No. 04-5928

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED AUGUST 18, 2004
CERTIORARI GRANTED DECEMBER 10, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

International and Foreign Cases

Constitutional Provisions

Treaties and Federal Statutes

Other Authorities

ARGUMENT

Petitioner came to this Court seeking enforcement of the *Avena* Judgment as the rule of decision in his case. Exercising his foreign affairs authority, the President of the United States has now determined that the *Avena* Judgment should be given effect in state courts. *See* U.S. Br. App. 2. Specifically, the President has determined that "expeditious compliance" with the Judgment is in the "paramount interest" of the United States. U.S. Br. 41-42.

The President's determination provides Petitioner an independent right to enforce the *Avena* Judgment. *See* U.S. Br. Part IV. At the same time, by removing any conceivable doubt about the appropriateness of judicial enforcement of the *Avena* Judgment, the President's determination confirms Petitioner's right to relief, as a matter of the direct effect of the *Avena* Judgment under the Supremacy Clause, and hence also confirms the error of the judgment this Court has under review. After the President's determination, it should be the task of this Court, and any other court addressing a claim by one of the Mexican nationals subject to the *Avena* Judgment, to ensure that they receive the review and reconsideration to which the International Court of Justice ruled, and the President has now confirmed, they are entitled. *See* Part I below.

On the questions on which this Court granted the Petition, Respondent contests remarkably little of Petitioner's case. *First*, Petitioner argued that the Vienna Convention on Consular Relations, as interpreted and applied by the ICJ in the *Avena* Judgment, is a binding international legal obligation of the United States and requires the United States to provide review and reconsideration of his conviction without regard to procedural default rules. Respondent agrees, as does the United States. *See* Part II.A.1 below.

Second, Petitioner argued that the Vienna Convention is self-executing in the sense that it is effective without

implementing legislation. Respondent agrees, as does the United States. *See* Part II.A.2 below.

Third, Petitioner argued that the Vienna Convention, as interpreted and applied in the *Avena* Judgment, provides individual rights. Respondent argues for a different interpretation of the Convention. He does not contest, however, that the ICJ, in a judgment binding on the United States, interpreted the Convention to provide individual rights, an interpretation that is well grounded in its text. *See* Part II.A.3 below.

Fourth, Petitioner argued that the federal habeas corpus statute, specifically 28 U.S.C. §§ 2241(c)(3) and 2254(a), provides an express private cause of action to individuals held in custody in violation of a treaty. Respondent ignores this point, and instead argues the irrelevant point that the treaty itself does not create a private cause of action. Like most treaties, however, the Vienna Convention allows each country to comply by the means specified by its own laws, subject, in the case of the Vienna Convention, to the proviso in Article 36(2) that those procedures be adequate to give full effect to the rights created by the Convention. In the United States, treaty rights are enforceable in habeas corpus. *See* Part II.A.4 below.

The various other arguments that Respondent raises as to why the Court should disregard the treaty obligations of the United States are without merit, *see* Part II.B below, as are the assorted procedural arguments that Respondent belatedly inserts in an attempt to prevent this Court from reaching the merits of the questions presented, *see* Part III below.

In deference to the President's authority, Petitioner has asked that this Court stay its proceedings while Petitioner pursues enforcement in the Texas courts of his rights under the *Avena* Judgment and the President's determination. Should the Court go forward with the case at this time, however, it should answer the questions presented in Petitioner's favor.

I.

THE PRESIDENT'S DETERMINATION COMPELS JUDICIAL ENFORCEMENT OF THE *AVENA* JUDGMENT.

On February 28, 2005, the President confirmed that the United States has an international obligation to comply with the *Avena* Judgment and determined that, as a means of compliance, state courts should provide the review and reconsideration mandated by the *Avena* judgment. U.S. Br. Part IV & App. 2. The President's action removes any possible objection that judicial review and reconsideration of Mr. Medellín's conviction and sentence would trench on the Executive's conduct of foreign affairs or that extending comity to the *Avena* Judgment would offend the public policy of the United States.

As the United States explains, the President "has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ's decision to be enforced.…" U.S. Br. at 48. He therefore exercised his well-established foreign affairs power to implement the binding legal commitments that the United States, acting through the President and Senate, had already undertaken in the Vienna Convention, Optional Protocol, United Nations Charter, and ICJ Statute. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In the face of the President's determination, any suggestion that United States federal or state courts could not or would not enforce the *Avena* Judgment would be inconceivable. *See* U.S. Br. Part IV.

Texas has failed to give Mr. Medellín the review and reconsideration required by the *Avena* Judgment and the President's determination. Mr. Medellín is therefore entitled to a writ of habeas corpus directing Texas to provide him with review and reconsideration in accordance with the *Avena* Judgment.

II.
THE *AVENA* JUDGMENT PROVIDES THE RULE OF DECISION IN MR. MEDELLÍN'S CASE.

A. Mr. Medellín Has Rights Under the Vienna Convention and *Avena* Judgment That Are Enforceable and Applicable in This Case.

1. The Vienna Convention and the *Avena* Judgment Are Binding Obligations of the United States.

There is no dispute that, by ratifying the Vienna Convention on Consular Relations, the United States committed itself to inform arrested or otherwise detained nationals of its treaty partners of their right to seek assistance from their consulates and to follow procedures adequate to give full effect to the purposes for which those rights were created. Vienna Convention, arts. 36(1), 36(2). There is no dispute that the United States, by ratifying the Optional Protocol, committed itself to submit disputes arising out of the interpretation and application of the Vienna Convention to the ICJ for resolution when called upon to do so by another party to the Optional Protocol. And, there is no dispute that the Vienna Convention, its Optional Protocol, the U.N. Charter, and the ICJ Statute constitute treaties binding upon the United States and hence the supreme law of the land under Article VI of the Constitution.

Finally, it is not disputed that, as a result, the *Avena* Judgment represents an international legal obligation binding upon the United States. Hence, the dispute on the questions presented is a narrow one: Respondent disputes only *this Court's* authority to give effect to that legal obligation.

2. The Supremacy Clause Requires State and Federal Courts to Give Effect to Treaty Rights in Cases in Which Those Rights Are in Issue.

