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Case No. 97-214
(OT 1997 set, vol. 358)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,

Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether article 36 of the Vienna Convention on Consular Relations and a similar provision in another United States treaty impose a continuing obligation on state law enforcement officials to permit meaningful assistance by foreign consular officers to a detained foreign national at all stages of criminal proceedings, or whether the state officials' outstanding obligations under the treaties are satisfied if, after arresting, trying, convicting and sentencing to death the national without permitting any consular assistance, the state officials allow foreign consular officers to meet with the national while he awaits execution?

2. Whether the doctrine of *Ex parte Young* authorizes a plaintiff to sue to enjoin the continuing consequences of a violation of federal law where (1) the state officials ceased to violate that law prior to the time suit was filed and (2) the injunction sought would have the effect of undoing the illegal conduct by protecting the plaintiff against the consequences of that conduct?

LIST OF PARTIES

Petitioners:

The Republic of Paraguay
Jorge J. Prieto, Ambassador of the Republic of Paraguay to the United States
José María Gonzalez Avila, Consul General of the Republic of Paraguay to the United States

Respondents:

James S. Gilmore III, Governor of the Commonwealth of Virginia
Mark L. Early, Attorney General for the Commonwealth of Virginia
David A. Garraghty, Warden, Greensville Correctional Facility, Jarratt, Virginia
Fred W. Grene, Warden, Mecklenberg Correctional Facility, Boydton, Virginia
Paul F. Sheridan, Judge for the Circuit Court of Arlington County, Virginia
Benjamin N.A. Kendrick, Judge for the Circuit Court of Arlington County
William Newman, Jr., Judge for the Circuit Court of Arlington County
William L. Winston, Judge for the Circuit Court of Arlington County
Richard E. Trodden, Commonwealth's Attorney for the County of Arlington
Edward Flynn, Chief of Police of Arlington County
Ronald J. Angelone, Director of Corrections for the Commonwealth of Virginia.

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IN THE

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OCTOBER TERM, 1997

No. 97-____

THE REPUBLIC OF PARAGUAY and
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PETITION FOR WRIT OF CERTIORARI

Petitioners the Republic of Paraguay, its Ambassador Jorge J. Prieto, and its Consul General José María Gonzalez Avila (collectively, "Paraguay") respectfully request that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on January 22, 1998, affirming the District Court's order dismissing Paraguay's action for want of jurisdiction under the Eleventh Amendment to the Constitution of the United States.

Paraguay brings this action to enforce its rights under two treaties of the United States: the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("the Vienna Convention"), and the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S. -Para., 12 Stat. 1091 (the "Friendship Treaty") (together, the "Treaties"). The Treaties provide Paraguay with the right (1) to receive prompt notification when a Paraguayan national is detained in the United States; (2) to have detained Paraguayan nationals notified directly of their right to consular

assistance; and (3) to have the opportunity actually to provide consular assistance to detained Paraguayan nationals prior to and during the course of criminal proceedings brought against them in the United States.

Notwithstanding these treaty rights, Virginia officials did not notify Paraguay when they arrested Angel Breard, a Paraguayan national, in 1992, and they did not apprise Breard of his right to contact the Paraguayan consul. As a result, Paraguay did not learn of Breard's arrest until *after* he had been tried, convicted, and sentenced to death, and had exhausted all appeals and state habeas proceedings – in short, until a time when, unless a new trial was scheduled, it would be impossible for Paraguay to render him the consular assistance that it was entitled to provide under the Treaties.

Respondents are the Virginia officials with responsibility for carrying out Breard's conviction and sentence. They do not deny that Virginia authorities tried, convicted, and sentenced Breard without providing the notifications or permitting the consular assistance contemplated by the Treaties. They claim, however, that they are no longer in violation of the Treaties because they have allowed Paraguay access to Breard while he awaits execution. The Court of Appeals agreed, holding that Paraguay neither alleged an ongoing violation nor sought prospective relief and hence that, notwithstanding the *Ex parte Young* doctrine, the Eleventh Amendment rendered the District Court powerless to remedy the state officials' violation of federal law in the form of two treaties of the United States.

This Court should grant review and reverse. *First*, the Court of Appeals was able to hold that there was no ongoing violation only by erroneously construing the Vienna Convention and the Friendship Treaty to provide a mere right to access to a detained national, rather than a right to provide effective consular assistance to the national at all stages of the proceedings against him. That holding is dangerous

both to American citizens living and traveling abroad and to foreign nationals present in the United States.

The Vienna Convention is the cornerstone of international consular law and practice, and the United States, like many nations, depends upon its consular assistance provisions to fulfill its mission of protecting American nationals abroad. The United States can hardly expect foreign governments – including those unfriendly or authoritarian regimes whose compliance with the consular assistance provisions would be most important to this country's citizens and consuls abroad – to give the Convention a more generous interpretation when dealing with American citizens than have United States courts when addressing the claims of foreign sovereigns. The vigor of the Vienna Convention, like that of any multilateral or bilateral treaty, depends upon reciprocal enforcement.

Second, even accepting the Court of Appeals' erroneous understanding of the rights provided by the Treaties, its holding creates a substantial conflict among the Courts of Appeals as to the requirements that a plaintiff must meet in order to come within the component of the *Ex parte Young* doctrine that permits a federal court to remedy the continuing consequences of a past violation of federal law. No other Court of Appeals has held that a continuing-consequences plaintiff must demonstrate that the state officials are still engaged in the illegal conduct, or that the relief sought cannot have the effect of undoing the very consequences of the illegal conduct against which the plaintiff seeks protection. These requirements, which are contrary to the premises of the continuing-consequences doctrine, would effectively eliminate it. The Court should grant the writ to resolve this conflict on the reach of the *Ex parte Young* doctrine.

Finally, the Court should grant the writ because this action falls within a category of cases that the Constitution expressly directs this Court to consider. This is a "Case[] affecting . . . Consuls" within

this Court's original jurisdiction. Paraguay respectfully submits that the Court should presumptively review cases, such as this one, that are within the Court's original jurisdiction, but where, out of respect for the Court's essentially appellate nature, the party seeking review first instituted suit in the lower federal courts. Review is particularly appropriate here because it would accord with the Framers' purpose in empowering this Court and the lower federal courts to resolve disputes concerning foreign diplomats and treaties: to ensure enforcement of the United States' treaty obligations before any such dispute escalated to the international arena. If this Court does not make clear that federal law gives effect to the Vienna Convention, Paraguay will have little recourse other than to seek relief in the International Court of Justice, which has compulsory jurisdiction over disputes between the United States and Paraguay arising under the Convention pursuant to its Optional Protocol.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ___ F.3d ____ and reproduced herein at A1. The District Court's opinion is reported at 949 F. Supp. 1269 (E.D. Va. 1996) and reproduced herein at A13.

JURISDICTION

The Court of Appeals entered judgment on January 22, 1998. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. III, § 2, cl. 2; *id.* art. VI, cl. 2; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261; Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091; 42 U.S.C. § 1983. These provisions are reproduced herein at A35-A39.

STATEMENT OF THE CASE

A. The Treaty Obligations

In 1970, the United States and the Republic of Paraguay each entered into the Vienna Convention on Consular Relations. Both nations thereby agreed to ensure that each other's consular officials, as well as consular officials from other signatory nations, would enjoy the rights, privileges, and immunities specified in the Convention. *E.g.* A35-36. Under the Constitution, the Vienna Convention became part of the "supreme Law of the Land" and hence binding law in each of the United States. U.S. CONST. art. VI, cl. 2.

