No. 05-51

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER MARIO A. BUSTILLO

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I. Article 36 Creates Enforceable, Individual Rights

No one disputes that, when determining whether Article 36 creates individual rights, "[t]he clear import of treaty language controls." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). Here, the treaty's text is unequivocal. Article 36 provides that "authorities [of the receiving State] *shall* inform [the detainee] of *his rights* under [Article 36(1)]." Vienna Conv. art. 36(1)(b) (emphasis added). And it declares that a receiving State's laws "must enable full effect to be given to the purposes for which the *rights* accorded under this Article are intended." *Id.* art. 36(2) (emphasis added). The Commonwealth thus concedes (Br. 14) that "Article 36 * * * discusses a 'right' of access to consular officials," and the United States acknowledges (Br. 16) that Article 36 "refers to the detainee's 'rights.'" That language is reinforced by Article 36's drafting history; by the United States' repeatedly expressed (but now conveniently ignored) view that Article 36 creates individual rights; and by the considered and persuasive views of other signatories and the international tribunal entrusted with the Convention's construction.

A. There Is No Presumption Against The Recognition Of Individual Rights Under Treaties

1. Hoping to minimize the import of the treaty's text, its *travaux préparatoires*, and the signatories' post-ratification conduct, the Commonwealth and the United States insist there is a "long-established presumption" against the recognition and judicial enforcement of individual treaty rights. U.S. Br. 11; see Resp. Br. 12-13. Respondent thus declares (Br. 12-13) that any "ambiguity in the treaty * * * is resolved by the customary presumption against the creation of treaty-based individual rights." Even if such a presumption exists—and, as explained below, it does not—a presumption cannot make the treaty's reference to "rights" mean something else, nor can it overcome other indicia of the treaty's meaning. In any event, this Court's cases refute respondent's proposed presumption: The "long-established" rule is that, "'where * * * a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more

liberal interpretation is to be preferred.'" *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 163 (1940)).

The *Head Money Cases*, 112 U.S. 580 (1884), are not to the contrary. Those cases do state that "'[a] treaty is primarily a compact between independent nations,'" and they note that treaty violations may become the "'subject of international negotiations and reclamations.'" Resp. Br. 12, 24; U.S. Br. 11. But those cases establish no *interpretive* presumption against private rights. To the contrary, they recognize:

> [W]henever [a treaty's] provisions prescribe a rule by which the rights of the private citizen or subject may be determined[, and] when such rights are of a nature to be enforced in a court of justice, [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases, 112 U.S. at 598-599.

The Restatement (Third) of Foreign Relations Law (1987) provides even less support for the proposed presumption. It does observe that "'[i]nternational agreements * * * generally do not create private rights.'" Resp. Br. 11; U.S. Br. 12 (quoting 2 Restatement § 907, cmt. a, at 395). But that does not create a presumption. In fact, the commentary continues: "Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement." 2 Restatement § 907, cmt. a, at 395. Respondent and the United States, moreover, elevate the commentary over § 907's *text*, which says that "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States." *Id.* § 907(1), at 395.[1]

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[1] Nor do other decisions of this Court (see U.S. Br. 11) support a presumption. *Charlton* v. *Kelly*, 229 U.S. 447, 450, 475-476 (1913), addressed the scope of federal "habeas corpus," not treaty rights; *Whitney* v. *Robertson*, 124 U.S. 190, 193-194 (1888), held that a subsequent federal statute superseded an earlier treaty; and *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829), held that the Court would not resolve a dispute "between two nations

2. In their haste to assemble a presumption, the Commonwealth and its *amici* also conflate two analytically distinct issues. The question here is whether the treaty creates an individual right for detained foreign nationals, not, as they suggest (Resp. Br. 15; U.S. Br. 12), whether it creates a private *cause of action*. In this case, the cause of action—the mechanism by which Bustillo asserts the violation of his rights in court—is provided by Virginia's habeas corpus statute, Va. Code Ann. § 8.01-654. That statute allows suit by those claiming to be "detained without lawful authority," including any challenge to a "conviction or sentence." Petitioner in No. 04-10566, Moises Sanchez-Llamas, need not show that he has a cause of action; he asserts his rights defensively in a criminal prosecution brought by the State. In both cases, petitioners do not claim that the Vienna Convention creates a cause of action. They claim merely that the treaty supplies "a rule of decision for * * * case[s]" that are otherwise properly before the courts. *Head Money Cases,* 112 U.S. at 599.