By the Supremacy Clause, the Framers determined that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. As a result, it has never

been doubted that when a treaty confers rights "of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 598-99 (1884); *see* Pet'r Br. 23-25.[1] Accordingly, this Court has consistently given effect to treaties conferring rights on foreign nationals, "their self-executing character assumed without discussion." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporter's note 5; *see* Pet'r Br. 26-29.[2]

Respondent's argument that the ICJ judgment is not a treaty and cannot be self-executing therefore misses the point. The Vienna Convention is undisputedly a treaty and is undisputedly self-executing. By the Optional Protocol, the United States agreed that the ICJ would resolve any disputes

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[1] *See generally* David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Martin Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land",* 99 COLUM. L. REV. 2095 (1999).

[2] Respondent suggests that this Court "has held that treaties provide judicially enforceable rights" only in "specific and narrow circumstances," but then acknowledges that the Court has regularly found such individual treaty rights to exist. Resp. Br. 27. The United States does not contest that treaties may create judicially enforceable rights on behalf of foreign nationals, but then unsuccessfully tries to distinguish two of this Court's cases demonstrating that point on the ground that they supposedly required implementing legislation. U.S. Br. 27-28; *see United States v. Rauscher*, 119 U.S. 407, 423, 430 (1886) (treaty was judicially enforceable; statute settled "any doubt" as to "construction," not enforceability); *Johnson v. Browne*, 205 U.S. 309, 317 (1907) ("'manifest scope and object of the treaty itself'" would have alone sufficed for *Rauscher*'s holding). And contrary to what Respondent's amici argue, *see* Resp. Int'l Law Profs. Br. 18, the history and text of the Supremacy Clause and this Court's precedent make clear that, while Congress has power to enact implementing legislation for treaties, such legislation is not ordinarily required. *See* Pet'r Br. 24-29 & nn. 19-22 (citing authorities). *See generally* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101-10 (1992).

with Mexico concerning the interpretation and application of the Convention. Once a party to a treaty undertakes a substantive obligation and, at the same time, undertakes to abide by the result of a specified dispute resolution process, the decision that results from that process determines the extent of the treaty obligation, no less than if the decision were written into the treaty itself. Pet'r Br. 33-37. The Vienna Convention, as interpreted and applied by the *Avena* Judgment, therefore provides the "rule of decision" in this case. *The Head Money Cases*, 112 U.S. at 598-99.

Respondent suggests that this Court and other courts in the United States are not capable of applying the Vienna Convention as federal law. Resp. Br. 41-42. He does not, however, identify any bar to the exercise of this Court's judicial authority.[3] The protection of individual rights within the United States criminal justice system is a core area of judicial competence and does not encroach on areas traditionally left to the Executive. *See* Pet'r Br. 31 n.25. This Court does not need the Executive's permission to apply the law in the cases before it, but in any event, the President has now determined that the interests of the United States require judicial enforcement of the *Avena* Judgment. *See* U.S. Br. Part IV & App. 2.

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[3] Respondent's sweeping suggestion that "the judiciary [is not] well suited to determine how the United States should act under a treaty," Resp. Br. 42, ignores the Supremacy Clause and the inclusion of treaties within Article III. *See* Pet'r Br. 24-25. The cases Respondent cites either do not support the proposition or establish the contrary. *See Chicago & Southern Airlines*, *Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (President's discretion to deny permit under Civil Aeronautics Act not judicially reviewable; no treaty rights involved); *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913) (Court has "plain duty" to enforce treaty unless abrogated by political branches); *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888) (by its terms, treaty did not bar legislation; in any event, Congress may repudiate treaty obligations by later-in-time statute).

3. Article 36 of the Vienna Convention Creates Individual Rights.

It is not disputed that in *Avena,* on an application brought by Mexico on its own and Mr. Medellín's behalf, the ICJ determined that Article 36(1) of the Vienna Convention confers individual rights, and that Respondent violated those rights in Mr. Medellín's case. It is also undisputed that the ICJ determined in that case that Article 36(2) of the Convention entitles Mr. Medellín to receive judicial review and reconsideration of his conviction and sentence in light of that violation and its potential resulting prejudice.

Since the *Avena* Judgment is binding on the United States as an interpretation and application of the Vienna Convention in Mr. Medellín's case, the question of individual rights under Article 36 cannot be relitigated now. *See* U.S. Br. 47 (President's determination precludes relitigation of questions decided in *Avena*). The arguments of Respondent and his amici concerning the proper interpretation of the treaty are therefore beside the point.

In any event, the ICJ correctly interpreted the treaty. In holding that the Convention conferred an individual right, the ICJ followed its decision in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27). There, the ICJ noted that Article 36(1)(b) of the Vienna Convention refers to the obligation to notify "the person concerned without delay of *his rights* under this subparagraph" (emphasis added) and that Article 36(1)(c) provides the national with the right to refuse consular assistance. *See LaGrand* ¶ 77. On that basis, the ICJ correctly concluded that the "ordinary meaning" of the language of Article 36 "admits of no doubt" as to its creation of individual rights. *Id.*[4]

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[4] The ICJ's determination that the Vienna Convention creates individual rights accords with the suggestion of this Court in *Breard v. Greene*, 523 U.S. 371, 376 (1998); the rulings of several United States courts, *e.g., United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *Standt v. City of New York*, 153 F. Supp. 2d 417, *(footnote continued)*

4. The Habeas Corpus Statute Creates an Express Private Right of Action for Individuals Who Are in Custody in Violation of a Treaty.

Respondent argues not only that the Vienna Convention creates no individual rights but that no "private right of action" can be found there. Respondent looks in the wrong place. Treaties can and do create individual rights, but the manner in which the United States legal system gives effect to those rights is ordinarily a matter of United States law.[5]

In this case, the habeas corpus statute supplies Mr. Medellín's cause of action. Congress has explicitly authorized any person "in custody in violation of the Constitution, laws or *treaties* of the United States" to seek relief from the violation by petition for habeas corpus. 28 U.S.C. § 2241(c)(3) (emphasis added); *id.* § 2254(a) (same); *see also id.* § 2242 (prisoner may bring habeas petition on his own behalf). The habeas statute thus gives Mr. Medellín an express private right of action to enforce his treaty rights. *See*

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427 (S.D.N.Y. 2001); *see Ledezma v. State*, 626 N.W.2d 134, 150-51 (Iowa 2001) (collecting additional cases); and all known decisions of foreign courts after *LaGrand*, including the two cases relied on by Respondent, BGH 5 StR 116/01 (Nov. 7, 2001) (Germany); *R. v. Partak*, [2001] 160 CCC (3d) 553, ¶¶ 25-26 (Ont. Super. Ct.) (Canada). None of the foreign cases cited by Respondent or his amici hold otherwise. Respondent also misinterprets paragraph 5 of the Preamble to the Vienna Convention, in which the terms "privileges," "immunities," and "functions" are obvious references to those articles of the Convention that grant privileges and immunities to consular personnel. Vienna Convention arts. 29, 32-33, 35, 40-41, 43, 49-50, 52. By contrast, Article 36 speaks of the "rights" of ordinary citizens of the sending state, not the privileges and immunities of its consular officers.