The Vienna Convention guarantees the right to provide meaningful consular assistance to detained nationals. The Convention protects this right by requiring law enforcement officials (1) to notify "without delay" the detained national of his right to consular assistance; (2) to notify "without delay" the detained national's consulate of the arrest, if the national so requests; and (3) to permit the consular officials to render whatever assistance they desire to the detained national from the date of arrest through the end of any criminal proceedings brought against him. Further, while the Convention provides that the right of consular assistance "shall be exercised in conformity" with local laws and regulations, it also provides that, notwithstanding the foregoing, such "laws and regulations must enable *full effect* to be given to the purposes for

which the rights accorded under this Article are intended." A35-A36 (emphasis supplied).

In 1860, the United States and the Republic of Paraguay entered into the Treaty of Friendship, Commerce and Navigation. A37. Article XII requires that consular officers of Paraguay be accorded "whatever privileges, exemptions, and immunities are or may be" granted by the United States to consular officers "of any other nation whatever." The United States subsequently granted to consular officers of other nations, including the United Kingdom and the Russian Federation, the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals by law enforcement authorities in the United States. *Id.* Under the Friendship Treaty, law enforcement authorities in the United States are therefore required to extend to Paraguayan consular officers the same privilege and immediately notify them when a Paraguayan citizen is arrested. *Id.*

B. Breard's Detention And The Failure to Notify.

On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested in Virginia by the Arlington County police department on suspicion of murder. A49. Although the arresting authorities knew that Breard was a Paraguayan national, they did not inform him of his right under the Vienna Convention to request consular assistance from Paraguay, and they did not inform Paraguay that Breard was in their custody. *Id.* Had Breard been notified of his rights, he would have instructed the authorities to notify Paraguay of his arrest. Similarly, had Paraguay been notified of Breard's arrest, it would have demanded immediate access to Breard, in order to assist him *prior to and during* his criminal proceedings. A49-A51. Because Paraguay did not learn of Breard's detention until the spring of 1996, Paraguay did not afford Breard any assistance prior to or during the proceedings brought against him. *E.g.*, A50. In the circumstances

of Breard's case, effective consular assistance would have, at a minimum, resulted in a non-capital sentence. A50-A51.

On June 24, 1993, Breard was convicted of murder and, two months later, sentenced to death. A51. Breard's direct appeals of the conviction and sentence were denied, as was his state petition for habeas corpus. *Id.* When Paraguay finally learned of Breard's situation, an execution date had already been set. Since that time, Paraguay has attempted to render him consular assistance. However, the timing is such that little meaningful can be done on his behalf. Thus, Virginia authorities continue to deny Paraguay the opportunity to provide Breard with effective consular assistance consistent with the Treaties. A35-A37.

C. The Proceedings Below.

On September 16, 1996, Paraguay filed its complaint in the United States District Court for the Eastern District of Virginia, alleging violations of the Treaties and, with respect to its Consul General, of 42 U.S.C. § 1983. Federal jurisdiction was based on 28 U.S.C. § 1331. A42. The complaint sought, among other relief, an injunction barring respondents from taking any future actions based on Breard's illegally obtained conviction and ordering them to afford Paraguay its rights under the Treaties in any future proceedings against Breard. In October 1996, respondents moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(1), 12(b)(6).

On November 27, 1996, the District Court (Hon. Richard L. Williams) entered a final order dismissing the action for lack of subject matter jurisdiction. The District Court held that, as a party to the Treaties, Paraguay had standing to sue for redress of the treaty

violations. A20.[1] The court held, however, that because Virginia officials permitted Paraguayan officials to meet with Breard on death row, they were not engaged in an "ongoing violation" of federal law necessary to remove the bar of the Eleventh Amendment and bring the case within the doctrine of *Ex parte Young*.[2]

Paraguay appealed, and, on January 22, 1998, the Court of Appeals affirmed. The court stated that it "share[d] the district court's expressed 'disenchantment' with the Commonwealth's conceded past violation of Paraguay's treaty rights," and it noted the "disturbing implications in that conduct for larger interests of the United States and its citizens." A11 & n.7. Nevertheless, holding that Paraguay had not alleged an ongoing violation and did not seek prospective relief so as to come within even the continuing-consequences

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1. *See, e.g., Santovincenzo v. Egan*, 284 U.S. 30 (1931) (treaty claim by Italian consul originating in New York court to recover property of Italian national who died intestate); *Wildenhus's Case*, 120 U.S. 1, 17 (1887) ("[W]e see no reason why [the Belgian consul] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States."); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794) (United States courts had jurisdiction to hear case brought by French consul to determine rights in ship of various parties, including France and Sweden, under "the laws of nations and the treaties and laws of the United States."); *see also Argentina v. New York*, 250 N.E.2d 698 (N.Y. 1969) (suit to enforce consular rights under customary international law in which United States filed brief as *amicus curiae* in support of foreign sovereign plaintiff).

2. The District Court also held that it lacked subject matter jurisdiction under the *Rooker/Feldman* doctrine. A18-19 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). That holding, which the Court of Appeals did not address, A7 n.4, is squarely foreclosed by this Court's decision in *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994), in which the Court held that *Rooker/Feldman* does not apply where, as here, the federal plaintiff "was not a party in the state court" and thus "was in no position to ask [the Supreme Court] to review the state court's judgment."

component of the *Ex parte Young* doctrine, the Court of Appeals affirmed. A11-A12.[3]

On the same day, the Court of Appeals affirmed the District Court's order denying Breard's own petition for habeas corpus, holding that Breard had defaulted his treaty-based claim of lack of notice. *Breard v. Pruett*, __ F.3d. __ (4th Cir. Jan. 22, 1998) (reproduced herein at A23-34). On February 18, 1998, the Court of Appeals denied Breard's petition for rehearing and suggestion for rehearing en banc. Under Virginia law, an execution must now be set

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3. In the Court of Appeals, the United States filed a brief in support of appellees to argue that, although a foreign sovereign could certainly sue to vindicate its legal rights generally, *see Pfizer, Inc. v. India*, 434 U.S. 308 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), a suit by a foreign sovereign on a treaty raised a nonjusticiable political question. *See* Brief of *Amicus Curiae* United States at 8-9, 11-23, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). The position articulated by the United States conflicts with a long line of cases from this Court dating back to the beginning of the Republic, *see, e.g.*, cases cited at note 1, as well as with the United States' *amicus* support in 1969 of Argentina in an action brought in New York State courts to enforce consular rights under pre-Vienna Convention customary international law. *See* Brief of *Amicus Curiae* United States, *Argentina v. New York*, 250 N.E.2d 698 (N.Y. 1969). Nor does the United States' position find support in the modern political-question doctrine, because a decision by a federal court ordering state officials to comply with two treaties signed by the President and consented to by the Senate could not possibly encroach upon the powers allocated to the political branches on the federal level. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"). A group of international law scholars, consisting of Professors Abbott, Bederman, Bilder, Caron, D'Amato, Damrosch, Dodge, Field, Fitzpatrick, Guttman, Henkin, Koh, Lockwood, Riesenfeld, Schachter, Schwartz, Slaughter, Steinhardt, and Weissbrodt, filed a brief *amicus curiae* at the reply stage to oppose the United States' position. *See* Brief of *Amicus Curiae* Group of Law Professors, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). The Court of Appeals did not decide the question of justiciability. A7 n.4.

for no more than seventy days from the date of Virginia's notice informing the sentencing court of the Court of Appeals' decision. *See* VA. CODE ANN. § 53.1-232.1. Paraguay expects this notice to be given shortly.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS' DECISION EVISCERATES A FEDERAL RIGHT CREATED BY A TREATY TO WHICH THE UNITED STATES ATTACHES THE HIGHEST IMPORTANCE.

Ratified by over 130 countries, the Vienna Convention is the cornerstone of international law on consular affairs. LUKE T. LEE, CONSULAR LAW AND PRACTICE 23-25 (2d ed. 1991). The Convention "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." Department of State telegram 40298 to the United States Embassy in Damascus, February 21, 1975, *reproduced in* CONSULAR LAW AND PRACTICE 145.