Respondent thus errs in suggesting (Br. 15) that relief is unavailable unless Article 36 "creates a judicially cognizable cause of action." Prisoners seeking federal habeas relief based on a constitutional violation do not need to prove that the Constitution creates a "private right of action." The federal habeas statutes, 28 U.S.C. §§ 2254 & 2255, supply the cause of action. Nor do plaintiffs suing under 42 U.S.C. § 1983 need to show that the violated statute or the Constitution creates a private cause of action. Section 1983 provides that. See *Gonzaga* v. *Doe*, 536 U.S. 273, 284 (2002). ("[Section 1983 plaintiffs] do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights * * * ."). Likewise here, Bustillo need not

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concerning a national boundary" under a treaty that was not self-executing, *id.* at 314-315. The proffered lower-court cases, Resp. Br. 12-13 & n.13; U.S. Br. 11-12, are also unpersuasive. The supposed presumption in those cases originates in *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965 (4th Cir. 1992). But *Goldstar* did not hold that there is a presumption *against* recognizing and enforcing individual treaty rights. It observed only that there was no presumption *in favor* of individual rights. *Id.* at 968.

show that the treaty creates a cause of action or provides for a "domestic judicial remedy." Resp. Br. 21. The Virginia habeas statute does that.

For the same reason, the United States' reliance on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), is misplaced. While the United States claims that *Amerada Hess* "held that two conventions did not create judicially enforceable rights for ship owners," Br. 12; see Resp. Br. 16, that description is incomplete. The issue was not whether the treaties at issue created *individual rights* (or whether the nature of the rights rendered them incapable of enforcement). It was whether the treaties created *causes of action* for foreign corporations. Because the corporations could not assert treaty violations under causes of action created by other statutes (such as habeas or § 1983), they were forced to argue that the treaty itself created a federal cause of action for damages. 488 U.S. at 442. Relying on sovereign immunity principles, this Court held that the treaties "'do not create *private rights of action* for foreign corporations to recover compensation from foreign states in United States courts.'" U.S. Br. 12 (quoting 488 U.S. at 443) (emphasis added). That holding has no bearing where, as here, a statute (the Virginia habeas statute) creates the cause of action being invoked.[2]

The United States likewise errs in citing *Johnson* v. *Eisentrager*, 339 U.S. 769 (1950), for the proposition that the "protections of the [Geneva Convention] are not judicially enforceable." U.S. Br. 12. In that case, this Court did not hold that the *rights* being asserted were, by their nature, incapable of judicial enforcement. The Court held that, regardless of the right at issue, the writ of habeas corpus—the *cause of action* through which German prisoners sought to assert putative treaty rights—was not available to "an enemy alien who, at no

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[2] The United States' and respondent's attempt to distinguish individual rights from "judicially enforceable individual rights," U.S. Br. 11; see *id.* at 17; Resp. Br. 19, reflects the same confusion. If the treaty gives the individual a right, that right can be asserted as a rule of decision in any matter otherwise properly before the court.

relevant time and in no stage of his captivity, has been within [the United States'] territorial jurisdiction." 339 U.S. at 768. This Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), confirms that reading of *Eisentrager*. See 542 U.S. at 478-479 & n.8; *id.* at 493 (Scalia, J., dissenting). Here, there is no doubt that the Virginia habeas statute extends to prisoners held by Virginia in the Commonwealth itself.

The controlling principles here come from *United States* v. *Jung Ah Lung*, 124 U.S. 621, 632-633 (1888), which respondent and its *amici* simply ignore. In that case, the treaty did not provide a private "right of action" to sue in federal court. In fact, "the treaty itself contemplate[d] only executive action." *Id.* at 632. But that did not stop this Court from enforcing the treaty rights through the writ of habeas corpus. *Id.* at 627-628. Likewise, so long as the Vienna Convention creates individual rights, the Virginia habeas statute provides Bustillo with a cause of action to assert their violation.[3]

3. Ultimately, the United States is reduced to arguing that, although this Court has consistently enforced treaty rights, see, *e.g.*, Pet. Br. 18-19 & n.3, such enforcement is limited to treaties that "guarantee * * * freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property."

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[3] Respondent now asserts (Br. 25-27) that, just as some *statutory* violations do not warrant *federal* habeas relief, some *treaty* claims do not warrant *state* habeas relief. But the Commonwealth never raised that issue below or in its brief in opposition; accordingly, it is waived. *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985). In any event, the limit respondent cites is derived from *federal* habeas principles and has been applied only to federal habeas petitions, as respondent concedes. Br. 26 n.24; *Reed* v. *Farley*, 512 U.S. 339, 349-355 (1994). Respondent makes no effort to explain why that federal standard should govern state habeas cases. The rule is also limited to "technical error[s]" where the petitioner "suffered no prejudice." 512 U.S. at 352, 355. It does not apply where, as here, the violation likely resulted in the conviction of an innocent man. Pet. Br. 45-50; n.13, *infra*. Respondent's invocation of *Teague* v. *Lane*, 489 U.S. 288 (1989), is similarly flawed. As we explained at the petition stage, respondent waived *Teague* by failing to raise it below, and *Teague* does not apply to state habeas claims in any event. Pet. Cert. Reply at 3-7. Respondent does not even hazard a response.

