No. 04-5928

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, ALLIED EDUCATIONAL FOUNDATION, AND U.S. REPRESENTATIVES STEVE CHABOT AND WALTER B. JONES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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QUESTIONS PRESENTED

1. Are Petitioner's claims under the Vienna Convention on Consular Relations procedurally barred because he failed to raise them in a timely manner?

2. If Petitioner's claims are procedurally barred, should the Court nonetheless order the district court to consider those claims in the interests of judicial comity and uniform treaty interpretation, in light of the International Court of Justice's decision in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31, 2004)?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states.[1] WLF devotes a significant portion of its resources to promoting the rights of crime victims and has regularly appeared before this Court and other federal and state courts to advocate for greater judicial recognition of those rights as well as the need to streamline appellate review of criminal sentences. *See, e.g., Lynn v. Gathers, cert. denied* 540 U.S. 1141 (2004); *Felker v. Turpin*, 518 U.S. 65 (1996); *Payne v. Tennessee,* 501 U.S. 808 (1991). WLF has also appeared before this Court in support of its view that federal courts should base their decisions on international law only to the extent that Congress has decided to incorporate that international law as part of our domestic law. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

Randy and Sandra Ertman are the parents of Jennifer Lee Ertman, one of the two teenage girls who were brutally raped and murdered by Petitioner. Mr. and Mrs. Ertman have endured more than a decade of appellate review of Petitioner's conviction and sentence and believe that it is time to bring that review to an end. The Ertmans attended each of the trials of their daughter's killers; they were granted the opportunity to address the defendants at the conclusion of several of those proceedings and to describe the tremendous impact that their daughter's murder has had on the lives of her surviving relatives.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Honorable Steve Chabot is a United States Representative from Ohio, and the Honorable Walter B. Jones is a United States Representatives from North Carolina. As Members of Congress, both have supported efforts to limit the jurisdiction of federal courts to second-guess criminal sentences handed down by state courts. In particular, both have worked to limit the jurisdiction of federal courts to invoke either federal law or international law to overturn state-court decisions that rest on an adequate foundation of state substantive law.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici oppose efforts to elevate decisions of the International Court of Justice (ICJ) to a status above that of other federal law. Even if, as Petitioner contends, ICJ decisions in some instances should be deemed a part of federal law, *amici* believe that such decisions are but one source of federal law and cannot be invoked as a basis for ignoring well-established federal law that both pre-dates and post-dates adoption of the Vienna Convention. Where, as here, a defendant was convicted of a gruesome murder more than a decade ago and every appellate court has concluded that he received a fair trial, *amici* do not believe that he should be permitted to continue to delay his sentence by invoking a new issue that he failed to raise until years after his initial conviction.

Amici are filing this brief with the consent of all parties. Counsel for Petitioner filed with the Court a blanket consent to

all *amicus* briefs on December 17, 2004. A letter of consent from counsel for Respondent has been lodged with the Court.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in Respondent's brief.

In brief, Petitioner Jose Ernesto Medellin stands convicted of the particularly gruesome rape and murder of two teenage girls in Houston, Texas 12 years ago. The victims, 14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School in Houston. They had the misfortune of running into Medellin and fellow gang members, whom they did not know, while walking home on the evening of June 24, 1993. The gang members brutally raped both girls vaginally, anally, and orally for more than an hour. Medellin and the other gang members then took the girls to a wooded area to be killed so that they could not report the attacks. Medellin personally strangled at least one of the girls, and perhaps both, with their own shoe laces. He later complained that he had difficulty in getting Jenny Ertman to die and had to step on her throat to finish the murder. The girls' badly decomposed bodies were discovered four days later after a call from a brother of one of the gang members led them to the site.

Overwhelming evidence of Medellin's guilt was presented at his September 1994 trial. In addition to forensic evidence, the evidence included the testimony of several witnesses to whom Medellin had bragged of his exploits immediately after the crime -- including boastful statements that both of the girls were virgins until Medellin and other gang members had raped them. The evidence also included inculpatory statements given to police by various gang

members (following waiver of *Miranda* rights), including a written statement by Medellin in which he admitted raping Elizabeth Pena but denied direct participation in the murders. On September 16, 1994, Medellin was convicted of murder during the course of a sexual assault. Following the punishment phase of Medellin's trial, during which the jury heard about Medellin's extensive gang-related illegal activity (including a 1992 gang-related fight that led to his expulsion from school), he was sentenced to death on October 11, 1994.