One of the most important consular functions protected by the Vienna Convention is the right of consuls to provide assistance to detained nationals. Vienna Convention, art. 5. The Vienna Convention protects that right by obligating local authorities of signatories of the Convention, including the United States, to notify "without delay" a detained national of his right to request assistance from his nation's consul. The Convention requires the arresting authorities, upon the national's request, "without delay [to] inform the consular post . . . if . . . a national of that state is arrested . . . or detained in any other manner." Vienna Convention, art. 36(1)(b). Through its guarantee of free communication and access between

consular officers and detained nationals, including pre- and post-conviction visits to prison, arranging legal representation, and conversations and correspondence, the Vienna Convention makes possible a wide range of consular assistance at every stage of the criminal proceedings against the detained national. *Id.* arts. 36(1)(a), 36(1)(c).[4]

In the face of these requirements, the Court of Appeals held that respondent Virginia officials are not "presently violating claimants' ongoing rights." A10. The court acknowledged that neither Paraguay nor Breard had received the notifications required by the Vienna Convention. *See* A3-A4. It did not question Paraguay's well-pleaded allegations that, by having failed to provide those notifications, respondents barred Paraguay from rendering consular assistance at the time it most mattered - during the proceedings on the merits and state post-conviction proceedings. The court held instead that respondents were not continuing to violate Paraguay's rights because they now permitted Paraguay access to Breard on death row, at a time when Paraguay can do little more than offer its condolences to the condemned man. A9-A11; *accord United Mexican States v. Woods*,

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4. Similarly, by virtue of its most-favored-nation clause, the Friendship Treaty requires that a consular officer shall "immediately" be notified of a national's arrest and provided access to the national no more than four days after the arrest. *E.g.*, Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2)-(3) & §§ 1-2 of protocol, 19 U.S.T. 5018, 5027, 5039 (providing privileges of immediate notification and access to Soviet consuls), A38; *see* Friendship Treaty, art. XII (Paraguayan consuls entitled to privileges of most favored nation), A37; *see also Santovincenzo v. Egan*, 284 U.S. 30, 35-36 (1931) (under most-favored-nation clause such as that in Friendship Treaty, rights and privileges provided other consuls under other treaties inure to benefit of consul invoking clause). For the sake of brevity, this petition refers occasionally only to the Vienna Convention, but the same importance attaches to the consular notification provisions of the Friendship Treaty, and the same effective interpretation should be given to that treaty.

126 F.3d 1220, 1223 (9th Cir. 1997).[5] In other words, the court held that article 36 provides merely an ephemeral right of access to a detained national, not a right to provide the full range of consular assistance desired at a time when the assistance might have an impact.

The Court of Appeals' interpretation of the right provided by the Vienna Convention is as deeply "disturbing" as the underlying treaty violation. A11. The Vienna Convention makes clear that, more than mere *access*, article 36 is intended to guarantee effective consular *assistance* to a detained national, both during the substantive proceedings against him and afterwards. Access cannot be an end in itself; to the contrary, the right to visit, converse, correspond, and arrange for legal representation reflects the parties' intention to facilitate effective assistance to the detained national facing foreign criminal proceedings. *See* Vienna Convention, arts. 5(e), 36. As this Court has cautioned, "a treaty should generally be construe[d] . . . liberally to give effect to the purpose which animates it." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal quotation omitted). Here, the Court of Appeals has construed the Convention in a way that diminishes its effect.

In this case, moreover, the Vienna Convention supplies its own requirement that domestic law preserve the effectiveness of the rights

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5. Mexico filed its complaint in *United Mexican States* on May 16, 1997. 126 F.3d at 1221. With the execution of Mexico's national then imminent, the district court dismissed the complaint three days later, citing the District Court in this case on both grounds of dismissal. The case was submitted to the Court of Appeals for the Ninth Circuit on June 3, 1997, after expedited briefing and without oral argument. The court affirmed on Eleventh Amendment grounds on October 7, 1997, and later denied a petition for rehearing. Paraguay expects that Mexico will file a petition for review of the *Woods* decision. The habeas proceeding of Mexico's national in *Woods* is presently before this Court on writ of certiorari to the same court. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 634-35 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 294 (Oct. 14, 1997) (Nos. 97-80229, 97-80249). Oral argument has yet to be scheduled.

of consular assistance it grants. In ratifying the Vienna Convention, the signatory nations recognized that each of their legal systems was in some way unique and that procedures for enforcing the consular notification and assistance rights could vary from one state to another. *See* Vienna Convention, art. 36(2) (consular assistance rights "shall be exercised in conformity" with local laws and regulations). At the same time, however, the signatory nations agreed that the form of a given signatory's domestic laws and regulations would not prevail over the substance of the rights accorded by the Convention. Whatever the structure of its domestic law, a signatory's "laws and regulations must enable *full effect* to be given to the purposes for which the rights accorded under [article 36] are intended." *Id.* (emphasis supplied).[6]

Faithful to the purpose of the Vienna Convention, the United States has itself read the rights afforded by article 36 in a manner inconsistent with the holding of the Court of Appeals here. In its Memorial to the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, filed in response to the 1979 storming of the American Embassy there, the United States stated:

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must *at all times* remain open. Indeed, *such*

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6. Indeed, article 36(2) was adopted over an amendment proposed by the Soviet Union that would have permitted domestic law to impair the rights accorded in article 36 so long as it did not render them completely inoperative. U.N. GAOR, Conf. on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶ 2-9, UN Doc. A/CONF. 25/SR. 12, 17 April 1963, p. 1, *reprinted in* 1 OFF. REC. 40; *see id.* (statement by Mr. Khlestov, USSR) (stating that article 36(2) could "force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders").

> *communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations*. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (emphasis added and citations omitted).[7]

The clear intent of the Treaties' provisions for prompt notification and access is to provide consular officers the right to assist the national at a time and in a context where such assistance can be most useful to the national and most effective in the exercise of consular functions. In the context of a criminal proceeding, the time that counts is the period prior to and during trial. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 859 (1994) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined.").[8] Here, there is no dispute that Virginia authorities

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7. *See also* ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973) (emphasis added) ("[s]erious problems in . . . regard [to Article 36] have been experienced by American consular officers in countries of Eastern Europe, where . . . detention of an individual for prolonged 'interrogation' prior to the filing of formal charges is officially sanctioned. During this period of days, weeks, or even months, authorities of the receiving state may decline to observe that State's obligation to make notification to consular officials of the sending State. *Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.*").

8. The strictures imposed by federal law on the ability of a foreign national to seek habeas corpus relief for treaty violations make the Court of Appeals' interpretation of the signatories' rights even more troubling. In *Breard v. Pruett*, __ F.3d. __ (4th Cir. Jan. 22, 1998), an opinion rendered the same day as the decision Paraguay asks the Court to review, the Court of Appeals held that Breard was barred from bringing his Vienna Convention claim on habeas because he had defaulted the claim by failing to raise it on direct

(continued...)

have never satisfied their obligation to permit Paraguay to render consular assistance during the substantive proceedings against Breard, the only time when such assistance could have been outcome-determinative. By holding that the provision of consular access *three years* after Breard's trial and conviction satisfied their obligations of prompt notification and access, the Court of Appeals departed from the unambiguous text and intent of the Treaties. In the most fundamental sense, so long as Virginia authorities continue to take steps to carry out a conviction and death sentence rendered without permitting Paraguay the notification and meaningful access to which it is entitled, they will continue to violate Paraguay's rights under the Treaties.