U.S. Br. 13. It is difficult to imagine how an alien's right to be a pawnbroker, *Asakura* v. *Seattle*, 265 U.S. 332 (1924), or to avoid cancellation of a debt owed to him, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796), is more "peculiarly private" than the right to seek assistance in a criminal trial in which the alien risks the loss of his liberty in an unfamiliar legal system.[4]

Finally, the United States misguidedly attempts to downplay the significance of the fact that the Vienna Convention is self-executing. Self-executing treaties are "the law of the land" and must be "regarded by the court as an act of congress." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); Pet. Br. 19-20 & n.5. Consequently, the Vienna Convention is not self-executing solely in the sense "that government officials *can* provide foreign nationals with information about consular assistance * * * without the need for implementing legislation." U.S. Br. 14 (emphasis added). Because the Vienna Convention is self-executing, government officials *must* comply with the Convention's requirement that they inform foreign nationals of their right to consular notification, and failure to do so violates supreme federal law.

B. Article 36 Unequivocally Creates Individual Rights

Although "[t]he clear import of [the] treaty language controls," *Sumitomo Shoji Am.*, 457 U.S. at 180, respondent and his *amici* pay scant attention to Article 36's text. That is no surprise. Article 36 expressly refers to "rights" and states that the rights belong to the foreign national. In the words of the treaty, the rights are "his rights."

1. Conceding that Article 36 "discusses a 'right' of access to consular officials," respondent argues that "this reference merely reflects the creation of *rights among the signatory*

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[4] The United States also attempts to confine this Court's enforcement of individual treaty rights in *United States* v. *Rauscher*, 119 U.S. 407 (1886), and *Johnson* v. *Browne*, 205 U.S. 309 (1907), to "specialty rules in extradition treaties." U.S. Br. 14. But *Rauscher* and *Browne* affirm a more expansive view. The treaties in those cases did *not* expressly incorporate the rule of specialty. *Browne*, 205 U.S. at 317. Rather, this Court *implied* the rule from the "scope and object of the treaty," allowing defendants to invoke the implied right in their defense. *Rauscher*, 119 U.S. at 422.

nations." Br. 14. But that ignores the text of Article 36(1)(a), which first addresses the duties owed to consular officials and then declares that *"[n]ationals of the sending State shall have the same freedom* with respect to communication with and access to consular officers." It likewise ignores Article 36(1)(b), which provides that the detaining State's "authorities shall inform the [foreign national] without delay of *his* rights." Art. 36(1)(b) (emphasis added). The text of Article 36 creates rights in the individual *along with* rights in the States.

Acknowledging that Article 36 "refers to the detainee's 'rights,'" the United States urges that "the 'rights' enumerated in Article 36(1)(b) do not encompass notice to the detainee; the provision places only a *duty* on the receiving State to give notice." U.S. Br. 16-17. This Court has long held, however, that "rights and duties are correlative," *Ullman* v. *United States*, 350 U.S. 422, 427 n.2 (1956)—*i.e.*, "[t]he existence of [a] duty on the part of the government necessarily implies a corresponding right of the [individual] to be so protected." *Logan* v. *United States*, 144 U.S. 263, 284 (1892). Accordingly, this Court has repeatedly recognized an individual right where, as in Article 36(1)(b), the text states that the government "shall" treat a specific class of persons in a specified manner. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979).

Respondent and the United States also argue that the explicit rights-creating language in Article 36(1) is vitiated by an introductory clause, which states that the rights are provided "[w]ith a view to facilitating the exercise of consular functions." Resp. Br. 14; U.S. Br. 19. But they do not explain how granting rights to foreign nationals is inconsistent with facilitating consular functions. To the contrary, requiring a foreign national to be notified of his right to consular access increases the likelihood that the consul will be contacted, and thus able to perform his duties. A "consul's duties * * * could not be carried out effectively unless his right of access to his nationals, *and the right of those nationals of access to him*, were safeguarded." Summary Records of the 535th Meeting, 1 Y.B. Int'l Law Comm'n, U.N. Doc. A/CN.4/SER.A/1960, at 49 ¶ 7 ("ILC Records") (emphasis added).

Reliance on the treaty's preamble, Resp. Br. 13-14; see U.S. Br. 19, is likewise unpersuasive. As noted above, "ensur[ing] the efficient performance of functions by consular posts" is not inconsistent with an individual right to notification. The Commonwealth never addresses the U.S. delegation's report, which explains that the preamble merely emphasizes that the "privileges and immunities are granted for governmental reasons, rather than for the benefit of officers, members of families, and employees, as individuals." Report of the United States Delegation to the Conference on Consular Relations ("U.S. Delegation Report"), S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 46; Pet. Br. 33. It does not explain why the preamble necessarily encompasses the "rights" the Convention accords foreign nationals. Pet. Br. 33. Nor does it explain why this Court should look to the preamble at all, when the text of Article 36 is unambiguous. Pet. Br. 32.

2. Respondent's construction is also inconsistent with Article 36's *travaux préparatoires*. Neither respondent nor the United States disputes that the delegates specifically debated whether Article 36 should create individual rights (see Pet. Br. 24-27) and ultimately adopted a text that explicitly "refers to the detainee's 'rights.'" U.S. Br. 16.