Although Medellin has lived in the United States most of his life and speaks English fluently, he was born in Mexico and is a citizen of that country. But there is no evidence that law enforcement personnel knew that Medellin was a Mexican citizen; the state court hearing his habeas corpus petition found that there was no testimony at his trial that he was not a U.S. citizen or that he told anyone that he was a Mexican national. Pet. App. 47a. Article 36(1) of the Vienna Convention on Consular Rights[2] provides that when an individual is arrested outside of his nation of citizenship, the nation undertaking the arrest shall, among other things, "without delay" inform the person detained of his right to communicate with consular officers from his native country. Although police officers read Medellin his *Miranda* rights following his arrest (and he explicitly waived his right to remain silent), it is uncontested that he was not informed of his Vienna Convention right to communicate with Mexican consular officials.

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[2] 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). Article 36 of the Vienna Convention is reprinted at Pet. App. 137a-138a.

Medellin's counsel did not raise the Vienna Convention issue at trial.[3] Nor did he do so in connection with Medellin's direct appeal of his conviction and sentence. Medellin did not raise the issue until he filed an application for a writ of habeas corpus with the trial court nearly *four years* after his conviction.

The Texas Court of Criminal Appeals affirmed Medellin's conviction and sentence in March 1997. Pet. App. 1a-31a. He did not seek review of that decision in this Court. In January 2001, the trial court recommended that Medellin's habeas corpus petition be denied. *Id.* 34a-58a. The trial court rejected claims that Medellin had not received effective assistance of counsel at trial and on direct appeal. *Id.* It further found that Medellin had waived his right to object to his conviction based on any violations of the Vienna Convention because he did not raise that objection either during or before trial. *Id.* 46a-48a. It further found that reversal of the conviction or sentence based on any Vienna Convention violation was unwarranted in the absence of any showing that Medellin had been prejudiced by the violation. *Id.* 48a. Based on the trial court's findings and conclusions, the Texas Court of Criminal Appeals denied Medellin's habeas corpus petition in October 2001. *Id.* 33a-34a.

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[3] Had he done so, the trial judge would, of course, have been in a position to take any corrective action he deemed necessary to ensure a fair trial. For example, if he determined that police failed to inform Medellin of his consular rights despite knowledge of his Mexican citizenship, he could have considered a request to exclude Medellin's written statement to police or to delay the trial until Mexico had been given an opportunity to provide whatever legal assistance it might have chosen to give the defense.

Medellin thereafter filed a habeas corpus petition in federal district court in Houston. The district court denied that petition in June 2003. *Id.* 59a-118a. The court denied Medellin's ineffective assistance of trial counsel claim on the merits. *Id.* The court rejected Medellin's Vienna Convention claim, both on the merits and because consideration of the claim was barred by Texas's contemporary objection rule. *Id.* 79a-85a. Citing this Court's decision in *Breard v. Greene,* 523 U.S. 371 (1998), the district court held, "Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule." *Id.* 82a.

While Medellin's appeal to the Fifth Circuit was pending, the International Court of Justice (ICJ) issued its decision in *Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. No. 128 (Mar. 31, 2004). Pet. App. 174a. *Avena* was a proceeding initiated by Mexico against the United States, in which Mexico complained that American police routinely fail to advise Mexican nationals arrested in the United States of their right to communicate with Mexican consular officials. Although neither Medellin nor Texas was a party to that proceeding, the complaint alleged that Medellin and 51 other individuals sentenced to death by American courts had not been afforded their rights under the Vienna Convention.