The United States considers that the obligations enumerated in article 36 of the Vienna Convention are "of the highest order and should not be dealt with lightly." ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973). It is easy to understand why. As the United States advised the Court of Appeals, "[t]hese provisions are very important to the United States because they give significant protection to U.S. nationals when they reside or travel abroad." Brief of *Amicus Curiae* United States at 1, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). In his opinion concurring in the *Breard* court's ruling, Judge Butzner, too, emphasized that the "freedom and safety [of American citizens abroad] are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard v. Pruett*, ___ F.3d ___, A34. Yet, as this

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8.(...continued)

appeal or in his state habeas proceedings. A30. In conjunction, the decisions of the Court of Appeals here and in *Breard* make it impossible to give *any* effect to article 36 of the Vienna Convention: though it is Virginia officials who violated the Convention by failing to provide the required notice, it is Paraguay and its national who now suffer the consequences, because, according to the Court of Appeals, it is too late for either to seek relief.

case demonstrates, there is ample reason to be concerned about the degree of compliance in this country with the obligations imposed by the Convention.[9]

This Court should grant the writ to correct the Court of Appeals' dangerously narrow interpretation of article 36 of the Vienna Convention and to confirm this country's commitment to an international obligation to which it vigorously holds other nations.

II.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHERWISE UNIFORM DOCTRINE ON THE AUTHORITY OF A FEDERAL COURT UNDER *EX PARTE YOUNG* TO REMEDY THE CONTINUING CONSEQUENCES OF A PAST VIOLATION OF FEDERAL LAW.

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits a federal court to grant prospective relief against state officials when necessary to remedy an ongoing violation of federal law or the

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9. As the Court of Appeals noted in this case, Virginia appears to have repeatedly violated its obligations under article 36. A11 & n.7. Secondary sources confirm that those obligations are not well understood or respected by state law enforcement officials. The General Counsel to Texas Governor George W. Bush reportedly protested a request by the U.S. Department of State for information concerning possible violations of article 36 by Texas law enforcement officials on the ground that "the State of Texas is not a signatory to the Vienna Convention." Al Kamen, *Virtually Blushing*, THE WASHINGTON POST, June 23, 1997, at A17. A state prosecutor who oversaw capital murder proceedings against a Mexican national was reported to describe an assertion of rights under article 36 as "completely ridiculous" and to question whether such rights were enforceable as law: "I mean, what is the remedy? I suppose Mexico could declare war on us." Laura LaFay, *Court to Hear Appeal of Mexican National in Beach Murder Case*, THE VIRGINIA PILOT, April 9, 1997, at B5.

continuing consequences of a past violation. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (ongoing violation); *Milliken v. Bradley*, 433 U.S. 267, 288-290 (1977) (continuing consequences of past violation). Here Paraguay alleges, and respondent officials do not deny, that no Virginia official provided the notice or permitted the consular assistance required by the Treaties at any point during the three-year period during which Breard was arrested, charged with capital murder, tried, convicted, sentenced to death, denied relief on appeal, and denied relief on state habeas. A48-52, A3, A18. Faced with the approaching execution of a national to whom it had been thwarted from rendering effective consular assistance, Paraguay brought suit in the District Court for an order prohibiting the competent authorities from executing Breard or otherwise enforcing his conviction and enjoining them to afford Paraguay its treaty rights should Virginia retry him, as Paraguay expects it would.

The Court of Appeals held that Paraguay's suit did not come within the *Ex parte Young* doctrine because Paraguay did not allege an "ongoing violation" and did not seek "prospective relief." A8-A11. The Court therefore concluded that, notwithstanding its "'disenchantment'" with respondent officials' conduct and the "disturbing implications in that conduct for larger interests of the United States and its citizens," the federal courts had to stand by and allow the "conceded [violators] of Paraguay's treaty rights" to put its national to death. A11-12.

For the reasons explained in Part I above, the Court of Appeals' *Ex parte Young* holding rests on a fundamentally erroneous interpretation of the rights afforded by the Vienna Convention and the Friendship Treaty and hence the status of the violation alleged at the time Paraguay brought suit. But even assuming with the Court of Appeals that the treaty violation was not ongoing, this case warrants review for the separate and independent reason that the court's *Ex parte Young* holding cannot be squared with either this Court's decision in *Milliken* or the otherwise consistent understanding of the

Courts of Appeals as to the circumstances in which a federal court may afford relief from the continuing consequences of even completed illegal conduct.

In *Milliken*, this Court held that the Eleventh Amendment did not prevent the district court from acting to eradicate the present effects of previously segregated schools by ordering the state to pay half the funds necessary to implement a remedial education plan for the Detroit school system. 433 U.S. at 288-90. The Court explained that, because the remedial education program was "plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit," the termination of the illegal segregation did not bar the relief. *Id.* at 290; *see Papasan v. Allain*, 478 U.S. 265, 282 (1986).

Following *Milliken*, the Courts of Appeals have uniformly recognized that *Ex parte Young* authorizes the federal courts to order state officials to fund remedial education programs designed to eradicate the continuing adverse effects of prior segregation even after the illegal segregation has ended;[10] to order state officials to reinstate illegally terminated state employees even when the firing of which they complain is past and completed such that retrospective relief in the form of lost wages is barred;[11] and to order state officials to fund

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10. *See Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996); *Parents for Quality Educ. with Integration, Inc. v. Indiana*, 977 F.2d 1207, 1210-11 (7th Cir. 1992).

11. *See Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir.), *cert. denied*, 498 U.S. 813 (1990); *Melo v. Hafer*, 912 F.2d 628, 635-37 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991); *Coakley v. Welch*, 877 F.2d 304, 306-07 & n.2 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989); *Williams v. Kentucky*, 24 F.3d 1526, 1543-44 (6th Cir. 1994), *cert. denied*, 513 U.S. 947 (1985); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986); *Barnes v. Bosley*, 828 F.2d 1253, 1257-58 (8th Cir. 1987); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 837 (9th Cir. 1997); *Ramirez v.* (continued...)

remedial measures designed to remedy the continuing adverse effects of an illegal psychiatric confinement even after the confinement has ended.[12]

The Court of Appeals departed from the previously uniform understanding of the continuing-consequences doctrine by reading two requirements into that doctrine. *First*, the court held that the doctrine requires the plaintiff to show that the defendants are "in violation of federal law at the precise moment when the case was filed." A10. Neither this Court in *Milliken* nor any of the other Courts of Appeals, however, have imposed any such requirement. To the contrary, the premise of the doctrine is that, although the violation has ended, its consequences persist. For example, in *Milliken* and the other desegregation cases, the illegal segregation had ended, but its educational consequences continued; in the reinstatement cases, the illegal firing had already taken place, but its consequences in the form of the plaintiff's unemployment continued; and in the psychiatric confinement cases, the illegal confinement had ended, but its mental-health consequences continued. In none of those cases did the fact that the state officials had terminated their illegal activity prevent the federal court from requiring the officials to take affirmative steps to remedy the consequences of their actions.[13] As the Court of Appeals

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11.(...continued)
Oklahoma Dep't of Mental Health, 41 F.3d 584, 589 (10th Cir. 1994); *Cross v. Alabama Dep't of Mental Health and Mental Retard'n* , 49 F.3d 1490, 1503 (11th Cir. 1995).

12. *Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986); *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990).

13. In *United Mexican States v. Woods*, the court held, erroneously in Paraguay's view, that the Eleventh Amendment barred Mexico's similar action, *see* note 5 above, but did not cite *Milliken* or expressly consider the continuing-consequences doctrine. 126 F.3d at 1222-24. To the extent the (continued...)

for the Second Circuit explained in words that could have been addressed to the Court of Appeals here:

> We do not agree . . . that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially undermined because the need for prospective relief often arises out of a past injury.

Russell, 896 F.2d at 668.