The United States asserts that, although the treaty uses the term "right," it was not intended to create "an individual right that can be privately enforced through judicial process." Br. 17. The United States claims that Sir Gerald Fitzmaurice "warned" other delegates that "'[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue.'" *Ibid.* (quoting ILC Records at 49 ¶ 8). But Sir Fitzmaurice went on to say that "the object of his proposal was to ensure that *an alien had equal rights with a national's* in the circumstances covered by the text," ILC Records at 49 ¶ 8 (emphasis added), and that the way to do that was to "safeguard[]" "the *right of those [foreign] nationals* of access" to their consuls, *id.* at 49 ¶ 7 (emphasis added). Read as a whole, the records reveal that the driving factor behind Article 36(1)(b) was, as the U.S. delegate explained at the time, "the rights of the national concerned."

U.N. Conf. on Consular Relations: Official Records, U.N. Doc. A/Conf./25/16, U.N. Sales No. 63.X.2 (1963), at 338 ¶ 11.[5]

Finally, respondent and the United States argue that, in ratifying the Convention, "the Senate did not intend to create any individual rights." Resp. Br. 18; see U.S. Br. 22. But they rely exclusively on an executive summary, which states that "[t]he Convention does not change or affect U.S. laws or practice." S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2 (1969). But the summary also states that, "[w]here uniformity or specific rules did not previously exist, the Convention breaks new ground and sets minimum standards." *Id.* at 1. More important, that three-page summary of the 79-article treaty does not purport to address the question of individual rights and refers readers to the "detailed analysis" in the U.S. Delegation Report. *Ibid.* That report (at 60) repeatedly declares that the Convention requires "authorities of the receiving State to inform the person detained of *his right* to have the fact of his detention reported to the consular post * * * and of *his right* to communicate with the consular post."

3. Respondent and the United States contend that this Court should not recognize individual rights under Article 36 because "[t]he Executive Branch has *never* construed the *VCCR*" to create such a right. Resp. Br. 17; see U.S. Br. 23. But they overlook the State Department's instructions for domestic law enforcement and the Foreign Affairs Manual, both of which specifically refer to the arrestee's "right[s]." Pet. Br. 28. They likewise ignore the Attorney General's representation to Mexico that a foreign national "is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated." *Id.* at 29 (quoting Letter From Attorney General John Ashcroft at 2 (June 3, 2004)).

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[5] The United States recognizes that the Convention allows the detained individual to decide whether consular notification occurs. See Pet. 23, 26. But the United States claims the purpose of that provision was to "to lessen the burden on * * * the receiving States." Br. 18. The drafting history, however, makes clear that the primary reason was to give the foreign national control over notification, underscoring the fact that the rights belong primarily to the detained national and not his country of origin. Pet. Br. 26.

Indeed, when the rights of *Americans* abroad were at issue, the United States forcefully argued that "Article 36 *establishes rights* not only for the consular officer but, *perhaps even more importantly, for the nationals of the sending State*." Memorial of the United States, *United States Diplomatic & Consular Staff in Tehran (U.S.* v. *Iran)*, 1980 I.C.J. Pleadings at 174 (emphasis added). This Court should look to the practical construction the Executive has given to Article 36, not to more recent "litigating positions." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).[6]

4. "[S]ubsequent interpretations of the signatories" also may "clarify [a treaty's] meaning." *Air France* v. *Saks*, 470 U.S. 392, 403 (1985). Here, dozens of signatories agree that the Convention creates individual rights. Pet. Br. 29. Respondent nonetheless asserts that "there is a striking lack of judicial decisions holding that the Treaty creates individual rights." Resp. Br. 18; see U.S. Br. 26-27. But it is no less "striking" that the respondent cites only three foreign court decisions that allegedly support its view. None of those cases, however, actually resolves the individual rights issue; and none is from a nation's highest court.[7] More striking still, the

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[6] The United States argues that the State Department's "longstanding practice has been to investigate" Convention violations and to "extend a formal apology" for violations. U.S. Br. 24. But this Court has held that the availability of diplomatic "remedies" does not preclude an individual from enforcing his treaty rights in court. *Jung Ah Lung*, 124 U.S. at 632-633; *Rauscher*, 119 U.S. at 431; p. 5, *supra*. Likewise, it is hard to see how reading the Convention in accord with its text could interfere with the United States' "ability to effectuate treaty obligations and speak with one voice." U.S. Br. 16; see Resp. Br. 17. It cannot possibly jeopardize international relations to require Virginia—under the Supremacy Clause—to honor the United States' obligations. Indeed, the Framers chose to make treaties part of the "supreme Law of the Land," allowing "judges of the United States * * * to carry [them] into effect," to "show the world that we make faith of treaties." Pet. Br. 17 n.2; see Pet. Br. at 16-17.