[5] *See, e.g.,* ANTONIO CASSESE, INTERNATIONAL LAW 168 (2001) ("[I]nternational law does not contain any regulation of implementation. It thus leaves each country *complete freedom* with regard to how it fulfils, nationally, its international obligations.") (emphasis in original); *see also* Part II.B below.

Pet'r Br. 28-29.[6] That statute, which Respondent does not mention in this context, fully addresses Respondent's concern. This Court has consistently enforced treaties that did not themselves create domestic judicial remedies, where the habeas corpus statute or other domestic law provided a right of action. *See* Pet'r Br. 26 n.19, 29 n.22; Vazquez, *supra* note 2, at 1143-50.

B. Texas's Arguments Seeking to Thwart Enforcement of Its Legal Obligations Are Without Merit.

Respondent also offers a series of arguments to suggest that even though the *Avena* Judgment interprets and applies a treaty that is self-executing in United States law, and even though the *Avena* Judgment is a binding legal obligation of the United States, this Court is powerless to stop Texas from continuing to violate that obligation. None of these arguments has merit.

First, Respondent argues that, because Article 94 of the United Nations Charter authorizes the Security Council to enforce ICJ judgments against noncompliant states, this Court is barred from enforcing the *Avena* Judgment on its own authority. Resp. Br. 34-35; *see* U.S. Br. at 34-35. That argument confuses the United Nations Charter with the United States Constitution.

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[6] Contrary to what the United States argues, U.S. Br. 29, this Court's willingness in *Wildenhus's Case*, 120 U.S. 1 (1887), to enforce on habeas corpus the Belgian consul's right to try a Belgian crewmember provides square support for the power of federal courts to enforce the provisions of a treaty by habeas corpus. State courts similarly hear petitions for post-conviction relief under their own laws. The requirement that state courts apply federal law in those proceedings is mandated by the Supremacy Clause, *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (P.A. 142a-163a) (enforcing *Avena* Judgment in case of national whose rights were adjudicated there), and does not violate any prohibition against federal commandeering of state officials, *Printz v. United States*, 521 U.S. 898, 928-29 (1997) (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

By Article 94(1) of the Charter, the United States has undertaken to comply with an ICJ judgment in cases in which it is a party. If the United States fails to comply, the other party to the case may bring the matter to the Security Council under Article 94(2).

The question before this Court, however, is whether and how, *by action within its own legal system*, the United States will comply with the international obligation reflected in the *Avena* Judgment, not what rights Mexico might have as a matter of international law if the United States does not comply. The U.N. Charter, the Optional Protocol, and Article 59 of the ICJ Statute say nothing about the former question. To the contrary, under international law, the means by which a State party complies with its treaty obligations is generally left to its domestic law,[7] subject in this case to the Vienna Convention's proviso that those means must be sufficient to give full effect to the rights of consular notification and access. *See* Vienna Convention art. 36(2). Consistent with that principle, the *Avena* Judgment expressly acknowledged that as long as the review and reconsideration provided by the United States met the criteria set forth in the Judgment, the United States could provide that review and reconsideration by "the means of its own choosing." P.A. 261a-262a, 273a, ¶¶ 138-39, 153(9) (*Avena* Judgment).

Hence, the question of the authority of this Court to enforce treaty compliance in the United States is a question of United States constitutional law, not international law. The Framers answered that question over 200 years ago, when

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[7] *See, e.g.,* CASSESE, *supra* note 5, at 168. Accordingly, foreign cases applying foreign constitutions are irrelevant to the question whether the *Avena* Judgment is judicially enforceable under the United States Constitution. In any event, Respondent fails to cite a single foreign case suggesting that a binding ICJ judgment adjudicating individual rights would not be enforceable in the domestic courts. *See* Resp. Br. 49 (citing German and Canadian cases that recognized that Vienna Convention created enforceable individual rights, but rejected the particular claims in those cases on their merits); *see also* note 4 above.

they provided in the Supremacy Clause that courts must give effect to rights created by treaty in all cases within their jurisdiction. Indeed, a principal reason that the Framers made treaties judicially enforceable was to avoid noncompliance that could give rise to international reprisals, such as an invocation by Mexico of Article 94(2) in the circumstances here. Pet'r Br. 23; *see* Vazquez, *supra* note 2, at 1124-25.

Second, Respondent argues that he is not bound by the *Avena* Judgment because Texas and Mr. Medellín were not parties to the case. As this Court has made clear, however, "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear." *United States v. Belmont*, 301 U.S. 324, 331 (1937). Texas and the United States are distinct entities domestically, but in the sphere of foreign relations, the United States acts as a single and indivisible nation, and the federal government speaks on behalf of the nation as a whole. *See* Pet'r Br. 19-20 & nn. 10, 12; *id.* at 22 & n.14. Because the United States appeared in *Avena*, so too did Texas, and it is bound by the result.

Likewise, in *Avena*, Mexico asserted not only its own rights, but also those of 54 specific nationals, including Mr. Medellín, in accordance with its right of diplomatic protection under international law.[8] *See* P.A. 188a, ¶ 12, cl. (1); 190a, ¶ 13, cl. (1); 194a, ¶ 14, cl. (1). The ICJ explicitly adjudicated Mr. Medellín's rights and issued a treaty-based

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[8] It is an "elementary principle of international law" that a State may assert the rights of its nationals in international judicial proceedings in the exercise of diplomatic protection. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) no. 2, at 12 (Aug. 30), *available at* http://www.icj-cij.org/icjwww/idecisions/icpij. *See generally Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) (available on Westlaw). The United States has frequently asserted its right of diplomatic protection on behalf of United States citizens. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713, Rep. Note 9; *See*, *e.g.*, *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 6, ¶ 8 (May 24).

remedy in his own case on the basis of the violation by Texas state officials of his individual rights under the Vienna Convention. Thus, the *Avena* Judgment binds both Respondent and Petitioner.[9]