Second, the Court of Appeals held that Paraguay did not seek prospective relief, and the continuing-consequences doctrine did not apply, because, whether that relief was characterized as the voiding of a conviction and sentence or a prospective injunction against enforcement of that conviction and sentence, it remained "the inescapable fact that its effect would be to undo accomplished state action." A11. This Court and the other Courts of Appeals do not agree, however, that a continuing-consequences plaintiff must show that the relief sought would not "undo accomplished state action." To the contrary, the very premise of the doctrine is that the plaintiff has alleged illegal state action whose consequences can and should be "undone." The purpose of the relief provided in *Milliken* and the other desegregation cases was to undo, to the extent possible, the present effects of the prior illegal segregation; of that provided in the reinstatement cases to undo, to the extent possible, the present effects of the prior illegal firing; and of that provided in the mental health cases to undo, to the extent possible, the present effects of the prior illegal confinement. As the Court of Appeals for the Third Circuit put it in a psychiatric confinement case, "federal court[s] may order state

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13.(...continued)
decision rejects the doctrine, or imposes the requirements to which Paraguay objects, it exacerbates the conflict and reinforces the need to review the Court of Appeals' decision in this case.

officials to fund from the state treasury remedial measures found necessary to undo the harmful effects" of the prior illegal conduct. *Clark,* 794 F.2d at 84.

So too here, the federal court has the authority to undo, to the extent possible, the present and future effects of the "conceded past violation" by Virginia officials of Paraguay's rights under the Vienna Convention and the Friendship Treaty during the proceedings by which Breard was convicted and sentenced to death. The District Court can protect Paraguay from the prospective consequences of the violation by enjoining Virginia officials from seeking in the future to enforce the results of the prior proceedings and ordering them to permit Paraguay to render effective consular assistance in any future proceedings. Absent that authority, the continuing-consequences doctrine has no meaning.

In short, the continuing-consequences doctrine establishes that Paraguay is not asking for "quintessentially retrospective" relief prohibited by the Eleventh Amendment when it asks a federal court to prohibit Virginia officials from going forward with Breard's execution or enforcing his illegally obtained conviction. A11. The doctrine of *Ex parte Young* has has been described as "indispensable to the establishment of a constitutional government and the rule of law." CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 312 (5th ed. 1994). Because the two requirements engrafted by the Court of Appeals onto that doctrine represent a basic departure from the rule set down by this Court and followed by every other Court of Appeals, this Court should grant the petition.

III.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE CONSTITUTION'S FRAMERS INTENDED THIS COURT TO RESOLVE TREATY DISPUTES SUCH AS THIS ONE BEFORE THEY REACHED THE INTERNATIONAL PLANE.

Though Paraguay chose to file in the first instance in the District Court, this action falls within this Court's original jurisdiction. Though Paraguay chose to seek relief in the first instance from a court of the United States, the underlying dispute with the United States over the failure of Virginia officials to comply with their Vienna Convention obligations lies within the compulsory jurisdiction of the International Court of Justice.

Those special circumstances would make this case worthy of a writ even if the Vienna Convention and *Ex parte Young* issues identified in Parts I and II above did not independently warrant review. *First*, Paraguay respectfully submits that the Court should presumptively review cases, such as this one, that are within the Court's original jurisdiction, but where, out of respect for the Court's essentially appellate nature, the party seeking review first instituted suit in a district court. *Second*, review should be granted because this case accords precisely with the Framers' purpose in empowering this Court in particular and the federal courts in general to resolve disputes involving foreign diplomats and duties owed to foreign sovereigns: to ensure enforcement of the United States' international obligations before the dispute escalated to the international plane.

A. The Court Should Presumptively Review Cases Within Its Original Jurisdiction That Arrive Here On Certiorari.

Because Paraguay bases its action on consular conventions and seeks to protect consular functions, the case falls within the Court's original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls." U.S. CONST. art. III, § 2, cl. 2. Congress has determined, however, that the Court's original jurisdiction over such actions does not exclude that of the lower federal courts. 28 U.S.C. § 1251(b)(1). Mindful of this Court's busy appellate docket and stated preference against acting as trier of fact in the first instance, Paraguay instituted suit in the district court. *See, e.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-99 (1971) (recognizing "time-honored" maxim that courts possessing jurisdiction generally must exercise it, but holding that modern role of Court as principally appellate court "ill-equipped for the task of factfinding" favors hearing of original-jurisdiction cases in lower courts in first instance).

Paraguay's decision to respect the Court's self-described limitations as an original tribunal does not diminish the importance the Constitution attaches to cases falling within the grant of original jurisdiction. Hence, to fulfill the constitutional mandate, the Court should stand ready to exercise its appellate jurisdiction to review substantial issues of law arising in cases that would fall within its original jurisdiction.[14] The guidelines this Court has set down for the exercise of its concurrent original jurisdiction indicate that the Court

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14. Unsurprisingly, this Court has repeatedly undertaken to review lower court decisions in cases that would otherwise have been within its original jurisdiction. *See, e.g., Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (exercising appellate jurisdiction to review issues Court had earlier declined to try under its original jurisdiction in *Arizona v. New Mexico*, 425 U.S. 794 (1976)); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Vermont*, 377 U.S. 351 (1964); *United States v. California*, 297 U.S. 175 (1936); *United States v. Louisiana*, 123 U.S. 32 (1887).

should grant the writ in cases within that jurisdiction arriving here on a petition for certiorari unless the legal issues presented are routine or based upon a particularly fact-intensive analysis. In *Wyandotte*, the Court held that it can decline to exercise its concurrent original jurisdiction

> only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

401 U.S. at 499.

Applying those guidelines, the Court should grant the writ here. *First*, because the case arrives in this Court in the posture of an appeal from a motion to dismiss and hence on a set of facts assumed to be true, the case presents no difficulties of factfinding and calls into play the Court's competence as "an appellate tribunal." *Id.* at 498. For the reasons set forth in Parts I and II above, this petition presents issues "of federal law and national import as to which [the Court is] the primary overseer[]." *Id.* *Second*, this case, grounded as it is on the failure of state officials to respect treaty obligations owed by the United States to a foreign sovereign, falls within a category of cases that the Constitution's Framers specifically intended the federal courts in general, and this Court in particular, to decide. For the reasons set forth in the next section, a denial of the writ in this case would clearly "disserve . . . the principal policies underlying the Article III jurisdictional grant," *id.* at 499, over "Cases affecting . . . Consuls." U.S. CONST. art. III, § 2, cl. 2.

B. The Court Should Grant The Writ Because The Framers Intended This Court To Resolve Cases Involving Consular Functions Where The Grant Of Relief Might Avoid An International Dispute.

An important motivation for the Framers' decision to establish a new government under a new Constitution was the inability of the central government under the Articles of Confederation to secure compliance by the states with the nation's obligations under international law. In reviewing the "evils" of the Articles of Confederation in order to assess an alternative, James Madison first asked:

> Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does (not) sufficiently provide against this evil.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (Max Farrand rev. ed. 1966).[15]

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15. *See also id.* at 19 (in the Confederation, Congress "could not cause infractions of treaties or of the law of nations, to be punished") (statement of Edmund Randolph reported by James Madison); *id.* at 164 ("foreign treaties [had not] escaped repeated violations") (statement of Charles Pinckney reported by Madison); *id.* at 24-25 ("If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the (continued...)

The Framers adopted a twofold solution. *First*, by the Supremacy Clause, they expressly made "all Treaties . . . the supreme Law of the Land" and hence binding on "the Judges in every State . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. *Second*, the Framers designated the judiciary the principal line of enforcement for treaty rights, no less than statutes and the Constitution itself, and they defined the federal judicial power to parallel the Supremacy Clause in scope. Hence, under Article III, the federal judicial power extends "to all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases affecting Ambassadors, other public Ministers and Consuls;" and to "Controversies . . . between a State, or the Citizens thereof, and foreign States . . . ." *Id.* art. III, § 2, cl. 1; *see, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[the provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect") (statement of James Wilson).[16]

15.(...continued)
Confederation] cannot punish that State, or compel its obedience to the treaty.") (statement of Edmund Randolph reported by James McHenry); *id.* at 164 ("Experience had evinced a constant tendency in the States . . . to violate national Treaties . . . .") (statement of Madison).