The *Avena* decision contains no indication that the ICJ had before it any specific information regarding Medellin's case. The decision indicates that Mexico submitted to the ICJ declarations from "a number" of the 52 Mexican nationals, attesting that they had never been informed of their Vienna Convention rights, but it does not indicate whether Medellin was one of those who provided an affidavit. *Avena*, ¶ 76. The decision further indicates that Medellin's was not one of the cases in which the United States submitted evidence contesting

Mexico's allegation that the defendants were not provided timely notification of their Vienna Convention rights. *Id.* ¶¶ 74-90. Based on that evidence, the ICJ concluded that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Id.* ¶ 90. The ICJ ruled that an appropriate remedy for those violations consisted of an obligation of the United States to "permit review and reconsideration of these nationals' cases by the United States courts" to determine whether any of the violations "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* ¶ 121. The ICJ further ruled that this "review and reconsideration" obligation should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in state court. *Id.* ¶¶ 111-113, 133-143.

The parties brought the *Avena* decision to the attention of the Fifth Circuit. The Fifth Circuit nonetheless denied Medellin's request for a certificate of appealability (COA) from the district court's habeas corpus petition. Pet. App. 119a-135a. The appeals court denied Medellin a COA on his ineffective assistance of counsel claim, holding that "no reasonable jurist" could uphold Medellin's claim. *Id.* 123a-31a. The court also denied a COA on Medellin's Vienna Convention claim, holding both that the claim was procedurally defaulted and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 131a-133a. The court recognized that *Avena*'s ruling on procedural defaults contradicted *Breard*, but held that *Breard* "directly control[led]" and that it was bound to follow *Breard*. *Id.* at 132a.

SUMMARY OF ARGUMENT

In determining that Texas's contemporaneous objection rule barred federal court consideration of Medellin's Vienna Convention claim, the Fifth Circuit was simply adhering to a long-recognized provision of federal law. The Texas courts, like the courts of numerous other states, have insisted that criminal defendants who contend that their trial is being conducted unfairly to raise their objections with the trial court in order to permit the presiding judge to correct any unfairness. Because Medellin did not object at trial to Texas's failure to inform him of his Vienna Convention right to communicate with Mexican consular officials, the Texas courts invoked their contemporaneous objection rule to hold that Medellin had waived his right to raise that objection on habeas review. Pet. App. 46a-49a. This Court has long held that application of a state contemporaneous objection rule provides an adequate foundation of state substantive law for maintaining custody over an individual, and thus bars granting federal habeas relief to that individual. *See, e.g., Coleman v. Thompson,* 501 U.S. 722, 730 (1991). Medellin does not contest that he failed to raise any Vienna Convention issues at trial, and he has not sought review of the lower courts' determination that his trial counsel provided effective legal assistance. Nor has he sought to invoke the "cause" and "prejudice" exception to that procedural default bar. Under those circumstances, the Fifth Circuit's denial of a COA on the Vienna Convention claim was an unexceptional application of federal law.

Medellin's claim that the normal procedural default rule is inapplicable to this case is based entirely on the ICJ's *Avena* decision. Medellin notes that the Vienna Convention is a part of federal law by virtue of its ratification by the U.S. Senate in 1969. He notes further that the United States is a party to the Optional Protocol to the Vienna Convention on Consular

Relations Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, 596 U.N.T.S. 487 ("Optional Protocol"), which commits signatories to submit disputes arising under the Vienna Convention to binding adjudication by the ICJ. Medellin contends that *Avena*'s interpretation of the Vienna Convention is, by virtue of the Senate's ratification of the Optional Protocol, just as much a part of federal law as is the Vienna Convention itself. Medellin contends that *Avena*'s status as "federal law" requires this Court to give effect to that decision and thus to order the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule.

The principal flaw in Medellin's rationale is his contention that the Vienna Convention, as interpreted by the ICJ, merits an exalted position in the federal-law hierarchy and thereby trumps all other sources of federal law. Even accepting for the sake of argument that the ICJ's rather far-fetched interpretation of the Vienna Convention should be deemed to embody the intent of the U.S. Senate in ratifying that treaty, there is no basis for asserting that that interpretation supersedes the numerous conflicting federal laws that also can claim to embody the will of Congress. It is emphatically the role of this Court, not the ICJ, to resolve that conflict by determining what federal law requires. In light of federal laws that endorse continued application of this Court's procedural default case law and that were enacted *after* the 1969 ratification of the Vienna Convention, Congress cannot be understood to have intended the result espoused by Medellin.