Third, Respondent claims that this Court's per curiam decision in *Breard v. Greene*, 523 U.S. 371 (1998), should control this case. As Petitioner has explained, *Breard* arose on fundamentally distinguishable facts, *see* Pet'r Br. 42-44, but if *Breard* presented an obstacle to the relief Petitioner seeks, it should not be followed in light of the *Avena* Judgment, *see* Pet'r Br. 44-45. This Court has recognized that when new international law materials are brought to its attention that were not available to it previously, it is not bound by its earlier interpretation of a treaty. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (overruling earlier precedent after examining Spanish text of treaty). Particularly given the hurried circumstances in which *Breard* was issued, the absence of oral argument, and the fact that it was a denial of discretionary review, the considerations applicable to the overruling of fully considered precedent set forth in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), should not apply. *See* Pet'r Br. 44-45.[10]

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[9] *See, e.g.*, *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) no. 78, at 175, 178 (June 15) (arbitration award in proceeding between Greece and Belgian company was res judicata in action between Greece and Belgium in which Belgium exercised its right of diplomatic protection on behalf of Belgian company).

[10] If they did apply, the *Casey* factors would strongly support overruling *Breard*: (1) *Breard* puts the United States in violation of well-established international law, which renders it "intolerable" and "practical[ly] [un]workable"; (2) the law of the Vienna Convention as reflected in *LaGrand* and *Avena*, which is international rather than domestic law, "ha[s] so far developed" as to undermine the holding in *Breard*; (3) the ICJ's determination of the merits of Mr. Medellín's Vienna Convention claim robs *Breard*, in which there had been no such ruling, of "its significant application"; and (4) because it is unlawful for Texas to fail to inform noncitizen arrestees of their Vienna Convention rights, regardless of whether they have an individual remedy in habeas

(footnote continued)

Finally, Respondent argues that enforcing the Vienna Convention, as interpreted and applied by the ICJ in Mr. Medellín's case, would raise "serious constitutional questions" regarding the Article III requirement that the "judicial Power of the United States" be vested in the courts established under that article, and the Article II requirement that the President "shall appoint . . . Officers of the United States." Respondent's concerns are without merit.

The United States has never subscribed to the "parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). From the Nation's infancy to the present day, the federal political branches have repeatedly found it within the foreign-policy interests of the United States to agree to submit disputes to binding adjudication by international tribunals.[11] Such treaties raise no serious concern under Article III; to the contrary, this Court has made clear that the federal government may require specific categories of disputes to be adjudicated by international tribunals. *See Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (upholding international agreement establishing Iran-U.S. Claims Tribunal).[12]

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corpus for Texas's violations, Texas cannot justifiably have relied on *Breard* as a reason for continuing to violate the Vienna Convention. *Casey*, 505 U.S. at 854-55.

[11] *See, e.g.,* Treaty of Amity, Commerce and Navigation, art. 6, Nov. 19, 1794, U.S.-Gr. Br., 12 Bevans 13, T.S. No. 105; U.S. Dep't of State, *2004 Model BIT*, arts. 1, 24-34, *at* http://www.state.gov/documents/organization/38710.pdf; *see also* Mexico Amicus Br. 6.

[12] *See also, e.g., Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568 (1985) (upholding constitutionality of arbitration mandated by federal law and binding on EPA); *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (upholding authority of United States to submit customs valuation disputes to binding arbitration). *See generally Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 1995 OLC LEXIS 17, at *8-38 (U.S. Dep't of Justice, Ofc. of Legal Counsel, Sept. 7, 1995) (citing and discussing authorities).

In addition, this Court has long recognized and enforced foreign courts' judgments on the basis of comity without reexamining the merits of those decisions. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1895); *Ritchie v. McMullen*, 159 U.S. 235 (1895). The judgments of state courts, which are not Article III courts or appointed by the President, have been given full faith and credit by statute from the time of the First Judiciary Act. *See* 28 U.S.C. § 1738; *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374-75 (1996). This Court, moreover, has repeatedly upheld delegations of federal adjudicative authority not only to federal administrative agencies, *e.g., Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 455 (1977), but even to private individuals unaffiliated with the federal government, *see Schweiker v. McClure*, 456 U.S. 188, 198-99 (1983). It has also indicated that treaties delegating adjudicative authority to foreign governments in criminal and civil matters are valid. *See Wildenhus's Case*, 120 U.S. 1, 17 (1899); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794).[13] Respondent's Article III delegation argument is therefore without merit.

For all the same reasons, members of an international tribunal to which the United States has submitted a dispute are not "officers" of the United States, but "arbitrators between the two countries." Alexander Hamilton, THE DEFENCE No. 37 (1796) (rejecting a similar objection to an early treaty establishing an international commission), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974). As a matter of longstanding

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[13] There is nothing unusual about federal enforcement of foreign courts' jurisdiction over the rights of individuals who are within the United States. The United States has unquestioned power to make extradition treaties, which require individuals—United States citizens and aliens alike—to be delivered to a foreign country to face criminal prosecution under its laws or to serve a prison sentence previously imposed by its courts. *See, e.g., Neely v. Henkel*, 180 U.S. 109, 122-23 (1901); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569-70 (1840).

practice, members of international tribunals created by treaty have never been regarded as officers of the United States. *See Constitutional Limitations*, *supra* note 12, at *13-22; *Office—Compensation*, 22 Op. Att'y Gen. 184 (1898).[14]

In short, Respondent's suggestion that enforcing a non-Article III judgment would somehow be an impermissible delegation of judicial power or improper appointment of federal officers is directly contrary to over 200 years of well-settled precedent.

C. In Any Event, the Court Should Recognize the *Avena* Judgment on Grounds of Comity and Uniform Treaty Interpretation.

Even apart from its binding effect, the ICJ's interpretation and application of the Vienna Convention in the *Avena* Judgment should be enforced as a matter of comity. Pet'r Br. 45-48; *see* U.S. Br. Part IV & App. 2. The policy of showing respect to the judgments issued by foreign courts applies with even greater force to a judgment issued by an international court that the United States has had a major hand in establishing and before which the United States appeared and litigated in the proceedings from which the judgment resulted. Pet'r Br. 46-47. The President's determination removes any possible argument that extending comity to the *Avena* Judgment would violate the public

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[14] An "appointment" of a federal "officer" has not occurred unless four elements are present: "tenure, duration, emolument, and duties." *United States v. Germaine*, 99 U.S. 508, 511-12 (1879). None is present here: the members of the ICJ hold no position in the federal government, *see* ICJ Statute, art. 16(1); they are only occasionally called upon to decide cases involving the United States; they are not compensated by the United States, *see* ICJ Statute, art. 32; and they hold no duties assigned by United States domestic law. *See generally* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 341-44 (1998).

policy of the United States, which acts as a single nation in matters of foreign relations.