[7] In *Canada* v. *Van Bergen*, [2000] 261 A.R. 387 ¶ 15 (Alta. Crim. App. (Can.)), the "Minister did consider this [Article 36] argument under her general discretion and found that there was * * * no proven prejudice." In *R.* v. *Partak*, [2001] 160 C.C.C. (3d) 553 ¶¶ 25, 63 (Ont. Sup. Ct. of Justice (Can.)), the court assumed that Article 36(1)(b) *does* create individual rights,

United States cannot identify any other signatory whose executive denies the existence of individual rights. Respondent and the United States thus argue that the United States Executive Branch's interpretation of the treaty deserves weight, while claiming that the uniform interpretation of the executives of dozens of other signatories deserves none.

The ICJ, moreover, has interpreted Article 36 to create individual rights. See *LaGrand Case (F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 12 (Mar. 31).[8] Because the ICJ has been granted authority to interpret the Convention, its views are entitled to "respectful consideration." *Breard* v. *Greene*, 523 U.S. 371, 375 (1998). To be sure, the United States has "no obligation to accept the reasoning underlying the ICJ's judgments." U.S. Br. 30. But if this Court truly is to give "respectful consideration" to the ICJ's interpretation of Article 36, it should not diverge from the ICJ's construction without ample reason. Neither respondent nor the United States has demonstrated that the ICJ's interpretation is illogical or unreasonable. Accordingly, *LaGrand* and *Avena* must be given due weight.

II. Article 36 Requires States To Afford Foreign Nationals A Meaningful Opportunity To Assert Treaty Violations

Respondent concedes that, although Article 36(1)(b) expressly declares that state officials "shall notify" a detained foreign national of "his rights" to consular notification and access, Virginia officials never so advised Bustillo. As a result, Bustillo first learned of his rights under the Vienna Convention after his trial. Upon discovering the violation, Bustillo's

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but denied relief for lack of prejudice. Finally, in *R.* v. *Abbrederis*, [1981] 51 F.L.R. 99, 115 (N.S.W. Crim. App. (Austl.)), the court held only that suppression of evidence was inappropriate in the context of a border interrogation by customs agents.

[8] The United States claims *LaGrand* did "not state that Article 36 gives a foreign national a domestically enforceable private right." U.S. Br. 29. But the United States ignores *Avena*, which held that Article 36 creates rights in foreign nationals, and that such rights "are to be asserted * * * within the domestic legal system of the United States." 2004 I.C.J. at 35-36 ¶ 40.

new counsel moved (unsuccessfully) to remand the case to the trial court so he could develop the record. The Commonwealth's position boils down to the assertion that it may avoid review of an acknowledged treaty violation even though the defendant's failure to raise the issue earlier itself resulted from the treaty violation. That position defies common sense and is inconsistent with the Convention's requirements.

A. State Procedural Bars May Not Preclude A Meaningful Opportunity To Assert Treaty Rights

Article 36(1)(b) provides that any signatory detaining a foreign national "shall notify" the detained individual of his rights to consular notification and access. The reason for the notification requirement is self-evident: The treaty "presume[s] that most foreign nationals" are "unaware of the provisions of the Vienna Convention" and that, as a result, its protections would often be meaningless absent express notification. *Torres* v. *Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting denial of certiorari). In this case, it is undisputed that, because of Virginia's violation of the treaty, Bustillo did not know of his treaty rights (much less that his rights were violated) until after his trial had concluded. Requiring Bustillo to raise the violation before he learned of his rights, and enforcing a default that was itself a result of the treaty violation, would rob the notification requirement of effect. A treaty, no less than a statute, should not be given a "construction * * * [that] would defeat its purpose." *Browder* v. *Director, Ill. Dep't of Corr.*, 434 U.S. 257, 264 (1978). Moreover, Article 36(2) expressly requires that domestic laws "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Requiring a foreign national to assert rights of which the treaty presumes him to be unaware gives virtually no "effect" to those rights.

1. The Commonwealth asserts that Article 36(2) has nothing to do with *judicial* rules, even those that wholly frustrate a foreign national's Article 36 rights. Instead, the Commonwealth reads Article 36(2) to mean only that "a nation may not impose unreasonably restrictive visitation hours * * * or impose other measures that would restrict the 'exercise' of

the rights." Br. 32-33. Respondent nowhere explains how the word "exercise" can be defined to *include* logistical details but to *exclude* judicial redress or enforcement of treaty rights. This Court has already recognized that seeking judicial relief is one way to "exercise" Vienna Convention rights. See *Breard*, 523 U.S. at 377 ("By not asserting his [treaty] claim in state court, Breard failed to *exercise* his rights under the Vienna Convention * * * .") (emphasis added).[9]

Respondent likewise errs in claiming (Br. 30 n.28) that "nothing in the" Convention's "*travaux préparatoires*" suggests that Article 36 may sometimes require States to set aside inconsistent procedural rules. Concerned that Article 36(2)'s "full effect" clause "might force States to alter their *criminal laws* and regulations," 1 U.N. Official Records, *supra*, at 40 ¶ 4 (emphasis added), the Soviet Union proposed amending that clause to declare that "said laws and regulations [of the receiving State] must not nullify these rights," 2 U.N. Official Records, *supra*, at 168. The United Kingdom opposed the amendment because "it meant that the laws and regulations of the receiving State would govern" unless they "render[ed] [Article 36] rights completely inoperative * * * . But rights could be seriously impaired without becoming completely inoperative." 1 U.N. Official Records, *supra*, at 40 ¶ 6. The Convention's drafters thus chose to reject the proposed amendment and to displace local laws where their enforcement is inconsistent with the treaty's central objectives.