Medellin contends that *Avena* "provides the rule of decision" for this case and thus is binding on the federal courts. Pet. Br. 39. If by that argument Medellin is contending that either the doctrine of claim preclusion or of issue preclusion is applicable to this case, that is just plain

silly. Texas was not a party to *Avena* and thus cannot be bound by the ICJ's decision. The most that can be claimed is that the federal courts should accept the ICJ's ruling as the definitive statement of the requirements of the Vienna Convention, but as noted above those requirements cannot be deemed to grant the federal courts authority to second-guess a State's detention of an individual when subsequently enacted federal laws make clear that federal courts are denied such authority.

Indeed, the Fifth Circuit's denial of a COA is unassailable under the explicit terms of the statute governing issuance of COAs, 28 U.S.C. § 2253(c)(2). That statute provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Medellin has not made such a showing; at most he has demonstrated that he was denied rights under a federal treaty.

Medellin argues alternatively that the Court should give effect to *Avena* "in the interest of judicial comity and uniform treaty application." Pet. Br. 45. That argument is without merit. Indeed, the interests of judicial "comity" point in exactly the opposite direction: the federal courts' acceptance of the independent-and-adequate-state-ground doctrine as a basis for denying federal habeas corpus relief to a large extent is grounded in concerns of comity to state courts. Unless federal courts accept that doctrine, state criminal defendants would have little incentive to abide by well-justified state procedural rules such as the contemporaneous objection rule. More importantly, the federal courts have no license to ignore otherwise controlling federal law in the interests of pleasing foreign courts and governments. Nor does a desire to promote "uniform treaty application" have any relevance to this case. Medellin has not suggested that the judicial system of any other nation even remotely resembles the American system.

Thus, there is no reason to suppose that the ICJ's efforts to dictate how the Vienna Convention is to be applied in federal courts could ever be replicated in the courts of any other nation.

ARGUMENT

I. FEDERAL LAW DICTATES THAT FEDERAL HABEAS RELIEF BE DENIED WHEN, AS HERE, THE PETITIONER'S DETENTION IS JUSTIFIED BY AN INDEPENDENT AND ADEQUATE STATE GROUND

The procedural history of this case is uncontested: Medellin was represented at trial by competent counsel who chose not to raise a claim under the Vienna Convention. It was not until *nearly four years* after his conviction that Medellin first raised such a claim, in connection with his 1998 state habeas petition. Invoking the State's contemporary objection rule, the Texas Court of Criminal Appeals held that Medellin had waived that claim by failing to raise the claim at trial. Under those circumstances, it was totally unexceptionable for the lower federal courts to conclude that the Vienna Convention claim was procedurally defaulted.

For at least 28 years, since its decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court has strictly adhered to the rule that federal habeas claims are barred when a state court previously has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In such cases, the state judgment is deemed to rest on "independent and adequate state procedural grounds" and thus is largely immune from second-guessing in the federal courts. *Coleman*, 501 U.S. at 730. A firmly established and regularly followed state procedural

requirement is deemed an "inadequate" state ground only when the State has no legitimate interest in the rule's enforcement, *Osborne v. Ohio*, 495 U.S. 103, 124 (1990), or when the rule is being applied in an "exorbitant" fashion to a defendant who "substantially complied" with the rule. *Lee v. Kemna*, 534 U.S. 362, 376, 382 (2002).

Neither of those exceptions has any application to this case. Indeed, the Court has on numerous occasions held that States have a "legitimate" interest in enforcing the procedural rule invoked by Texas in this case -- the contemporaneous objection rule. Thus, in *Osborne*, the Court observed that a contemporaneous objection rule "serves the State's important interest in ensuring that counsel do their part in preventing trial courts" from committing reversible error. *Osborne*, 495 U.S. at 123.

