "rare circumstances" will §

2244(b)(2)'s exceptions apply. *See Mason* v. *Myers*, 208 F.3d 414, 417 (2d Cir. 2000). This AEDPA rule, too, would have to be jettisoned under Petitioner's theory.

In all of these situations, the ICJ's interpretation of Article 36(2) of Vienna Convention creates a conflict with the provisions of AEDPA. The United States ratified the Vienna Convention in 1969 and the Convention entered into force for the United States on December 24, 1969. *See* 21 U.S.T. at 77, 373. To be sure, the judgments in *Avena* and *LaGrand* postdate AEDPA, but they interpret the meaning of the Vienna Convention when it was drafted in 1963, and thus when it entered into force for the United States in 1969. *See Avena*, *supra*, ¶¶ 86, 124 (discussing the *travaux préparatoires* of the Vienna Convention); *LaGrand*, 2001 I.C.J at 493–94, ¶¶ 75–76 (discussing parties' contentions regarding the *travaux préparatoires*). Accordingly, the relevant date of the Vienna Convention, for purposes of assessing any conflict with a statute, is 1969—when it was ratified and entered into force for the United States. Because AEDPA was adopted over a quarter-century later, AEDPA is "last in date" and must "control" over inconsistent provisions of the earlier Vienna Convention. *Whitney*, 124 U.S. at 194; *Breard*, 523 U.S. at 376.

II. ALTHOUGH THE VIENNA CONVENTION MAY BE SELF-EXECUTING, JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE ARE NOT.

A. Judgments of the International Court of Justice Are Not Self-Executing.

Petitioner and his *amici* argue that the Vienna Convention is self-executing. Thus, according to Petitioner, judgments of the ICJ interpreting the Convention must be

enforced in federal court. *See* Pet.'s Br. at 30 ("Medellín's rights under the *Avena* Judgment are enforceable by the courts of the United States without any further executive or legislative action."). Although he seems hesitant to say so explicitly, this is essentially an argument that judgments of the International Court of Justice are self-executing, at least when the ICJ interprets a self-executing treaty. *See id.* at 31–32 n.25 (attempting to distinguish *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929 (D.C. Cir. 1988)). Petitioner is mistaken.

The Vienna Convention may be self-executing, in the sense that implementing legislation is unnecessary (at least in most instances). The Executive Branch apparently took that position in Senate hearings on ratification of the Convention. *See Torres* v. *Mullin*, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissenting from denial of certiorari) (quoting S. Exec. Rep. 91-9, app. at 5 (1969) (statement of State Department Deputy Legal Adviser J. Edward Lyerly) (Vienna Convention "is entirely self-executive and does not require any implementing or complementing legislation")). The Department of State continues to advise law enforcement officials that "[i]mplementing legislation is not necessary (and the VCCR and bilateral [consular relations] agreements are thus 'self-executing') because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." U.S. Dep't of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* 44 (2003) (emphasis added), http://travel.state.gov/pdf/CNA_book.pdf.[3]

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[3] On the other hand, the Executive Branch has taken the position that the Vienna Convention does not create individual rights. *See*

That the Vienna Convention may be self-executing, however, does not *ipso facto* make a judgment of the ICJ interpreting the Convention self-executing. The United States is a party to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. Thus, the United States has agreed that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." *Id.*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. But under the ICJ Statute, "[t]he decision of the Court has no binding force *except between the parties* and in respect of that particular case." Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 1062, 3 Bevans 1179, 1190 (emphasis added). Moreover, "[o]nly states may be parties in cases before the Court." *Id.*, art. 34(1), 59 Stat. at 1059, 3 Bevans at 1186. Thus, although Petitioner's case was discussed in *Avena*, he was not a party in *Avena*, and the judgment *Avena* is not binding between Petitioner and the United States or between

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United States v. *Li*, 206 F.3d 56, 63 (1st Cir.) (en banc) (quoting U.S. Dep't of State, *Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li* at A-1, A-2, A-3 (Oct. 15, 1999), *available at* U.S. Dep't of State, *Digest of United States Practice in International Law 2000*, ch. 2, doc. no. 1, http://www.state.gov/documents/organization/7111. doc), *cert. denied*, 531 U.S. 956 (2000); *see also id.* at 63 n.3 (noting that State Department had not officially addressed whether individual could enforce consular notification through mandamus; Vienna Convention, pmbl., para. 5, 21 U.S.T. at 79, 596 U.N.T.S. at 262 ("*Realizing* 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"). The Fourth Circuit observed in *United States* v. *Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004), that "no [U.S.] court has ever held that the Vienna Convention creates individual rights." *Id.* at 575 n.13.

Petitioner and the State of Texas. The judgment in *Avena* is only binding between the United States and Mexico.