16. *See also* THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL."); 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 249 (John P. Kaminski & Gaspare J. Saladino eds., 1984) ("The constitution . . . . excludes the (continued...)

Indeed, the Framers considered the federal judicial role so important in disputes potentially involving "the important and sometimes delicate nature of our relations and intercourse with foreign governments" that they provided for original jurisdiction in this Court over disputes concerning consuls and ambassadors. *Ex parte Gruber*, 269 U.S. 302, 303 (1925).[17] As one commentator has put it, by according treaties the status of supreme federal law and providing for a judicial sanction against treaty violations, the Framers "contemplated that the judiciary would provide such a sanction and thus prevent or remedy any violation before it escalated to the international arena." Vázquez, n.16 above, at 1110.

This case presents precisely the situation the Framers anticipated: if this Court lets stand the Court of Appeals' decision that the federal courts are powerless to remedy the uncontested treaty violations by Virginia state officials, this dispute could ripen from an internal dispute in which Paraguay sought to vindicate its rights under federal law into an international dispute in which Paraguay will hold

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16.(...continued)
idea of an armed force. The power, which is to enforce these Laws, is to be a legal power vested in proper magistrates. The force, which is to be employed, is the energy of Law; and this force is to operate only upon individuals, who fail in their duty to their country.") (statement of William Samuels Johnson). *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101-10 (1992) (constitutional history demonstrates that Supremacy Clause and judicial power over treaty questions reflected Framers' intent that federal courts remedy treaty violations before they could develop into an international incident).

17. *See also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *id.* NO. 81 at 487 ("Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation").

the United States responsible for its courts' failure to remedy the actions of Virginia officials. Under the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 326, the International Court of Justice has compulsory jurisdiction over disputes concerning the interpretation or application of the Convention. Thus, based on the violation here, Paraguay has the right to seek relief against the United States in the International Court of Justice. Like Paraguay, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER, art. 94(1). In addition, the International Court of Justice has the authority to order provisional measures to maintain the status quo pending consideration of Paraguay's application. Statute of I.C.J., June 26, 1945, art. 41, 59 Stat. 1055, 1061.

Notwithstanding the prospect of recourse to the International Court of Justice, Paraguay chose first to seek relief for the treaty violations from the federal courts of the United States, which held, in Paraguay's view erroneously, that they had no jurisdiction to provide relief. However, because the life of one of its nationals is at stake, if this Court does not grant review and reverse that result, Paraguay will have little choice but to seek relief from the International Court of Justice.[18]

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18. Though Paraguay expects that Breard will file his own petition for certiorari in this Court, the denial by the Court of Appeals of his petition for rehearing makes the setting of an execution date imminent. *See* Statement of the Case, Part C, above. To ensure that all available steps have been taken to vindicate its rights under the Vienna Convention, Paraguay may need to file an application in the International Court of Justice under the Optional Protocol, with, if necessary, a request for indication of provisional measures. Consistent with its conduct of this case throughout, however, Paraguay currently intends that it would seek a stay of that application and request for provisional measures if it were to obtain review in this Court and any injunctive relief necessary to prevent Breard's execution pending consideration of the merits. Paraguay would reserve the right to proceed

(continued...)

The Framers did not intend for a dispute such as this one to reach the international level while there remained the prospect of recourse from the United States' own courts. The Constitution provides this Court with original jurisdiction over cases involving ambassadors and consuls, and the federal courts generally with jurisdiction over cases involving treaties, specifically to give the United States' own judicial authorities the opportunity to remedy violations of international law that might otherwise create an international dispute. This Court should not permit this case to move to the international plane unless and until it has itself determined that, as the Court of Appeals held, the federal courts do not have the authority to halt the execution by state authorities of a foreign national even where the national was convicted and sentenced in a proceeding that violated two treaties of the United States.

18.(...continued)
further in the International Court of Justice if at any point it thought it necessary to prevent Breard's execution or otherwise vindicate its Vienna Convention rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Dated: New York, New York
February 20, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,
Plaintiffs-Appellants,
v.
GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; Richard Cullen, Attorney General for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Honorable, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; ROBERT A. DREISCHER, Acting Chief of Police of Arlington County; RONALD J. ANGELINE, Director of Corrections for the Commonwealth of Virginia,
Defendants-Appellees.

No. 96-277

UNION INTERNATIONALE DES AVOCATS; UNITED STATES OF AMERICA; FREDERICK M. ABBOTT; DAVID J. BEDERMAN; RICHARD B. BILDER; DAVID D. CARON; ANTHONY D'AMATO; LORI FISLER DAMROSCH; WILLIAM DODGE; MARTHA A. FIELD; JOAN M. FITZPATRICK; EGON GUTTMAN; LOUIS HENKIN; HAROLD HONGJU KOH; BURT LOCKWOOD; STEFAN A. RIESENFELD; OSCAR SCHACHTER; HERMAN SCHWARTZ; ANNE-MARIE SLAUGHTER; RALPH GUSTAV STEINHARDT; DAVID WEISSBRODT,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-96-745-R)

Argued: June 4, 1997
Decided: January 22, 1998

Before WIDENER and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Widener and Judge Murnaghan joined.

COUNSEL

ARGUED: DONALD FRANCIS DONOVAN, DEBEVOISE & PLIMPTON, New York, New York, for Appellants. DONALD RICHARD CURRY, Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellees. DOUGLAS NEAL LETTER, Appellate Litigation Counsel, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amici Curiae.

ON BRIEF: BARTON LEGUM, MICHAEL M. OSTROVE, ALEXANDER A. YANOS, DEBEVOISE & PLIMPTON, New York, New York; LOREN KIEVE, DEBEVOISE & PLIMPTON, Washington, D.C.; RODNEY A. SMOLLA, LINDA A. MALONE, MARSHALL-WYTHE SCHOOL OF LAW, COLLEGE OF WILLIAM AND MARY, Williamsburg, Virginia; LESLIE M. KELLEHER, T.C. WILLIAMS SCHOOL OF LAW, UNIVERSITY OF RICHMOND, Richmond, Virginia, for Appellants. JAMES S. GILMORE, III, ATTORNEY GENERAL OF VIRGINIA, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; ARA L. TRAMBLIAN, Deputy County Attorney, OFFICE OF THE COUNTY ATTORNEY, Arlington, Virginia, for Appellees. FRANK W. HUNGER, Assistant Attorney General, HELEN F. FAHEY, United States Attorney, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. JOHN CARY SIMS, Sacramento, California; STEVEN A. HAMMOND, HUGHES, HUBBARD & REED, L.L.P., New

York, New York, for Amicus Curiae Union Internationale. DAVID J. BEDERMAN, Atlanta, Georgia, for Amici Curiae Law Professors.

OPINION

PHILLIPS, *Senior Circuit Judge:*

The Republic of Paraguay and its Ambassador and Consul General to the United States appeal from the district court's dismissal of their action seeking declaratory and injunctive relief against the Governor and other officials of the Commonwealth of Virginia (hereinafter "the Commonwealth" or "Commonwealth Officials"). Paraguay sought a declaration of violation by the Commonwealth of treaties between Paraguay and the United States, the vacatur of a capital conviction and death sentence imposed by the Commonwealth on a Paraguayan national in alleged violation of the treaties, and an injunction against further violations. The district court determined that it did not have subject matter jurisdiction over the case and dismissed it pursuant to Fed. R. Civ. P. 12(b)(1). We affirm.

