No. 08-106

IN THE
# Supreme Court of the United States

RICARDO A. DE LOS SANTOS MORA,
*Petitioner*,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
RICHARD A. BROWN, DISTRICT ATTORNEY, AND
FLUSHING QUEENS POLICE DEPARTMENT,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER


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## TABLE OF CONTENTS

**Page(s)**

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

## TABLE OF AUTHORITIES

**Page(s)**



### TREATY PROVISIONS



### OTHER AUTHORITIES

## REPLY BRIEF FOR PETITIONER

The court below held that Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (1969), does not create a judicially enforceable right to be informed of the entitlement to consular notification and communication. As respondents acknowledge, that holding deepens a conflict among the courts of appeals: the court of appeals' decision is consistent with decisions of four other circuits, but it squarely conflicts with the Seventh Circuit's decision in *Jogi v. Voges*, 480 F.3d 822 (2007). Respondents also do not deny that the question presented is a recurring one of national and international importance. Nor do they dispute that this case presents a favorable vehicle for reviewing that question.

Respondents nonetheless oppose review based on their view that the Seventh Circuit's decision in *Jogi* is an "outlier." Br. in Opp. 12. But this Court does not refrain from resolving a circuit conflict on a recurring and important issue simply because most circuits have lined up on one side of the split. Indeed, when this Court previously granted review on the same issue in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the nature of the conflict was essentially the same—with several courts having held that Article 36 fails to confer judicially enforceable rights and the Seventh Circuit in *Jogi* having reached the opposite conclusion.

Moreover, the view adopted by the Seventh Circuit is not an "outlier." The only four Justices who have reached a conclusion on the question have agreed with the Seventh Circuit's view; one circuit reaching the opposite conclusion has acknowledged

that there are strong arguments in favor of the Seventh Circuit's position; concurring and dissenting judges in other cases have agreed with the Seventh Circuit's position; and so, too, has the International Court of Justice (ICJ).

Respondents also contend that review should be denied because the court of appeals correctly held that Article 36 does not create any individual rights. Respondents' merits-based argument, however, should be considered after the Court grants review, and provides no basis for denying review in a case that squarely presents a recurring and important question as to which the courts of appeals are divided. Respondents' argument on the merits, in any event, simply ignores the many flaws in the Second Circuit's reasoning identified in the petition.

1. The court of appeals in this case squarely held that Article 36 of the Vienna Convention does not grant a detained foreign national a judicially enforceable right to be informed of his entitlement to consular notification and communication. As respondents acknowledge, the Circuits are divided on this question. *See* Br. in Opp. 6, 11-12. In particular, while four other courts of appeals have agreed with the Second Circuit that Article 36 does not confer an individual right to be informed of the entitlement to consular notification and communication, the Seventh Circuit has expressly held that it does. *See* Pet. 9-13; Br. in Opp. 9, 11-12. The Seventh Circuit had an opportunity to consider the issue en banc after the initial panel opinion in *Jogi*, but no judge voted to grant en banc rehearing and the court therefore denied en banc review. *Jogi*, 480 F.3d at 824-25 & n.*. In addition, the Seventh Circuit recently reiterated its holding in *Jogi* in a decision is-

sued after the filing of the petition for a writ of certiorari. *See Osagiede v. United States*, No. 07-1131, 2008 WL 4140630, at *5, *7 & n.8 (7th Cir. Sept. 9, 2008).

The conflict among the courts of appeals warrants review. There is an important national interest in ensuring the uniform treatment of foreign nationals under an international treaty. That interest in uniformity is fatally compromised when foreign nationals in one circuit have a judicially enforceable right to be informed of their entitlement to consular notification and communication, while foreign nationals in five other circuits do not. To rectify that disparate treatment and to ensure uniformity in our Nation's treatment of foreign nationals, this Court should grant review.