A contemporaneous objection by trial counsel plainly could have served that purpose in this case. Had Medellin raise his Vienna Convention claim at the start of trial, the trial judge could have addressed any possible sources of prejudice to Medellin caused by the failure of Houston police to inform him of his right to communicate with Mexican consular officials. For example, if counsel had argued that Medellin would not have provided a written statement to police but for their failure to inform him of his consular rights, the trial judge could have considered a request to exclude that statement from the trial.[4] Medellin suggests that if had been prompted to

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[4] *Amici* do not mean to suggest that such exclusion would have been appropriate. To the contrary, we deem it highly implausible that Medellin, having voluntarily waived his right to remain silent despite being given a *Miranda* warning, would have chosen not to waive that right if also informed of his consular rights. In any event, given the (continued...)

exercise his right to contact Mexican consular officials, those officials might have assisted the defense "by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and, most importantly, ensuring that [Medellin was] represented by competent and experienced trial counsel." Pet. Br. 5-6. But if counsel had raised the issue prior to trial, the trial judge might well have been receptive to a Vienna Convention-based adjournment of the trial date, to give Mexican officials adequate time to provide whatever services they might have been willing to provide. Because trial counsel chose not to raise a Vienna Convention claim at trial, Medellin has only himself to blame for the fact that the trial judge did not consider providing relief from any prejudice that may have arisen due to the failure of police to inform him of his consular rights immediately after his arrest.

Nor can application of the contemporaneous objection rule to Medellin be viewed as an "exorbitant" application to someone who has "substantially complied" with the rule. Medellin did not raise anything that even remotely resembled a contemporaneous objection to the failure to inform him of his Vienna Convention rights. Despite being represented by competent counsel, he waited nearly four years after his conviction to raise the issue for the first time. Moreover, as the Texas courts found, Medellin introduced nothing into the trial record that would have alerted prosecutors to his Mexican citizenship. Pet. App. 47a. The ICJ deemed it of no moment that Mexican nationals such as Medellin had not raised Vienna Convention issues in a timely manner, because in its view any

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[4](…continued)
overwhelming evidence of Medellin's guilt, there is little likelihood that the exclusion of Medellin's written statement would have affected the jury's verdict.

tardiness on the part of defendants and their counsel could be excused in light of the police's failure in the first instance to alert Mexican nationals to their consular rights. *Avena,* ¶ 113. But that rationale is inconsistent with the approach this Court has adopted in procedural default cases based on failure to comply with contemporaneous objection rules. *Wainwright* rejected under analogous circumstances a similar excuse for failing to make a contemporaneous objection. The federal habeas petitioner in *Wainwright* claimed that inculpatory statements he made to police should be suppressed because he was given an inadequate *Miranda* warning. In finding that claim procedurally defaulted, the Court rejected arguments that a failure to inform a defendant of his *Miranda* rights could excuse his counsel from making a timely objection to use of custodial statements obtained in violation of those rights. *Wainwright,* 433 U.S. at 87-91.

Application of the contemporaneous objection rule in this case will, of course, leave Medellin without an opportunity to argue in federal court that he was prejudiced by the failure of police to inform him of his Vienna Convention right to communicate with Mexican consular officials. But as this Court recognized in *Breard*, "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Breard v. Greene,* 523 U.S. at 376. Medellin has provided no rationale explaining why procedural default rules should apply to a criminal defendant's constitutional claims but not to claims involving an alleged treaty violation.

The Court recognizes that a procedural default does not bar assertion of the defaulted claim in a federal habeas proceeding if "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation

of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. But Medellin has never asserted that he can meet the "cause" and "prejudice" standard. In the absence of such evidence, well-established federal law dictates that his Vienna Convention claim be deemed procedurally defaulted.

II. EVEN IF THE COURT ACCEPTS *AVENA* AS BINDING FEDERAL LAW, CONGRESS CANNOT BE DEEMED TO HAVE INTENDED TO PERMIT THE WHOLESALE RE-EXAMINATION OF STATE COURT JUDGMENTS ADVOCATED BY MEDELLIN

Medellin's claim that the normal procedural default rules are inapplicable to this case rests entirely on the ICJ's *Avena* decision. As noted above, the decision arose in connection with a complaint filed by Mexico against the United States, involving 52 Mexican nationals who had been convicted of murder in State courts and were facing death sentences. Although the ICJ had before it only minimal evidence regarding those 52 individuals, it determined that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Avena*, ¶ 90. As a remedy it ordered the federal courts in the United States to review each of the cases to determine whether the Mexican nationals had suffered "actual prejudice" as a result of the violation of their Vienna Convention rights. *Id.* ¶ 121. The ICJ further ruled that this review should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in State court. *Id.* ¶ 111-113, 133-143.