The policy of uniform treaty interpretation provides an additional reason to follow the *Avena* Judgment. Texas argues that this Court's own prior decision in *Breard* should prevail over the ICJ's decision.[15] Treaty interpretation, however, is a question of international law, not the law of any one country that is a party to the treaty. *See, e.g., Air France v. Saks*, 470 U.S. 392, 399 (1985); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71-72 (1821).[16] Rather than leave treaty interpretation up to national courts alone, the parties to the Optional Protocol agreed that the ICJ would have final authority to resolve disputes over the treaty's interpretation and application.

III.
RESPONDENT'S ATTEMPTS TO INSERT NEW ISSUES PROVIDE NO GROUNDS FOR THE COURT NOT TO REACH THE QUESTIONS PRESENTED.

A. Whether Mr. Medellín Has Made a Substantial Showing That His Right Is "Constitutional" Under 28 U.S.C. § 2253 Is Not Properly Before the Court.

The judgment on review before this Court is the denial of a certificate of appealability ("COA"). A COA 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). A "substantial showing" means that "reasonable jurists" would

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[15] Respondent's assertion that certain foreign decisions are inconsistent with the holdings of *Avena* that are relevant to the issues before this Court is mistaken. *See* note 4 above.

[16] The Constitution makes international law "part of our [federal] law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), just as it makes federal law "part of the laws of every State," *Blythe v. Hinckley*, 173 U.S. 501, 508 (1899). The interpretation of an international treaty in a United States court remains a question of international law, as the interpretation of a federal statute in state court remains a question of federal law.

find the issue at least "debatable." *Tennard v. Dretke*, 124 S. Ct. 2562, 2569 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

In the Court of Appeals and in his opposition to certiorari, Respondent argued only that Mr. Medellín had not made a substantial showing that he had been *denied* a right. He did not contest that the right Mr. Medellín was seeking to enforce was *constitutional*. He makes that argument for the first time in his brief on the merits.

It is this Court's usual practice not to reach issues that were not decided by the court below. *See, e.g., Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Nor will the Court consider a threshold issue that has not been called to its attention in a brief in opposition at the petition stage. Sup. Ct. R. 15.2; *see, e.g., Baldwin v. Reese*, 541 U.S. 27, 34 (2004). This Court should not reach out to decide this new issue without the benefit of a decision in the Court of Appeals or a full opportunity for the parties to develop the issue there or in this Court.

Any suggestion that Respondent's objection is jurisdictional, *see* U.S. Br. 13-14, is foreclosed by this Court's decision in *Slack*. Although Mr. Slack had not made a substantial showing of the denial of a constitutional right, the Court reached other issues in the case relevant to the issuance of a COA and then remanded to the Court of Appeals to allow him to make the necessary showing. *Slack*, 529 U.S. at 483-89. While the issuance of a COA may be a jurisdictional prerequisite for the Court of Appeals to hear an appeal on the merits, *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the decision under review here is not an appeal on the merits. Instead, as in *Slack*, it is a decision denying a COA in the first instance.

The Court plainly has jurisdiction to review that decision. *Hohn v. United States*, 524 U.S. 236 (1998). And in the face of multiple threshold issues, the Court need not reach them in any particular order even if they are "jurisdictional." *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005). If Respondent wishes

to raise additional grounds for denying a COA beyond the grounds decided in the Court of Appeals and raised at the petition stage in this Court, he can do so in the courts below on remand if those grounds have not been waived. *See Baldwin v. Reese*, 541 U.S. at 34; *Slack*, 529 U.S. at 489.

In any event, even if there were a jurisdictional bar to the Court's ability to grant a writ of certiorari to review the Fifth Circuit's denial of a COA on a highly important question of federal law, there is not even an implication, much less a clear statement, in the language of § 2253 that would bar this Court, in the absence of any other avenue of appellate review, from reaching that question by treating the papers before the Court as a petition for an original writ of habeas corpus under 28 U.S.C. § 2241, or a writ of mandamus or certiorari to the District Court under 28 U.S.C. § 1651(a). *See, e.g., Felker v. Turpin*, 518 U.S. 651, 658-62 (1996) (habeas corpus); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (mandamus to District Court); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-02 (1945) (common-law certiorari to District Court).[17] Review by extraordinary writ would be particularly appropriate in this case because "[t]he case involves the dignity and rights of a friendly sovereign state," *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943), and the lower court's actions "threaten the separation of powers," *Cheney v. United States Dist. Court*, 124 S. Ct. 2576, 2587 (2004), and implicate "a delicate area of federal-state relations," *Will v. United States*, 389 U.S. 90, 95 (1967) (citing *Maryland v. Soper*, 270 U.S. 9 (1926)).[18]

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[17] The characterization in the Petition of the writ sought is not controlling. *See, e.g., Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 n.4 (1988) (appeal treated as certiorari petition); *Pitts v. Wainwright*, 408 U.S. 941 (1972) (habeas corpus petition treated as certiorari petition).

[18] When Congress has meant to foreclose extraordinary writ review in addition to ordinary appellate review, it has said so explicitly. *See, e.g.,* 28 U.S.C. § 1447(d) (barring review of certain orders "on appeal or

(footnote continued)

B. Mr. Medellín Has Made a Substantial Showing of Denial of a "Constitutional" Right Within the Meaning of § 2253(c)(2).

Should the Court reach the issue, Mr. Medellín has made a substantial showing that his right to enforcement of the Vienna Convention is a *constitutional* right within the meaning of 28 U.S.C. § 2253(c)(2). Mr. Medellín's habeas corpus petition squarely presented a claim that Texas's failure to provide a forum for enforcing his Vienna Convention rights violated his due process rights under the Fourteenth Amendment. *See* Amended Petition for Writ of Habeas Corpus, June 18, 2002, at 2, 28-29.