2. Respondents also do not deny that the question presented is one of recurring national and international importance. Nor could they. This case presents "an important issue of federal law that has arisen hundreds of times in the lower federal and state courts." *Sanchez-Llamas*, 548 U.S. at 371 (Breyer, J., dissenting); *Medellín v. Dretke*, 544 U.S. 660, 673 (2005) (O'Connor, J., dissenting) (issue is of "national importance" and is "bound to recur"). The steady stream of challenges under Article 36 of the Vienna Convention has not abated. To the contrary, in addition to the cases already cited, *see* Pet. App. 16a n.12; Pet. 14 & n.4, another court confronted the issue within a week of the docketing of the petition for certiorari. *See McPherson v. United States*, No. 07-6119, 2008 WL 2985448, at *6-9 (D.N.J. July 31, 2008) (action for damages under § 1983).

Respondents assert that the City of New York has a written policy that requires compliance with Article 36. Br. in Opp. 2-4. But they offer no evidence that this policy has been implemented effectively; and the available evidence is to the contrary. Respondents assert that their policy has remained substantially the same since 1992. *Id.* at 4. Yet they do not challenge the results of a study that revealed only 4 instances of consular notification among more than 53,000 arrests of foreign nationals in New York City in 1997.[1] Nor do they offer any evidence that the situation has improved, in New York City or elsewhere. As long as noncompliance with Article 36 remains a "vexing problem," this Court's review is needed to address "questions that will inevitably recur" concerning the rights of arrested foreign nationals. *Medellín*, 544 U.S. at 674-75 (2005) (O'Connor, J., dissenting). "[G]iven its importance," the Court should resolve the question presented in this case. *Sanchez-Llamas*, 548 U.S. at 371 (Breyer, J., dissenting).

3. This case also presents a particularly suitable vehicle for resolving that question. The court of appeals resolved this case on the threshold ground that Article 36 does not confer on foreign nationals a judicially enforceable right to notice of their entitlement to consular notification and communication. *See* Pet. App. 20a-22a, 35a-36a n.23. The court explicitly declined to resolve the subsequent question whether petitioner may seek damages under 42 U.S.C.

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[1] Mark Warren, *Human Rights Research, Foreign Nationals and the Death Penalty in the United States* (updated Feb. 29, 2008), *available at* http://www.deathpenaltyinfo.org/article.php? did=198&scid=31.

§ 1983, and even suggested that if petitioner in fact "has an individual right under the Convention," then "his claim for damages pursuant to § 1983 would likely be actionable." *Id.* Accordingly, this case squarely presents only the threshold question that has divided the courts of appeals. Respondents do not suggest otherwise.

This case also presents that issue in the favorable posture of a dismissal for failure to state a claim. For purposes of such a dismissal, the allegations in the complaint must be assumed to be true. *Erickson v. Pardus*, 127 S. Ct. 2197, 2197 (2007) (per curiam). And petitioner's allegations present the purely legal question whether Article 36 gives a foreign national a right to be informed of his entitlement to consular notification and communication. See Pet. 23. Respondents again do not contend otherwise.

4. While respondents acknowledge the conflict in the circuits and do not deny the importance of the issue or the suitability of this case as a vehicle for resolving it, they nonetheless oppose review. Respondents rest their opposition primarily on their view that the Seventh Circuit's decision in *Jogi* is an "outlier." Br. in Opp. 12. That basis for opposing review is unpersuasive.

A circuit split on a recurring issue of national and international importance falls within the core of cases warranting the Court's review. The pressing need for review in such circumstances does not vanish simply because most circuits have come out on one side of the split. The reason is apparent. Like any other circuit split, a split in which most circuits are on one side frustrates the uniform application of federal law. And that lack of uniformity is particu-

larly damaging when, as here, the conflict implicates the obligations of the United States under an international treaty. *See* Br. of Honduras, et al. as *Amici Curiae*, *Bustillo v. Johnson*, No. 05-51, at 11 (Sept. 23, 2005), *available at* 2005 WL 2376680.