Of course, that is not to say that the United States' actions with respect to Petitioner have no impact on its compliance with the judgment in *Avena*; they do. The duty to comply with ICJ judgments principally arises from sources outside the Vienna Convention itself, however. Under Article 94(1) of the United Nations Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94(1), June 26, 1945, 59 Stat. 1031, 1051, 3 Bevans 1153, 1175. The problem for Petitioner, however, is that the lower courts have generally treated the provisions of the United Nations Charter and the ICJ Statute as not being self-executing. *See Flores* v. *So. Peru Copper Corp.*, 343 F.3d 140, 157 n.24 (2d Cir. 2003) ("[A]lthough the Charter of the United Nations has been ratified by the United States, it is not self-executing."); *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (Mikva, J.) (Article 94 of U.N. Charter and ICJ Statute not self-executing); *Frolova* v. *USSR*, 761 F.2d 370, 374–75 (7th Cir. 1985) (*per curiam*) ("We have found no case holding that the U.N. Charter is self-executing . . . .") (Articles 55 and 56 of U.N. Charter not self-executing); *Spiess* v. *C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. Unit A Apr. 1981) ("[T]he Charter of the United Nations, although adopted by the United States, is not a self-executing international obligation."), *vacated on other grounds*, 457 U.S. 1128 (1982); *Hitai* v. *INS*, 343 F.2d 466 (2d Cir.) (Article 55 of U.N. Charter not self-executing), *cert. denied*, 382 U.S. 816 (1965); *see also Tel-Oren* v. *Libyan Arab Repub.*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (Articles 1 and 2 of U.N. Charter not self-executing), *cert. denied*, 470 U.S. 1003 (1985); *People of Saipan* v. *U.S. Dep't of Interior*, 502 F.2d

90, 100 (9th Cir. 1974) (Trask, J., concurring) ("First of all, it appears clear to me that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants."), *cert. denied*, 420 U.S. 1003 (1975).

Underscoring the non-self-executing nature of Article 94, paragraph 2 of the Article provides a mechanism for enforcing compliance:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Id., art. 94(2), 59 Stat. at 1051, 3 Bevans at 1175. As one commentator has observed, "[b]y indicating an alternative remedy for non-compliance, it is unlikely that a court would find the ICJ provision of the Charter to be self-executing because the Charter itself contemplates that the resolution of ICJ disputes ha[s] been committed to the Security Council." Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. Rev. 457, 516 (2004); *see also* David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. Int'l L. & Pol'y 435, 481 (1997) ("[C]ourts have pointed to the non-self-executing nature of the U.N. Charter to support the proposition that enabling legislation is required before private individuals can claim a cause of action in a domestic court based on a judgment obtained before the ICJ.").

Indeed, the judgments in both *LaGrand* and *Avena* reinforce the conclusion that those judgments are not self-executing. In *LaGrand*, the ICJ concluded that, if the

United States failed in its consular notification obligation under Article 36(1)(b) of the Vienna Convention and a German national were "convicted and sentenced to severe penalties," then under Article 36(2),

> it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. *This obligation can be carried out in various ways. The choice of means must be left to the United States.*

2001 I.C.J. at 514 ¶ 125 (emphasis added); *see also id.* at 516 ¶ 128(7) ("[S]hould nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.") (emphasis added).

In *Avena*, the ICJ rejected Mexico's request that the court order the United States to vacate the convictions and sentences of the Mexican nationals at issue in that case. *See Avena*, *supra*, ¶¶ 116–125. The ICJ stated that "[i]t is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy." *Id.* ¶ 123. The court similarly rejected Mexico's contention that the United States be required to exclude any statements or confessions obtained before consular notification occurred. *Id.* ¶¶ 126–127. On the other hand, the court rejected the United States' argument that executive clemency afforded adequate "review and reconsideration" under *LaGrand*. *Id.* ¶ 143. The ICJ concluded "that it is the judicial process that is suited to this task" of review and reconsideration, not clemency proceedings. *Id.* ¶ 141. In the end, how-

ever, the ICJ reaffirmed "that the appropriate reparation in this case consists in the obligation of the United States of America to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences . . . by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment . . . ." *Id.* ¶ 153(9) (emphasis added). By leaving the process of "review and reconsideration" to the United States "by means of its own choosing," the ICJ essentially recognized that its judgment should not be considered self-executing, i.e., that some action regarding the means of "review and reconsideration" needs to be taken by the United States first.

B. Treating Judgments of the International Court of Justice as Non-Self-Executing Avoids Serious Constitutional Questions.

Interpreting judgments of the ICJ as not being self-executing not only comports with the U.N. Charter and the ICJ Statute, it avoids serious constitutional questions regarding international delegations and national sovereignty. As Justice O'Connor observed in an address in 1995, "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.' " Sandra Day O'Connor, *The Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol'y 35, 42 (1997) (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986)). One legal commentator has observed that "treating the decisions and actions of international institutions as non-self-executing within the U.S. legal system . . . will reduce many of the constitutional concerns associated with international delegations with-

out significantly affecting the United States's ability to participate in international institutions." Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557, 1595–96 (2003); *see id.* at 1572–73 (discussing the ICJ's decisions in *LaGrand* and *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9) (provisional measures order regarding stay of execution for Angel Francisco Breard)).

