IN THE SUPREME COURT OF THE UNITED STATES

No. 04-5928

JOSE ERNESTO MEDELLIN

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO EXCEED THE PAGE LIMITS

Pursuant to Rules 21, 22, and 33(d) of the Rules of this Court, the Acting Solicitor General, on behalf of the United States of America, respectfully moves to exceed the page limits for the government's amicus brief on the merits in this case. The government requests leave to file a brief not to exceed 50 printed pages.

1. This case concerns petitioner's claims to relief from his conviction and death sentence, on federal habeas corpus, based on violations of the Vienna Convention on Consular Relations. Petitioner relies on the judgment rendered by the International Court of Justice (ICJ) in Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31, 2004), which was based in part on the ICJ's decision in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27, 2001). The Fifth

Circuit denied petitioner a certificate of appealability to pursue his Vienna Convention claims, and this Court granted certiorari. The questions presented as stated in the petition are as follows:

> (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.
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> (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 comity and in the interest of uniform treaty interpretation.

2. The United States has a surpassing interest in the resolution of this case. The matter implicates vital questions of treaty interpretation, international relations, presidential authority, and the manner by which the United States, through its courts and by Executive determinations, responds to decisions of international tribunals. The Vienna Convention is an international treaty to which the United States is a party. The ICJ decisions in Avena and LaGrand were rendered after proceedings in which the United States participated. Under Article 94(2) of the U.N. Charter, a party dissatisfied with the United States' performance under an ICJ judgment may have recourse against the United States to the United Nation's Security Council.

In this Court's previous encounter with a criminal defendant's claims under the Vienna Convention, Breard v. Greene, 523 U.S. 371 (1998) (per curiam), this Court invited the United States to file a

brief on an expedited basis, Breard v. Greene, 523 U.S. 1068 (1998), and the government filed a 52-page typescript brief.

3. An adequate discussion of the issues in this case will require the government to address (1) potentially dispositive procedural issues under the Anti-Terrorism and Effective Death Penalty Act that were not covered in the lower court opinions or discussed in briefs at the petition stage; (2) the international legal significance of the treaties at issue, including the Vienna Convention and the Optional Protocol under which the proceedings were initiated in the ICJ; (3) the scope and meaning of the ICJ's decisions in LaGrand and Avena; (4) the domestic legal significance of those treaties and decisions; (5) and the unique role of the Executive Branch in responding to the ICJ's decisions. In view of the Executive Branch's role in administering treaties and its preeminent status in representing the nation in foreign affairs, cf. American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414-415 (2003); United States v. Stuart, 489 U.S. 353, 369 (1989), this Court would be materially assisted by a thorough discussion by the United States.

4. The government is in the process of preparing its brief as amicus curiae. It has concluded that an adequate treatment of the issues from the government's distinctive perspective is impossible within the normal page limits for an amicus brief under this Court's rules. In this case, no party will, or can, present the position of the United States government on the significant treaty and international law issues at stake. Petitioner has already filed

a 50-page merits brief, and is supported by nine amici curiae briefs totaling in the neighborhood of 200 pages. To provide an adequate presentation of its position, the government requests leave to file a brief of no more than 50 printed pages.

3. Rule 33.1(d) requires a motion to exceed the page limits to be "received by the Clerk at least 15 days before the filing date, * * * except in the most extraordinary circumstances." S. Ct. R. 33.1(d). The filing date for the government's amicus brief is February 28, 2004. The extraordinary circumstances that prompt the filing of the current motion at this time arise from the need for the government to have conducted an extensive interagency process, including discussions at the highest levels of the government, to determine the precise position of the United States and the arguments that will be presented to this Court. Moreover, the sensitivity of the issues implicated by this case precluded the filing of a motion before a definitive decision to file a brief had been made. The decision to file a brief and present arguments that will require a brief in excess of the page limits was reached after the elapse of the normal 15-day period. The sensitivity, complexity, and importance of the matter constitutes an extraordinary reason for making the request at this time.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

FEBRUARY 2005