The Vienna Convention is the law of the land. U.S. CONST. art. VI. As interpreted and applied in the *Avena* Judgment, Article 36(2) of the Convention confers on Mr. Medellín an individual right to review and reconsideration of his conviction and sentence in light of the Article 36(1) violation without regard to procedural default rules. Where the substantive law of the land creates an individual right enforceable in judicial proceedings, the Due Process Clause bars a state from denying a litigant "an opportunity to be heard upon [his] claimed [right]." *See Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process prevents states from denying litigants a forum in which to enforce rights) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Yet that is exactly what Texas has done here by closing its courts to the enforcement of treaty rights. *See* P.A. 56a, ¶ 15 ("[T]he applicant, as a private individual, lacks standing. . . . [T]reaties operate as contracts among nations; thus, [the] offended nation, not [an] individual, must seek redress for

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otherwise"); *see also Felker*, 518 U.S. at 660-61 (limitation on appeal and certiorari in 28 U.S.C. § 2244(b)(3)(E) did not restrict original habeas corpus; any other reading would raise substantial constitutional concerns); *cf. Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We read limitations on our jurisdiction to review narrowly."). Congress has not done so here. *See* 28 U.S.C. § 2253(c)(2).

violation of sovereign interests."). The Texas courts thereby deprived Mr. Medellín of his right to review and reconsideration, a right arising from the Vienna Convention but guaranteed by the Constitution.

In addition, Mr. Medellín's claim based on the Supremacy Clause is not a run-of-the-mill preemption case, because the Texas courts have refused to apply federal treaty rights at all. That kind of outright blindness to or defiance of settled constitutional law is precisely the circumstance in which federal habeas corpus review is most essential. Regardless of how an ordinary preemption claim should be treated, a refusal by the state even to apply federal law should be regarded as a violation of a constitutional right under the Supremacy Clause for purposes of 28 U.S.C. § 2253(c)(2).

In any event, the Court should reject the argument that Congress, by adopting the current version of 28 U.S.C. § 2253 in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), in any way intended to withdraw the jurisdiction of the Courts of Appeals to review denials of habeas petitions on treaty claims. Respondent relies heavily on *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997), but he does not advise this Court that at least five Courts of Appeals (including the Fourth Circuit) have issued COAs on treaty claims, or have heard appeals on treaty claims after a District Court's grant of a COA, without pausing at the supposed exclusion of that category of claims.[19] Other Courts of Appeals have denied COAs for lack of a substantial showing of violation of a right, without any suggestion that the fact that the claim arose

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[19] *See Villagomez v. Sternes*, 88 Fed. Appx. 100 (7th Cir. 2004) (reaching merits of Vienna Convention claim after grant of COA); *Mendez v. Roe*, 88 Fed. Appx. 165 (9th Cir. 2004) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415 (6th Cir. 2003) (same); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998) (same); *see also Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002) (same, under International Covenant on Civil and Political Rights ("ICCPR")).

under a treaty was an independent reason for denying a COA.[20] Accepted principles of statutory interpretation, the structure of the statute as a whole, and the avowed purposes of AEDPA all demonstrate that Congress did not intend § 2253(c)(2) to foreclose appellate review of meritorious habeas corpus cases involving states' failure to give effect to treaty rights.

As an initial matter, when interpreting the application of § 2253(c)(2) to treaty claims, the Court must give due weight to the principle, first articulated by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that in the absence of a clear instruction to do so from Congress, courts should not construe statutes in a manner that would place the United States in breach of its treaty obligations.[21] That principle should apply with equal force here. The Framers accorded treaties the status of supreme federal law and placed them within the federal judicial power in order to avoid breaches of the international obligations of the United States. Pet'r Br. 23-24. For the same reason, Congress gave the federal courts power to grant habeas corpus to certain state prisoners held in violation of the law of nations long before it gave them power to issue habeas corpus to protect constitutional rights in the narrower sense that Texas now advocates. *See id*. at 29 n.23. This

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[20] *See* P.A. 117 (denying COA for Vienna Convention claim); *Plata v. Dretke*, 111 Fed. Appx. 213 (5th Cir. 2004) (same); *see also Kasi v. Angelone*, 300 F.3d 487 (4th Cir. 2002) (same, under extradition treaty); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) (same, under ICCPR); *Ross v. United States Marshal*, 168 F.3d 1190 (10th Cir. 1999) (same, under extradition treaty).

[21] *See also, e.g., Weinberger v. Rossi,* 456 U.S. 25, 32 (1982) (construing word in statute to have different meaning than in other contexts, in light of presumption that Congress does not intend to breach international obligations); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925) (treating existing treaty right as exception to statute, in light of presumption that Congress does not intend to breach international obligations); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115.

Court should not construe the language of § 2253(c)(2) to undermine this long-held respect for the federal judicial role in treaty enforcement, by giving the District Courts power to dispose of treaty claims without review on appeal, absent a clear indication that Congress intended to do so.

Respondent suggests that *Slack v. McDaniel*, 529 U.S. 473 (2000), somehow decided *sub silentio* that treaty claims are not appealable under § 2253(c)(2). In *Slack*, however, the Court merely noted that § 2253(c)(2) meant to codify the standard for a certificate of probable cause established in *Barefoot v. Estelle*, 463 U.S. 880, 892-94 (1983), and remarked that "Congress had before it the meaning *Barefoot* had given to the words it selected; and we give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word 'constitutional.'" 529 U.S. at 483.[22] The effect of the substitution of "constitutional" for "federal" was not before the Court in *Slack*, and the Court merely noted the change, leaving the issue of its effect, if any, to be decided in a future case. Nothing in the text of AEDPA or the legislative record suggests that any substantive change was intended.

First, as this Court has already remarked, "[a]ll we can say [about AEDPA] is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see* Anthony G. Amsterdam, *Foreword*, in RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at v (4th ed. 2001) ("The statutory

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[22] *See also Williams (Michael) v. Taylor*, 529 U.S. 420, 434 (2000) (cited in *Slack*, 529 U.S. at 483) ("[W]hen the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."); *Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised.").

language teems with problems and non-obvious alternative interpretations that need to be identified and sorted out by reference to a tangled legislative history."). Illustrating that point, AEDPA uses the words "constitutional" and "federal" without any discernible distinction. *See, e.g.,* 1 HERTZ & LIEBMAN, § 9.1 (cataloguing AEDPA's vacillation between the terms "constitutional" and "federal"). As a result, reading "constitutional" as more restrictive than "federal" throughout AEDPA would lead to pointless distinctions. *Compare, e.g.,* 28 U.S.C. §§ 2253(c)(2), 2254(e)(2)(A)(i) (provisions referencing "constitutional" rights), *with id.* §§ 2262(b)(3), 2264(a)(2) (similarly worded provisions in "opt-in" portion of statute, which Congress intended to be *more* restrictive of habeas review, referencing "Federal" rights).