The ICJ's interpretation of its mandate was remarkably broad, far broader than readings of the Vienna Convention and the Optional Protocol previously rendered by federal courts and Executive Branch officials. Among the ICJ's holdings: the Vienna Convention provides individually enforceable rights;[5] the Vienna Convention and the Optional Protocol grant the ICJ *unlimited* jurisdiction to grant *whatever* relief the ICJ deems appropriate to effectuate the purposes of the Vienna Convention;[6] and although Article 36(2) of the Vienna Convention provides that the consular rights set forth in Article 36(1) are to "be exercised in conformity with the laws and regulations of the receiving State," that language does not impose any substantive limitations on the ICJ's power to direct the operations of the receiving State's courts because Article 36(2)'s proviso effectively grants the ICJ unbridled authority to order whatever relief it deems necessary to carry out the purposes of the Vienna Convention.[7]

Medellin notes that the Vienna Convention is a part of federal law by virtue of its ratification by the U.S. Senate in 1969. He further notes that the United States is a party to the Optional Protocol, which commits signatories to submit disputes arising under the Vienna Convention to binding adjudication by the ICJ. Medellin contends that *Avena*'s

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[5] Many courts have held that Article 36 of the Vienna Convention does not create any judicially enforceable rights. *See, e.g., United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir. 2001).

[6] *Avena,* ¶¶ 27-35.

[7] Article 36(2) provides, "The rights referred to in [Article 36(1)] 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."

interpretation of the Vienna Convention is, by virtue of the Senate's ratification of the Optional Protocol, just as much a part of federal law as is the Vienna Convention itself. Medellin contends that *Avena*'s status as "federal law" requires this Court to give effect to that decision and thus to order the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule.

As a initial matter, Medellin has vastly overstated the powers that the United States Senate entrusted to the ICJ when it ratified the Optional Protocol. Medellin would have the Court believe that the Senate granted the ICJ the jurisdiction and authority to adopt *any* rule that the ICJ, in its sole discretion, deems necessary to effectuate the terms of the Vienna Convention. Carried to its logical extremes, that authority would include the power to demand such "remedies" as: an order requiring that all criminal charges be dropped against any alien in the United States whose Article 36 consular rights are deemed violated; an order requiring that any such alien not be subject to deportation after all criminal charges are dropped; or an order requiring the criminal prosecution and incarceration of police officers who fail to comply with the Vienna Convention in their treatment of detained foreigners. The intent of the Senate is the ultimate touchstone in discerning the meaning of the Optional Protocol. Because the Senate cannot possibly have intended to grant the ICJ jurisdiction and authority to grant relief of the sort outlined above, the Vienna Convention and Optional Protocol must be deemed to include *some* limits on the ICJ's authority to determine its own authority. *Amici* respectfully submit that the ICJ may well have exceeded those limits when it interpreted the Article 36(2) proviso as authorizing it to adopt *whatever* remedies it deems necessary to give "full effect" to the purposes of Vienna Convention -- an interpretation that

essentially writes the "shall be exercised in conformity with the laws and regulations of the receiving State" language out of Article 36(2).[8]

But the Court need not reach that issue in order to affirm the judgment below. Even accepting Medellin's contention that the *Avena* decision constitutes federal law, it does not follow that this Court must give effect to that decision by ordering the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule. The principal flaw in Medellin's rationale is his contention that the Vienna Convention, as interpreted by the ICJ, merits an exalted

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[8] In his dissent from the denial of a writ of certiorari in *Torres v. Mullin,* 540 U.S. 1035 (2003), Justice Breyer identified the crucial question to be answered in future Vienna Convention cases as the extent to which "the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention." *Torres,* 540 U.S. at 1041. Justice Breyer intimated that that grant of authority might indeed be quite broad:

> The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world" may well be yes, where the world has conferred such binding authority through treaty. *See Buchanan v. Rucker,* 9 East 192, 103 Eng. Rep. 546 (K.B. 1808). It is this kind of authority that Torres and Mexico argue the United States has granted to the ICJ when it comes to interpreting the rights and obligations set forth in the Vienna Convention.