The statement by a State Department official that the "'Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing

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[9] Respondent's reading of Article 36(2) would also confine Article 36's statement that "rights * * * shall be exercised in conformity with the laws and regulations of the receiving State" to ministerial issues such as visiting hours. *Breard* is to the contrary. 523 U.S. at 375-376 (requirement of "exercise[] in conformity" with local laws may encompass contemporaneous objection rule). Respondent cannot simultaneously maintain that Article 36(2)'s requirement that rights be "exercised" in conformity with local laws validates procedural bar rules, but that the requirement that such local laws give "full effect" to the treaty extends only to "restrictive visitation hours."

consular conventions,'" U.S. Br. 22 (quoting S. Exec. Rep. No. 9, *supra*, at 18); see Resp. Br. 17 & n.17, is not to the contrary. The official explained that "[m]any of the articles in the Vienna Convention * * * require * * * compliance with the laws and regulations of the receiving State," but he immediately clarified that, "[t]o the extent that there *are* conflicts with Federal legislation or State laws[,] *the Vienna Convention * * * would govern*." S. Exec. Rep. No. 9, *supra*, at 18 (emphasis added); see also p. 9, *supra*.

In any event, when the treaty was ratified in 1969, state procedural bar rules were rarely invoked to prevent relief. Indeed, the case upon which the Commonwealth relies as establishing the procedural bar invoked here—*Slayton* v. *Parrigan*, 205 S.E.2d 680 (Va. 1974)—was decided five years later. Moreover, at the time of ratification, the federal habeas corpus statute was almost always available to raise federal claims notwithstanding procedural defaults. See *Fay* v. *Noia*, 372 U.S. 391, 434 (1963) ("[F]ederal courts [may] grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision."). The federal cases adopting a more restrictive approach, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 86-88 (1977), post-date the Convention by nearly a decade. The State Department thus had little reason to mention that procedural default rules might give way in some cases.

2. Respondent also makes no effort to explain how the asserted procedural bar would allow foreign nationals who are not notified (or otherwise aware) of their Article 36 rights to develop an adequate record for direct review. "'Rules of procedure should * * * induce litigants to present their contentions to the right tribunals at the right time.'" *Massaro* v. *United States*, 538 U.S. 500, 504 (2003) (quoting *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)). To that end, *Massaro* held that claims of ineffective assistance of federal trial counsel need not be raised on direct appeal because the "trial record" would often be "incomplete or inadequate for this purpose," *id.* at 504-505,

creating the risk that "[e]ven meritorious claims would fail," *id.* at 506. For similar reasons, *Brady* claims need not be raised until the defendant becomes aware that exculpatory evidence was withheld.

The same is true here. A foreign national who has not been notified of his Article 36 rights often will not be in a position to determine (much less to establish to a court's satisfaction) that the violation "had an effect on [his] trial." *Breard*, 523 U.S. at 377; Pet. Br. 40-42. Establishing prejudice often requires an investigation of the assistance the consulate could have provided. In this case, Bustillo first learned of the treaty violation while his case was pending on direct appeal and unsuccessfully sought a remand to the trial court to develop the necessary record. See Pet. Br. 8-9, 41. Respondent nowhere addresses how foreign nationals can build a record before they are aware of the rights in question or can determine the impact consular assistance would have had.

To be sure, there will be instances where the defendant can and perhaps *must* raise the violation before trial—such as where the defendant actually learns of his rights from another source. In those cases, the violation will often be harmless, or it may be possible to cure any prejudice before trial (through a continuance or otherwise). But where state officials, by neglect or design, keep the detainee unaware of his rights, they should not be permitted to capitalize on that ignorance and the resulting default to preclude assertion of the treaty claim.[10]

B. The Treaty Does Not Permit Responsibility To Be Shifted To The Foreign National's Lawyer

Much of the Commonwealth's argument attempts to shift responsibility for advising defendants of their treaty rights to

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[10] The United States attempts to distinguish *Massaro* by positing that "it would be far better to litigate the question of a violation at trial, when a continuance would allow a (belatedly informed) consulate to provide any assistance it might be willing to offer." U.S. Br. 47. But Bustillo was not notified of his Vienna Convention rights—nor was his consulate informed of his detention—before trial. The United States also recites portions of *Massaro* and asserts that "[n]one of those considerations applies to consular notification claims," *ibid.*, but makes no attempt to explain why that is so.

counsel. "Expecting an effective counsel to recognize and consider raising a Treaty claim at trial," respondent asserts (Br. 33), "is no different than expecting an effective counsel to recognize and consider raising a constitutional claim at trial." Respondent ignores the fact that—unlike most federal statutory and constitutional provisions—Article 36 expressly requires *state officials* directly to notify *the foreign national* of his rights on the assumption that the detainee's ignorance will otherwise deprive the rights of meaning.