Second, the legislative history of AEDPA contains not the slightest hint that Congress intended to depart from the *Barefoot* standard. AEDPA was intended to "streamline Federal appeals" for prisoners under sentence of death, principally by curbing successive petitions. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1996 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996) (Pres. Clinton); *see also, e.g.,* Statement of Sen. Hatch, 142 Cong. Rec. S3446-47 (Apr. 17, 1996) ("Federal habeas review exists to correct fundamental defects in [federal law]" and the new AEDPA standard does not affect that fundamental scope of review). Consistent with that objective, the COA requirement was meant to allow for summary disposition of frivolous or insubstantial appeals by codifying the standard adopted by this Court in *Barefoot*. As explained in the first committee report on the legislation that became AEDPA,

> The bill also strengthens the certificate of probable cause requirement by providing (in proposed 28 U.S.C. § 2253(c)) that a certificate may issue only on a substantial showing of the denial of a federal right. The bill thus enacts the standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983).

H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). In a later version, after several competing drafts were merged, "certificate of appealability" replaced "certificate of probable cause," and the word "constitutional" replaced "federal." But there is no indication that the substitution affected the codification of *Barefoot*. To the contrary, after the change was made, the leading supporters of the bill continued to testify that the statute merely codified the *Barefoot* standard.[23]

The legislative history of AEDPA is silent on the matter of habeas corpus review to protect treaty rights, and it is clear that Congress did not consider it. Congress made no alterations to the provisions expressly authorizing this Court, its Justices, and Circuit Judges, as well as District Courts, to issue writs of habeas corpus to individuals held in state custody in violation of the "*treaties* of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (emphasis added). Nor did it touch the provision, enacted in the 1840s, allowing noncitizens domiciled abroad to petition for habeas corpus where the validity, under international law, of an act done under color of foreign law is at issue. 28 U.S.C. § 2241(c)(4); *see* Pet'r Br. 29 n.23. There is no basis to believe that Congress meant to cut off appellate review in those two classes of cases, which arise only infrequently, but invariably

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[23] *See Concerning Habeas Corpus Reform: Hearings on H.R. 729, S. 623, and S. 3 Before the Comm. of the Judiciary, United States Senate,* 141st Cong., 1st Sess. (1995) (statement of Daniel Lungren, Attorney General, California) (discussing *Barefoot* as consistent with amendment to § 2253); *Concerning Habeas Corpus Reform: Hearings on H.R. 729, S. 623, and S. 3 Before the Comm. of the Judiciary, United States Senate,* 141st Cong., 1st Sess. (1995) (statement of Gale A. Norton, Attorney General of Colorado) ("The addition of the *Barefoot v. Estelle* standard to the appeal section of the habeas statute—28 U.S.C. § 2253—is an important codification of existing case law."). California Attorney General Daniel Lungren "played a prominent role in the drafting of the habeas corpus reform provisions." 141 CONG. REC. S76 (daily ed. Jan. 4, 1995) (statement of Senator Dole).

implicate vital matters affecting the national interest when they do arise.

Third, Respondent's interpretation is inconsistent with this Court's holding that AEDPA should not be interpreted to "close [this Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 381 (2003). This Court has consistently construed AEDPA to ensure at least one meaningful opportunity for postconviction review in a District Court, in a Court of Appeals, and by *certiorari* in this Court.[24] AEDPA was intended to allow habeas petitioners "one bite at the apple" in federal court;[25] Respondent is trying to take away the apple before Petitioner has had a full bite.[26]

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[24] *See Castro*, 540 U.S. at 380-81 (rejecting government's proposed reading of AEDPA jurisdiction); *Clay v. United States,* 537 U.S. 522, 530 (2003) (rejecting government's "constricted reading" of AEDPA's statute of limitations provision to preserve availability of federal court review); *Carey v. Saffold*, 536 U.S. 214 (2002) (construing term "pending" broadly to ensure the availability of federal habeas review after state post-conviction review); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (forgoing a literal reading of the statute due to the "far-reaching and seemingly perverse" consequence that some habeas corpus petitioners would never "receive an adjudication of [their] . . . claim[s]" in federal court).

[25] 141 Cong. Rec. S7877 (daily ed. June 7, 1995) (statement of Sen. Dole); 141 Cong. Rec. S7662 (daily ed. June 5, 1995) (statement of Sen. Feinstein); *see also* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 772 (2002) ("[B]oth the language of the provisions and the underlying legislative history [of AEDPA] strongly suggest that Congress intended to ensure that petitioners would have at least one full, fair opportunity to raise each meritorious claim at each of the levels of federal court habeas corpus review.").

[26] In addition, Respondent's interpretation would not be outcome-neutral as between prisoners and the state. Construing § 2253(c)(3) to bar the review of *meritorious* claims, as opposed to the historic practice of foreclosing insubstantial appeals only, would skew the development of the law: errors that favor prisoners could be upset by appeal, while errors

(footnote continued)

Finally, this Court generally has construed statutes governing appellate jurisdiction to avoid, whenever possible, the anomalous result of foreclosing all appellate review of a single District Judge's final decision on an important question of federal law. When faced with a statute that would *prevent* appellate review of a final District Court decision, or would prevent this Court's review of a final appellate decision, the Court has repeatedly adopted a narrow construction—either confining the statute to the precise circumstances that Congress had contemplated, *see, e.g., Castro*, 540 U.S. at 380-81; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (citing cases), or declining to extend the statute beyond a narrow reading of its words, *see Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 85-89 (2000), or, as a last resort, construing the statute to leave open the possibility of review by extraordinary writ, *see, e.g., Felker v. Turpin*, 518 U.S. 651, 658-62 (1996). In light of the strong presumption in favor of the availability of appellate review, the term "constitutional right" as used in § 2253(c)(2) should be construed in favor of allowing the Courts of Appeals to hear appeals from habeas cases raising substantial questions of state deprivation of treaty rights.

For all of these reasons, reasonable jurists could find it, at a minimum, debatable whether Mr. Medellín has made a substantial showing of the violation of a constitutional right within the meaning of 28 U.S.C. § 2241(c)(3). For this reason, a COA should have issued even if Respondent had raised this argument in the Court of Appeals. *See Tennard*, 124 S. Ct. at 2569.