Id. *Amici* would add to Justice Breyer's observation that any interpretation of a treaty that conferred on the Island of Tobago authority to "pass a law to bind the rights of the whole world" is unlikely to be an accurate interpretation, in light of the implausibility that all the nations of the world would delegate such unlimited authority to a small island nation.

position in the federal-law hierarchy and thereby trumps all other sources of federal law. Even accepting for the sake of argument that the ICJ's rather far-fetched interpretation of the Vienna Convention should be deemed to embody the intent of the U.S. Senate in ratifying that treaty, there is no basis for asserting that that interpretation supersedes the numerous conflicting federal laws that also can claim to embody the will of Congress.

Indeed, this Court identified one conflicting federal law in *Breard*. The Court noted that the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the habeas corpus statute in 1996 to provide 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.'" *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. §§ 2254(a), (e)(2)). The Court concluded that that provision prevents an individual being held under state law from raising Vienna Convention claims in a federal habeas proceeding if the claims have been procedurally defaulted in state court:

> Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule [*i.e.,* enactment following ratification of the Vienna Convention in 1969], just as any claim arising under the United States Constitution would be. This rule prevents Breard [who had procedurally defaulted on his Vienna Convention claim by failing to raise it in state court] from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and

> what factors he considered in electing to reject the plea bargain that the State offered him.

Id.

Another relevant statute adopted by Congress in 1996 as part of the AEDPA is 28 U.S.C. § 2253(c), which established the requirement that no appeal may be taken from a district court order denying a habeas corpus petition unless the petitioner obtains a certificate of appealability (COA) from either the district court or the court of appeals. Section 2253(c)(2) provides that a judge may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." As this Court has explained, § 2253(c) establishes a "jurisdictional prerequisite" to an appeal to the court of appeals; "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003).

The Fifth Circuit denied Medellin a COA on his Vienna Convention claim, and Medellin has sought review of that denial. By the plain terms of § 2253(c), the Fifth Circuit properly denied the COA. That statute does not permit COAs to issue where the applicant alleges (as does Medellin) that he has been denied rights under a federal *treaty*; rather COAs may only be issued to an applicant who makes a substantial showing that he has been denied a "constitutional right." In sum, even if Medellin is correct that *Avena* constitutes federal law, that law (adopted in 1969 when the Senate ratified the Vienna Convention and the Optional Protocol) must give way to subsequently adopted federal statutes that express Congress's more recent views on the proper scope of federal habeas corpus review of state court criminal proceedings.

Medellin also argues that *Avena* "provides the rule of decision" for this case and thus is binding on the federal courts. Pet. Br. 39. If by that argument Medellin is contending that either the doctrine of claim preclusion or of issue preclusion is applicable to this case, that is just plain silly. Texas was not a party to *Avena* and thus cannot be bound by the ICJ's decision. Nor could Medellin be serious in contending that this Court is in some sense subordinate to the ICJ, or that it is bound by the ICJ judgment because the United States government lost before the ICJ and the Court is a part of the United States government. "It is emphatically the province and duty" of the federal courts to say what the law is, *Marbury v. Madison,* 1 Cranch (5 U.S.) 137 (1803), not to slavishly adopt the decisions of some foreign tribunal. Medellin properly may attempt to persuade the Court that it should choose to adopt *Avena* as a part of the federal law, but there can be no legitimate argument that the final choice belongs to any body other than this Court. As Justice Breyer made clear in the context of Vienna Convention claims, "it is undoubtedly correct as a general matter" that "the ICJ does not exercise any judicial power of the United States." *Torres,* 540 U.S. at 1041 (Breyer, J., dissenting from denial of certiorari).

III. THE INTERESTS OF JUDICIAL COMITY AND UNIFORM TREATY INTERPRETATION CANNOT JUSTIFY ORDERING THE LOWER COURTS TO CONSIDER MEDELLIN'S VIENNA CONVENTION CLAIMS

Medellin argues alternatively that, even if *Avena* does not *require* his Vienna Convention claims to be heard on the merits (and, accordingly, would be procedurally barred under normally applicable habeas corpus rules), the Court should order the lower federal courts to "give effect" to *Avena* "in the

interest of comity and uniform treaty interpretation." Pet. Br. 45. That argument is without merit.