The treaty's text requires a "competent authorit[y] of the receiving State"—*e.g.*, arresting officer, magistrate, prosecutor, or judge—to provide notification. Vienna Convention art. 36(1)(b). It does not permit that burden to be shifted or excused because the foreign national has a lawyer, and with good reason: The role and reliability of lawyers varies widely among signatory nations. Indeed, the State Department instructs consular officers "to gain prompt personal access to an arrested U.S. citizen" abroad to offer "information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan." U.S. Dep't of State Foreign Affairs Manual, 7 FAM 420 (2004). If a lawyer's failure to assert a treaty claim were always a basis for default—even where the defendant himself has no knowledge of his treaty rights—thousands of Americans abroad will be placed in the hands of foreign lawyers who, according to the State Department, may be "charlatan[s]." For that reason, the Convention requires the *State* to provide *notice to the detainee himself*.

The United States' effort to analogize Vienna Convention violations to the omission of warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is likewise inapt. It may be permissible to "rely[] on counsel to raise * * * claims * * * that the government failed to provide a detainee with" *Miranda* warnings, Br. 47-48, since such issues arise only in our legal system. But the Convention must be enforced and have effect even in those countries that lack a tradition of zealous and competent legal representation. For that reason, it places the burden of implementation and enforcement on "competent authorities" of the receiving State, not the alien or his counsel.

More fundamentally, *Miranda* is wholly unlike the Vienna Convention in two respects. *First*, the warnings required by *Miranda* are not focused solely on informing the "woefully ignorant" of their rights. 384 U.S. at 468. *Miranda*'s "[m]ore important" purpose is to "dispel the compelling atmosphere of the interrogation." *Id.* at 465. *Miranda* warnings are thus required regardless of "age, education, intelligence, or prior contact with authorities," because "a warning at the time of the interrogation is indispensable to overcome its pressures." Indeed, warnings are required even though *Miranda* is now "part of our national culture," *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), and virtually no one who has watched television or read a newspaper could be ignorant of those rights. See *United States* v. *Espinosa-Orlando*, 704 F.2d 507, 514 (11th Cir. 1983) (warnings required even if a suspect knows his *Miranda* rights). The individual and his lawyer will be aware of *Miranda*. As a result, they can be expected to raise the violation when the warning is omitted.

Article 36's direct notification requirement, by contrast, reflects the all-too-accurate "presum[ption] that most foreign nationals"—often poor and uneducated—are "unaware of the provisions of the Vienna Convention." *Torres*, 124 S. Ct. at 919 (Stevens, J., respecting denial of certiorari).[11] Unlike *Miranda* warnings, the sole and indispensable function of the Article 36 notification requirement is to provide information without which the detained individual will not know of, and cannot exercise, his rights. For that reason, unlike *Miranda* violations, Vienna Convention violations may be harmless if the individual actually learns of his rights by other means. But, for the same reason, where the State's error keeps the detainee ignorant of his rights, he cannot be expected to assert them before trial.

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[11] See U.S. Census Bureau, Current Population Survey, Annual Social and Econ. Supp., 2003 (avail. at http://www.census.gov/population/socdemo/foreign/ppl-174/tab01-05.pdf) (27% of foreign nationals age 25 and over have less than a 9th grade education, and 40% never completed high school).

Second, it makes sense to apply a strict default rule to *Miranda* claims because the *factual* predicate for the claim exists and is known to the defendant before trial. Even assuming an individual defendant is unaware of *Miranda*, he and his lawyer undoubtedly will be aware that he has made incriminating statements and will thus have an incentive to seek their exclusion. That most often will not be the case under the Vienna Convention, because neither the detained foreign national nor his lawyer will know whether consular assistance was available or would have yielded fruit.

C. *Breard* v. *Greene* Does Not Control This Case

Contrary to respondent's suggestion, Br. 30-31; see U.S. Br. 42-43, this Court's *per curiam* decision in *Breard* v. *Greene*, 523 U.S. 371 (1998), does not control whether a state procedural bar is always sufficient to defeat review of a Vienna Convention claim, for three reasons.