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that favor the government, no matter how egregious, could not be corrected. *See* Fed. R. App. P. 22(b)(3) (state does not need COA to appeal). This Court has construed AEDPA to minimize such asymmetries. *See Castro*, 540 U.S. at 380.

C. Neither Section 2254(d)(1) Nor the *Teague* Rule Poses a Bar to Mr. Medellín's COA Application.

Respondent further argues that even if 28 U.S.C. § 2253(c)(2) did not bar a COA, Mr. Medellín's request for a COA would fail to raise a substantial question because 28 U.S.C. § 2254(d)(1) would allegedly bar relief. Resp. Br. 11; *see also* U.S. Br. 15-17. Again, there is no reason for the Court to reach out to decide questions that are beyond the scope of the questions presented in the Petition and that were not decided by the Court of Appeals. Neither Respondent nor *amici* contend that the § 2254(d)(1) point is jurisdictional or limits the Court's power to reach the questions presented.[27]

In any event, § 2254(d)(1) is inapplicable here by its terms. That provision bars federal habeas corpus relief unless the state court adjudication (i) "on the merits" (ii) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In the posture of an application for a COA, the issue is whether "reasonable jurists" would find the District Court's conclusions as to the applicability of § 2254(d)(1) to be "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For three reasons, this standard is satisfied.

First, § 2254(d)(1) expressly limits its application to claims that were "adjudicated on the merits in State court proceedings." The effect of the *Avena* Judgment on Mr. Medellín's Vienna Convention rights was never considered

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[27] *See Williams (Terry) v. Taylor*, 529 U.S. 362, 404 (2000) (characterizing § 2254(d)(1) as a constraint only on a federal habeas court's power to grant the writ); *Weeks v. Angelone*, 528 U.S. 225, 227-37 (2000) (considering merits of the federal claim and only then assessing whether § 2254(d) serves as a defense to issuance of the writ); *Ramdass v. Angelone*, 530 U.S. 156, 165-178 (2000) (same); *see also Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (resolving one COA-related issue; remanding others for decision by court below); *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005) (reaching only one of two threshold issues raised).

by the state court, because the *Avena* Judgment had not yet been rendered at the time of his state-court petition. Respondent therefore cannot invoke § 2254(d)(1) to immunize the issue—which arose only after state post-conviction review was completed—from any review by this Court. As recently as last Term, this Court recognized that § 2254(d)(1) may not apply where new factual developments transpire after the state-court judgment, "on the theory that there is no relevant state-court determination to which one could defer." *Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (per curiam). At least five Courts of Appeals have so held.[28]

Second, it is axiomatic that a state's application of its rules of procedural default does not constitute a state court "adjudication on the merits." *See, e.g., Dretke v. Haley*, 541 U.S. 386 (2004) (not applying § 2254(d)(1) to resolution of propriety of state imposition of procedural default). The specific question presented by Mr. Medellín's petition here is whether Texas's application of its contemporaneous objection rule is permissible in light of the *Avena* Judgment. Section 2254(d)(1) by its own terms does not apply to federal habeas review of that question, which is not "on the merits."

Finally, the state court's adjudication of whether Mr. Medellín had an individual right under article 36 applied an erroneous legal rule that treaties *can never* confer individual rights. P.A. 56a, ¶ 15 (citing *Hinojosa v. State*, 4 S.W.3d 240 (Tex. Crim. App. 1999)). The *Hinojosa* case had stated in *dicta* that treaties "generally" did not confer individual rights. 4 S.W.3d at 252. The state courts in the present case, however, expanded *Hinojosa* to establish—with no analysis of the terms of the Vienna Convention—a blanket rule that individuals could not raise treaty claims, contrary to over 200

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[28] *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003); *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir. 2003); *Killian v. Poole*, 282 F.3d 1204, 1207 (9th Cir. 2002); *Brown v. Maloney*, 267 F.3d 36, 40 (1st Cir. 2001).

years of Supreme Court precedent. *See, e.g.,* Pet'r Br. at 26-29. As this Court has made clear, "[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams (Terry) v. Taylor*, 529 U.S. 362, 405 (2000).[29]

Respondent also cites the rule of retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Again, this is beyond the scope of the questions presented in the Petition and the issues decided by the Court of Appeals. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (procedural default issues should be decided before *Teague* issues). Furthermore, *Teague* does not apply because the *Avena* Judgment is a new *fact* giving rise to rights under existing law, not a new constitutional *rule* promulgated by this Court. *See Teague*, 489 U.S. at 310; *see also Breard*, 523 U.S. at 380 (Breyer, J., dissenting). In any event, as a prudential rule governing the exercise of judicial power under statutory provisions predating the Vienna Convention, *Teague* fares no better than the procedural default rule in the face of a controlling subsequent treaty provision. *See* Pet'r Br. 40-41. Respondent's citation to *Teague* therefore adds nothing.

For all of these reasons, at a minimum, "reasonable jurists" could find it "debatable" that the requirements of § 2254(d)(1) are satisfied and *Teague* poses no bar. *See Miller-El*, 537 U.S. at 335. The Court of Appeals therefore should have granted a COA.

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[29] Respondent also asserts that the state court's determination of this issue "flowed directly from the Court's holding in *Breard*." Resp. Br. at 11. Nothing in *Breard*, however, overruled this Court's long line of precedents holding that treaties can create individual rights. To the contrary, *Breard* pointed out that the Vienna Convention "arguably creates individual rights." *Breard*, 523 U.S. at 376. The state court reached precisely the opposite conclusion. P.A. 56a.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Court should (1) stay proceedings in this case pending completion of proceedings in the courts of Texas pursuant to the President's determination,[30] or (2) if it proceeds, hold that the *Avena* Judgment supplies the rule of decision with respect to the questions decided by the Court of Appeals, and remand the case either with directions to issue a COA or for further proceedings on the COA application consistent with this Court's opinion.

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[30] *See Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004) (modifying prior practice to allow state court to entertain habeas petition where federal court stays parallel habeas proceedings). If the Court decides that it should stay its hand in light of the President's determination, a dismissal of certiorari would not be appropriate, because it would leave in place the judgment of the Court of Appeals, which this Court had already determined warrants review, and which the President's determination now fatally undermines. It would be unfair to Mr. Medellín, subversive of this Court's authority, and inefficient to require further proceedings to adjudicate what effects, if any, that judgment would have if and after certiorari were dismissed solely because Mr. Medellín's case was pending before this Court when the President issued his determination.