Medellin suggests that the Court should adopt *Avena* because "respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes." *Id.* But of necessity, extending comity to the decisions of the ICJ means overturning the decisions of state courts. *Amici* respectfully suggest that when it comes to choosing between extending comity to international courts and extending comity to state courts within the American judicial system, the later should prevail every time. Indeed, the independent-and-adequate-state-ground doctrine has developed as a permanent fixture of federal law largely because of comity concerns. *Coleman*, 501 U.S. at 730. The Court explained:

> Without the [independent-and-adequate-state-ground doctrine], a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31.

Sound practical consideration undergird adoption of the independent-and-adequate-state-ground doctrine, and those considerations would be undermined if the Court were to abandon that doctrine solely because it wanted to signal its respect for a foreign tribunal. For example, respecting state contemporaneous objection rules:

- enables a record to be made with respect to the defendant's claims "when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Wainwright*, 433 U.S. at 88.

- promotes efficient use of judicial resources by, among other things, keeping potentially objectionable evidence out of the trial -- thereby either increasing the chances of acquittal (and thus bringing about a quick end of the case) or decreasing the number of remaining issues to be decided on appeal, in the event of a conviction. *Id.* at 88-89.

- discourages "sandbagging" by defense counsel, who might otherwise be tempted to hold back on one of their legal issues, thereby taking their chances on an acquittal while simultaneously holding their constitutional claim in reserve in case their initial gamble does not pay off. *Id.* at 89.

- promotes the perception of the trial in a criminal case in state court as a "decisive and portentous event." *Id.* at 90.

Medellin portrays the relief he seeks as a "minimal intrusion on Texas's criminal processes." Pet. Br. 47. That portrayal is wildly inaccurate. Granting Medellin the relief he seeks is likely to delay completion of the appellate process for at least two more years. Randy and Sandra Ertman have now had to endure more than a decade of post-conviction appeals; it would be a major hardship for them to be forced to endure significant additional delays in bringing to a close the case against the man who raped and murdered their daughter. And for what purpose? *Amici* cannot imagine how Medellin could ever demonstrate that the failure of police to inform him of his

consular rights caused him such prejudice that he would be entitled to have his conviction and/or sentence overturned. He was represented at all times in these proceedings by competent counsel; he thought so little of the Vienna Convention issue that he did not even bother to inform the trial court that he was not a U.S. citizen; and the evidence of guilt was so overwhelming that any other verdict is difficult to imagine regardless how many additional resources the Mexican government might have brought to Medellin's case.

Moreover, Medellin is proposing that the Court adopt a new rule of law that entails borrowing foreign law to decide cases differently from the manner in which they would be decided under traditional habeas corpus procedural rules. This Court has cautioned that federal courts -- which are not empowered to create new doctrines of general federal common law -- should be extremely reluctant to look to international law norms rather than legislative guidance in deriving rules of decision in cases touching on foreign relations. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004).

Finally, granting Medellin's petition will do nothing to promote "uniform treaty interpretation." Medellin has not suggested that the judicial system of any other nation even remotely resembles the American system. Thus, there is no reason to suppose that the ICJ's efforts to dictate how the Vienna Convention is to be applied in federal courts could ever be replicated in the courts of any other nation. For example, much of *Avena* turned on the existence of parallel federal and state court systems in this country and the ability of criminal defendants to bring their appeals into federal court after they have exhausted all state-court avenues of appeal. *Avena* held that even though criminal defendants are entitled to raise their federal claims -- including Vienna Convention claims -- in state court, they must also be permitted to raise those claims in

federal court, even when they have no good cause for having failed to raise the claims in state court. We do to see how that opinion can be applied in a "uniform" manner to a country that dictates, for example, that a criminal defendant convicted of a crime is entitled to one and only one appeal.

CONCLUSION

Amici curiae WLF, Randy and Sandra Ertman, the Allied Educational Foundation, and U.S. Representatives Steve Chabot and Walter B. Jones respectfully request that the Court affirm the decision below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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