First, *Breard* acknowledged that this Court "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. Since *Breard* was decided, the ICJ—after extensive briefing, argument, and consideration—has twice held that Article 36(2)'s "full effect" clause may require a State to set aside a procedural bar where the State "failed to carry out its [notification] obligation under the Convention." *LaGrand*, 2001 I.C.J. at 488, 497-498, ¶¶ 60, 91; *Avena*, 2004 I.C.J. at 56-57, ¶¶ 112-114.[12]

Second, *Breard*'s discussion of state procedural bars was unnecessary to the decision. Neither respondent nor the United States denies that, in *Breard*, the Vienna Convention claim was foreclosed by AEDPA's restrictive *federal* default rules for *federal* habeas claims. That "subsequently enacted"

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[12] The United States suggests *LaGrand* and *Avena* are irrelevant because, when *Breard* was decided, the ICJ had requested that the execution be stayed during the ICJ's proceedings. U.S. Br. 43 n.16. But the ICJ's provisional order did not "in any way prejudge findings the Court might make on the merits." *Case Concerning the Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, 1998 I.C.J. 99 ¶ 40.

federal statute trumped the treaty. 523 U.S. at 376; Pet. Br. 45. Because this case arises on state habeas, AEDPA does not apply. Moreover, *state* rules (whenever promulgated) can never overcome the requirements of a *federal* treaty.

Third, "in the past the Court has revisited its interpretation of a treaty when new international law has come to light." *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2105 (2005) (O'Connor, J., dissenting). It should feel even "less constrained to follow precedent" here, given that *Breard* was a *per curiam* opinion rendered under exigent circumstances, without the benefit of full briefing and argument. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998); see *Breard*, 523 U.S. at 379-380 (Stevens, J., dissenting); Br. *Amici Curiae* Honduras, *et al.*, 22-24.[13] Particularly given the intervening ICJ decisions and the views of dozens of signatories, Pet. Br. 20-31, *Breard* cannot be considered controlling.

D. The Supremacy Clause Controls This Case

Finally, the Commonwealth argues that setting aside a state procedural bar when it conflicts with a federal treaty would render principles of federalism "meaningless." Br. 45. Not so. Whatever the scope of "the States' sovereign powers,"

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[13] *Breard* also rested on the conclusion the petitioner could not have made the requisite "showing that the * * * violation * * * had an effect on the trial." 523 U.S. at 377. The exact opposite is true here. Pet. Br. 46-50. Here, the violation prevented Bustillo from establishing the existence of the alternative suspect (Sirena), J.A. 32, his presence at the crime scene, J.A. 61, 65, 98, 100, 106, and his flight to Honduras the day after the victim died, J.A. 73-74. When shown a photograph of Sirena obtained from the Honduran consulate, numerous eyewitnesses identified Sirena as the assailant. J.A. 61, 65, 98, 100, 106. Likewise, there is no dispute that, with consular assistance, Sirena's precise identity could have been determined, resulting in a timely request for and production of other exculpatory evidence from the police, including documents showing that Sirena was stopped by police near the crime scene shortly after the killing with red stains on his clothes; that Sirena lied to police about where he had been; and that an eyewitness saw Sirena approach the victim with a bat "cocked." Pet. Br. 49. Moreover, once Bustillo's counsel located Sirena in Honduras, he was able to obtain a videotape of Sirena admitting that he had killed the victim and that Bustillo was wrongly convicted. J.A. 33-55. This case does not require the least bit of speculation as to the impact of the Vienna Convention violation.

Resp. Br. 43, the Supremacy Clause expressly subordinates state laws to federal treaties. The Commonwealth nowhere mentions the Supremacy Clause. Nor does it confront evidence that the States' "constant tendency * * * to violate national Treaties" was precisely why the Framers made treaties, along with other federal laws, the "supreme law of the land." Pet. Br. 16-17 (quoting 1 The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1966), at 164 (statement of James Madison)).

The Commonwealth also suggests (Br. 47) that enforcing federal treaties impermissibly "commandeer[s] the States—specifically the state courts." But this Court has long held that, where state "courts have jurisdiction adequate and appropriate under established local law to adjudicate" a federal claim, they "are not free to refuse enforcement" of that claim. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947); see *Printz* v. *United States*, 521 U.S. 898, 928 (1997). *Alden* v. *Maine*, 527 U.S. 706 (1999), does not hold otherwise. *Alden* addressed the States' *sovereign immunity* from damages actions in state court and, in fact, reaffirmed *Testa*'s rule that "Congress may declare federal law binding and enforceable in state courts." 527 U.S. at 752. The United States certainly does not share respondent's view. Just last Term, the President "directed the States to take actions to implement the *Avena* decision," U.S. Br. 44, notwithstanding state procedural bars. That order is most easily upheld as directing state courts to comply with the requirements of Article 36 itself.[14]

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the Supreme Court of Virginia should be reversed.

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[14] The United States suggests the directive to state courts "was based on the President's constitutionally based foreign affairs power * * * and other treaties and statutes," *not* the Vienna Convention. U.S. Br. 44. The contortions necessary to avoid relying on the most obvious source of federal power—Article 36—raise far more constitutional questions than they resolve. See V. Jackson, *World Habeas Corpus*, 91 Cornell L. Rev. 303, 357-358 & nn. 306-312 (2006); Pet. Br. 44.

Respectfully submitted.

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MARCH 2006