Indeed, in *Sanchez-Llamas*, 548 U.S. at 342, this Court agreed to review the precise question presented in this case even though the nature of the split was essentially the same as it is today. At that time, two federal courts of appeals and three state supreme courts had already concluded that Article 36 creates no judicially enforceable rights, while the Seventh Circuit in *Jogi* was the lone court of appeals to have held that a "defendant can bring [a] Convention claim in [a] judicial proceeding." *Id.* at 371 (Breyer, J., dissenting). Nonetheless, recognizing the conflict of authority on an important question, the Court "granted the petitions for certiorari in significant part in order to decide" whether Article 36 confers judicially enforceable individual rights. *Id.* There is no reason for a different result here.

That is particularly true because there is nothing unusual about the grant of certiorari in *Sanchez-Llamas*. This Court has not hesitated to grant review in other cases involving circuit conflicts in which most circuits were on one side of the split. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). And such grants have not infrequently resulted in the Court adopting the view of the single outnumbered court of appeals. *See Dixon v. United States*, 548 U.S. 1, 27 (2006) (Alito, J., dissenting) (majority accepted a position rejected by 8 of 9 circuits); *Henderson v. United States*, 517 U.S. 654, 677-78 & n.2 (1996) (Scalia, J., dissenting) (majority accepted a position rejected by 4 of 5 circuits).

Moreover, the interpretation of Article 36 adopted by the Seventh Circuit cannot be fairly characterized as an "outlier." In *Sanchez-Llamas*, all four Justices who reached the issue concluded that Article 36 creates judicially enforceable individual rights. 548 U.S. at 371-78 (Breyer, J., dissenting). In addition, a majority of the Court agreed in *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), that "[t]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest." *Id.* at 376. In *Medellín*, Justice O'Connor, joined by three other Justices, found substantial support for the conclusion that Article 36 creates individual rights in the treaty's text and structure. 544 U.S. at 675-88 (O'Connor, J., dissenting).

In addition, the Eleventh Circuit, while ultimately agreeing with the conclusion reached by the court below, acknowledged that the "arguments in favor of individual rights under the Treaty are impressive." *Gandara v. Bennett*, 528 F.3d 823, 827 (2008). Concurring and dissenting judges in that case and others have echoed the Seventh Circuit's view that Article 36 creates enforceable individual rights. *See, e.g.*, *Cornejo v. County of San Diego*, 504 F.3d 853, 864-73 (9th Cir. 2007) (Nelson, J., dissenting); *United States v. Li*, 206 F.3d 56, 68-76 (1st Cir. 2000) (en banc) (Tourella, C.J., concurring in part and dissenting in part); *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), *aff'd sub nom.*, *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *see also United States v. Lombera-Camorlinga*, 206 F.3d 882, 890 (9th Cir. 2000) (en banc) (Boochever, J., dissenting); *Gandara*, 538 F.3d at 835-39 (Rodgers, J., specially concurring). And the ICJ, in an opinion that is entitled to "respectful

consideration," *Sanchez-Llamas*, 548 U.S. at 333, has likewise concluded that Article 36 grants arrested foreign nationals an individual right that may be "asserted . . . within the domestic legal system of the United States." *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 21). That judicial authority belies respondents' claim that the Seventh Circuit's decision constitutes an "outlier."

5. Respondents also argue that review should be denied because the Second Circuit correctly held that Article 36 does not create individual rights. Br. in Opp. 11. Such a merits-based argument, however, provides no basis for declining to resolve a circuit conflict on a recurring issue of national and international importance. Respondents' arguments on the merits can be considered after the Court grants review.

Respondents, moreover, make no effort to address the flaws in the Second Circuit's reasoning identified in the petition for certiorari. In particular, respondents offer no response to the points that: (i) Article 36 uses rights-creating language, Pet. 16; (ii) this Court has interpreted treaties using similar language to create individual rights, *id.* at 18-19; (iii) recognition of individual rights furthers the general purposes of the Vienna Convention to promote consular functions, *id.* at 19-20; (iv) this Court's cases contain no presumption against reading treaties to create individual rights, *id.* at 21-22; (v) the ICJ's ruling weighs in favor of an individual rights reading, *id.* at 20; and (vi) determinations of the Executive Branch are not controlling in circumstances like those present here, *id.* at 22.

## CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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