I

Angel Francisco Breard was arrested on August 17, 1992, by the Arlington, Virginia police on suspicion of the murder of Ruth Dickie, who was killed in February 1992. Though Breard is a citizen of the Republic of Paraguay, the Arlington and Virginia authorities did not advise him of any right to contact the Paraguayan consulate to consult with it throughout his detention and trial. The Circuit Court of Arlington County did, however, appoint two attorneys to represent Breard.

On June 24, 1993, after a four-day trial, a jury convicted Breard of capital murder and attempted rape, and fixed punishment for the rape at ten years' imprisonment and a fine of $100,000. After a separate sentencing proceeding, the jury recommended that Breard be sentenced to death for the murder, and after an additional hearing on September 9, 1993, the state court entered a final judgment imposing the death penalty. The Virginia Supreme Court then affirmed Breard's conviction and sentence on direct review, *Breard v. Commonwealth*,

445 S.E.2d 670 (Va. 1994), and the United States Supreme Court denied certiorari. *See* 513 U.S. 971 (1994). At no point in his direct appeal did Breard allege that the Commonwealth had violated any treaty provision during the period of his detention and trial.

The circuit court then appointed new counsel to represent Breard in his state habeas corpus proceedings. In his state court petition Breard again failed to allege violations of any treaty. The circuit court dismissed Breard's petition in July 1995, and the Virginia Supreme Court refused his petition for appeal in January 1996. At some point after this date, Paraguay's ambassador and general consul became aware of Breard's conviction and sentence and sought to confer with Breard in accordance with international treaties providing that right. The Commonwealth acquiesced, and Paraguay's officers have been given free access to Breard since that time.

In August 1996, Breard filed a federal habeas corpus petition in the United States District Court for the Eastern District of Virginia in which he claimed that the Commonwealth had violated his rights under Article 36(1) of the Vienna Convention on Consular Relations ("Vienna Convention"), to which both Paraguay and the United States are signatories. That section provides:

> (b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
> (c) [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers

> shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

The district court dismissed Breard's petition on the ground of procedural default in failing to raise the treaty-violation claim at any point in the state court proceedings. *See Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (citing *Gray v. Netherland*, 116 S. Ct. 2074, 2080-81 (1996)). Breard's appeal to this court from the dismissal of his petition is pending as of this writing.[1]

In September, 1996, the Republic of Paraguay, Jorge J. Prieto, its Ambassador to the United States, and Jose Antonio Dos Santos, its Consul General to the United States (collectively"Paraguay"), brought this action against the named Commonwealth officials alleging that Paraguay's separate rights under the earlier-quoted provisions of the Vienna Convention and those of another treaty requiring comparable notification, had been violated by the Commonwealth's failure to inform Breard of his rights under the treaties and to inform the Paraguayan consulate of Breard's arrest, conviction and sentence.[2]

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1 The district court's dismissal of Breard's petition was affirmed by this court in an opinion filed contemporaneously with that in this case. *See Breard v. Netherland*, ___ F.3d ___, No. 96-25 (4th Cir. Jan. 22, 1998).

2 The other treaty invoked is the Treaty of Friendship, Commerce, and Navigation ("Friendship Treaty") that was signed by the United States and Paraguay in 1859. Article XII of that Treaty provides that "the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever." Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091. By later consular conventions the United States entered

(continued...)

The action included a joint claim based directly upon Paraguay's treaty rights and, for Dos Santos, a parallel claim under 42 U.S.C. § 1983 alleging denial of his rights under federal treaty law by the conduct of Commonwealth officials taken under color of state law.

In its claims, Paraguay sought as relief a declaration of treaty violation, a vacatur of Breard's conviction and sentence, and an injunction against further violations of the treaty provisions. The Commonwealth moved to dismiss the action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on standing, subject matter jurisdiction, and merits grounds. The district court first determined that Paraguay and its officials had standing to bring their claims under the treaties, emphasizing that Paraguay was asserting its own rights and not those of Breard. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996). The court also concluded that Dos Santos had standing to maintain his parallel § 1983 claim because he was a "person" within the meaning of the Act. *Id.* at 1275 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 678-81 (1898)).

The court ultimately decided, however, that it did not have subject matter jurisdiction because the claimants were not alleging a "continuing violation of federal law" and therefore could not bring their claims within the exception to Eleventh Amendment immunity

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2 (...continued)
into agreements with the United Kingdom, among other nations, under which "[a] consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district." Consular Convention, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426. *See also* Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12, 19 U.S.T. 5018 ("The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state."). Paraguay invokes this agreement with "any other" nation as entitling it to the same notification respecting confinement or custody of its nationals as was provided for the "other" nation.

established in *Ex parte Young*, 209 U.S. 123 (1908). 949 F. Supp. at 1273 (citing *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977)). Alternatively, the court held that it did not have "jurisdiction to review final decisions of a state court," and therefore could not order the vacatur of Breard's conviction and sentence obtained in Virginia's courts. 949 F. Supp. at 1273 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). The district court therefore dismissed the action. This appeal followed.

II

Paraguay challenges both of the grounds upon which the district court dismissed the action for lack of subject matter jurisdiction. The Commonwealth defends the dismissal on both grounds and also urges as an alternative basis for affirmance that the claims raise only non-justiciable "political questions."[3] We review *de novo* the district court's dismissal of the action for lack of subject matter jurisdiction. *See White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995) (citing *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994)).

Because we consider it dispositive of the appeal, we address only the Eleventh Amendment ground of the district court's dismissal of the action for lack of subject matter jurisdiction.[4] Though the basic Eleventh Amendment principles are settled and familiar, we summarize them here briefly. The Amendment imposes, in the form of sovereign immunity, "a constitutional limitation on the federal judicial power" over certain actions against unconsenting states of the

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3 The United States filed a brief and participated as amicus curiae in support of this position.

4 We do not, therefore, address the *Rooker-Feldman* basis for the district court's dismissal, nor do we consider the "political-question" issue first raised on this appeal. Though both are important issues, they are better reserved for cases in which their resolution is critical to decision.

Union. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Though the immunity thus provided runs literally only to actions by "Citizens of another state or by Citizens or Subjects of any foreign State," it has been judicially interpreted to run as well to actions by a state's own citizens, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991), and, critically to this case, by foreign states, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *see also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1129 (1996) (citing *Monaco* for principle).

The immunity extends not only to actions against States as named parties but to actions such as that here against state officials that are in fact actions against the state as the real party in interest. *See Pennhurst*, 465 U.S. at 101-02. Immunity in actions against state officials, is, however, subject to the critical exception announced in *Ex parte Young*, 209 U.S. 123 (1908), under which federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective. *See id.* at 14950, *Green v. Mansour*, 474 U.S. 64, 68 (1985). This means that under the *Ex parte Young* exception, which is based upon the recognized fiction that the officials' conduct is not that of the state, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Conversely, the exception does not permit federal courts to entertain claims seeking retrospective relief, either compensatory or other, for completed, not presently ongoing violations of federally-protected rights. *See Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (distinguishing for *Ex parte Young* purposes between retrospective and prospective relief).