The constitutional questions that would arise from treating the judgment in *Avena* as a self-executing, binding rule of decision in Petitioner's case are troubling. The power to create binding judicial precedent is one of the classic, "essential attributes of judicial power." *See Anastasoff* v. *United States*, 223 F.3d 898, 900–04 (8th Cir.) ("We conclude therefore that, as the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III."), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Assigning the ICJ the "judicial power" of creating binding rules of decision for lower federal courts would violate Article III's assignment of that power to this Court. *See* U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Joshua A. Brook, *Federalism and Foreign Affairs: How To Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. Mich. J.L. Reform 573, 597–98 (2004) ("Although the case can be made that the U.N. Charter and the Statute of the ICJ may require domestic courts to enforce ICJ judgments, such an interpretation would probably run afoul of the Constitution's Article III provisions establishing the hierarchy of the federal judiciary."). Certainly, "a treaty permitting the ICJ to *overturn* determinations of the federal courts would be unconstitutional." A. Mark Weisburd, *International*

Courts and American Courts, 21 Mich. J. Int'l L. 877, 896 (2000) (emphasis added).

Separate and apart from Article III, treating judgments of the ICJ as self-executing, binding rules of decision for state courts would raise serious federalism concerns. In *Breard*, the Executive Branch recognized that "Our Federalism," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), "imposes limits on the federal government's authority to interfere with the criminal justice system of the States." Brief for the United States as Amicus Curiae 51, *Breard* v. *Greene*, 523 U.S. 371 (1998) (No. 97-1390). Treating ICJ judgments as self-executing could effectively permit the ICJ to commandeer state governments to enforce its judgments against the wishes of those governments and state officials and in violation of state-court precedent. Such "commandeering" would run afoul of this Court's holdings in *Printz* v. *United States*, 521 U.S. 898, 933 (1997), and *New York* v. *United States*, 505 U.S. 144, 176 (1992). This Court has observed, albeit in a different context, that

> [a] power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

Alden v. *Maine*, 527 U.S. 706, 749 (1999). If the Constitution does not authorize the Federal Government to "commandeer" state governments, it surely does not authorize the ICJ to do so.[4] By interpreting judgments of the ICJ as

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[4] Nor, it should be noted, has the ICJ presumed to have such power, given its acknowledgement of the need for further action to enforce its judgments in *LaGrand* and *Avena*,

non-self-executing, however, these federalism concerns, as well as Article III delegation issues, can be avoided.

III. THIS COURT SHOULD DEFER TO THE POLITICAL BRANCHES TO DECIDE HOW TO COMPLY WITH THE JUDGMENTS IN *LAGRAND* AND *AVENA*.

Under the judgment in *Avena*, the United States must choose how to provide "review and reconsideration of the convictions and sentences" at issue. *Avena*, *supra*, ¶ 153(9). As a delicate matter of foreign policy, that task should be left to the Executive Branch and Congress, at least in the first instance. As Justice Jackson observed,

> the very nature of . . . decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

Chicago & So. Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Petitioner asserts that this Court need not stay its hand or otherwise defer. Some will surely argue that this Court's modification of the procedural default rule would constitute the United States' choice as to how to comply with *Avena* just as much as a statute or executive order would. Such an argument neglects, however, the extent to which the later-enacted AEDPA bars the kind of "review and reconsideration" Petitioner seeks. Even if this Court were to modify the procedural default rule, that alone would not provide Petitioner with the relief he seeks. He would still need Congress to expand the

grounds for granting a certificate of appealability in § 2253(c)(2). Other foreign nationals would need Congress to modify or toll AEDPA's statute of limitations, § 2244(d)(1), others would require congressional authorization to file second or successive habeas petitions, § 2244(b), and still others would need special permission for an evidentiary hearing, § 2254(e)(2).

Given these statutory barriers, which must take precedence over earlier treaty obligations, it would be better to leave the question of implementation of *Avena* to the political branches. There, the Executive and Congress can consider *all* of the issues raised by *Avena* together, rather than piecemeal. Those issues would be numerous, e.g.: (1) Should "review and reconsideration" take place as part of federal habeas review, or should the States be allowed the option of addressing the issue first in state collateral review proceedings?; (2) What kind of showing, if any, should foreign nationals be required to make to demonstrate that they are not "sandbagging," i.e., that they (and their lawyers) were genuinely ignorant of their Article 36 consular notification rights?; (3) What penalties (other than death) are sufficiently "severe" to qualify for "review and reconsideration" under *Avena*? The political branches can work toward a solution that protects and balances the United States' sovereignty interests, the States' interests in finality and the efficient administration of criminal justice, and foreign nationals' interests in consular notification in an equitable fashion—all the while bearing in mind the important ramifications such a solution would have for United States citizens living and traveling abroad.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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