The parties here join issue precisely on the questions whether the violations alleged by Paraguay are "ongoing" ones and whether the relief sought is only "prospective." We agree with the district court that the violation alleged here is not an ongoing one for *Ex parte*

Young purposes and, with the Commonwealth, that the essential relief sought is not prospective.[5]

Paraguay says the violation is "ongoing" or"continuing" in the sense that its "consequences" persist in Breard's continuation in custody under death sentence without benefit of the timely counseling that was prevented by the violation. The Commonwealth counters that there is no ongoing violation of *Paraguay*'s treaty rights, as distinguished from those of Breard, because Paraguay is presently on notice of Breard's situation and the Commonwealth is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires. The only "present consequences" being experienced from the past violation of treaty rights, says the Commonwealth, are any that Breard himself may be experiencing through lack of timely counseling, and these may, and have been, properly raised by Breard in his federal habeas corpus action.[6]

Paraguay seeks to avoid the obvious fact that the actual violation alleged is a past event that is not itself continuing by drawing on decisions allowing *Ex parte Young* suits which sought injunctive relief for what were considered to be ongoing consequences of past violations of federal rights. Specific reliance is placed on *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977), both of which allowed *Ex parte Young* actions for injunctive relief against what were considered to be the current, ongoing consequences of past violations.

Reliance on those decisions is misplaced; the situations presented in those cases are not analogous in critical respects to those presented

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5 The district court did not address, except to recognize it, the "prospective relief" issue; the Commonwealth has raised it both below and here.

6 Which is an action against a state official, the prison warden, that itself is maintainable in federal court only by virtue of the *Ex parte Young* exception, as specifically implemented by 28 U.S.C. § 2254. *See Seminole Tribe*, 116 S. Ct. at 1182 (Souter, J., dissenting) (noting the point).

by Paraguay's action. In *Papasan*, the action sought injunctive relief to compel equalizing funding of a school district which had been and continued to be under-funded in relation to other districts of the state as a result of the State's unconstitutional sale 100 years earlier of property held in trust for the district's support. In *Milliken*, the action sought injunctive relief to compel state officials to fund a remedial education plan in order to eradicate the demonstrably continuing effects of a long-maintained state policy of racial segregation in a public school system.

Both of those cases involve classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights. As the district court put it, the state-official defendants in *Milliken* "were in violation of federal law at the precise moment when the case was filed." *See* 949 F. Supp. at 1273. Here, by contrast, again as the district court indicated, Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action. *See id.*

For the same reason, Paraguay's reliance on this court's decisions in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), and *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), is misplaced. *Coakley* held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring his reinstatement. *Thomas S.* held that persons subjected to unconstitutional treatment when formerly in state mental institutions suffered continuing violations of those constitutional rights after their release that could be remedied by a federal injunctive decree for their care. Again, those cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in *Milliken* and *Papasan*, at the time that those actions were filed, responsible state officials were presently violating the claimants' ongoing rights. Nor is the relief sought by Paraguay for the treaty violations in any true sense "prospective." Paraguay bases its prospective-relief contention on the fact that the relief sought is formally couched in injunctive, declarative terms and on the basis, as

if it were dispositive of the question, that no monetary damages are sought. But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is quintessentially retrospective: the voiding of a final state conviction and sentence. That this could be effectuated in an injunctive or declaratory decree directed at state officials does not alter the inescapable fact that its effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation. Money damages are probably the purest and most recognizable form of retrospective relief, but surely not the only form, and the fact that that remedy is not sought whereas an injunctive or declarative form is, does not automatically establish that the *Ex parte Young* exception allows the action to proceed. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (holding that Indian Tribe's action to enjoin state officials from continuing to exercise jurisdiction over lands claimed by Tribe, being "functional equivalent" of quiet title action against state, was barred by Eleventh Amendment notwithstanding claimed violation was continuing and the relief sought was only prospective in form).

III

We share the district court's expressed "disenchantment" with the Commonwealth's conceded past violation of Paraguay's treaty rights. *See* 949 F. Supp. at 1273. There are disturbing implications in that conduct for larger interests of the United States and its citizens.[7] But, we conclude that because the violation of federal treaty law was not ongoing when this action was filed, nor the relief sought prospective, the Eleventh Amendment does not permit the federal courts to provide

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7 Made even more disturbing by the fact that this is not the only revealed violation. *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 26 (1997). The larger interests threatened are admirably pointed out by Senior Judge Butzner, specially concurring in *Breard v. Netherland*, ___ F.3d ___, ___, No. 96-25 (4th Cir. Jan. 22, 1998).

a remedy against the Commonwealth officials sued in this action for their conceded past violations. *See United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997) (holding to same effect in affirming dismissal on Eleventh Amendment immunity grounds of comparable action by Mexico and Mexican officials against Arizona officials).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY, *et al.*, *Plaintiffs*, v. GEORGE ALLEN, GOVERNOR OF VIRGINIA, *et al.*, *Defendants*.	Civil Action Number 3:96CV745

Nov. 27, 1996.

LOREN KIEVE, DEBEVOISE & PLIMPTON, Washington, DC, for *plaintiffs*.

DONALD RICHARD CURRY, OFFICE OF THE ATTORNEY GENERAL, Richmond, VA, for *defendants* ALLEN, GILMORE, ANGELONE, GARRAGHTY, NETHERLAND, SHERIDAN, KENDRICK, NEWMAN, WINSTON AND TRODDEN.

ARA LORIS TRAMBLIAN, Arlington, VA, for *defendant* STOVER.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, Senior District Judge.

This matter is before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Proc. 12(b)(1). In the alternative, the defendants ask the Court to dismiss the action for failure to state a claim pursuant to Fed. R. Civ. Proc.

12(b)(6). For the reasons set forth below, the Court GRANTS the motion to dismiss for lack of subject matter jurisdiction.

I. *BACKGROUND*

This case arises from the arrest and conviction of Angel Breard. Mr. Breard is a dual citizen of Paraguay and Argentina. He came to the United States on a student visa in 1986. He has remained in this country since then. In 1993, a jury found Mr. Breard guilty of the rape and stabbing death of thirty-nine year old Ruth Dickie. The trial court sentenced him to death for these crimes. On August 30, 1996, Mr. Breard filed a petition for a writ of habeas corpus in this Court.

On September 12, 1996, the Republic of Paraguay, Jorge J. Prieto, Ambassador of the Republic of Paraguay to the United States and Jose Dos Santos, Consul General of the Republic of Paraguay to the United States, filed this action. Plaintiffs seek redress for alleged treaty violations stemming from Mr. Breard's arrest.

In 1970, the United States and the Republic of Paraguay entered into the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"). Article 36(1) states that if an arrested foreign citizen so requests:

> (b) the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular

officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Paraguay and its officials argue that defendants, various officials representing the state of Virginia, failed to comply with this provision.

Plaintiffs also insist that the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") grants similar privileges. The United States and Paraguay entered into this treaty on February 4, 1859. It is still in effect. Although the Friendship Treaty does not contain a notice provision similar to that in the Vienna Convention, it does contain a "most favored nation clause." Under Article XII of the Treaty, "the Diplomatic Agents and Consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever." Based on this clause, Plaintiffs contend that they are entitled to immediate and mandatory notification of the arrest of any Paraguayan national. The United States has extended this privilege to other nations in bilateral agreements. See, e.g., Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2) & sec. 1 of protocol, 19 U.S.T. 5018; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, sec. 5, 30 U.S.T. 17.

In addition, Mr. Dos Santos argues that defendants' inaction gives rise to a claim under 42 U.S.C. § 1983. Mr. Dos Santos is the Consul General of the Republic of Paraguay to the United States. In his official capacity, he has jurisdiction over the consular district encompassing the Commonwealth of Virginia.

Plaintiffs request several forms of declaratory and injunctive relief. In particular, they ask that this Court:

1. Declare that defendants violated the Vienna Convention and Friendship Treaty by failing to notify plaintiffs of Breard's arrest.

2. Declare that defendants continue to violate both treaties by failing to afford plaintiffs a meaningful opportunity to give Breard assistance during the proceedings against him.
3. Declare Breard's conviction void.
4. Enjoin defendants from taking any action based on the conviction and declare that any further action based on the conviction is a continuing violation of the treaties.
5. Grant an injunction vacating Breard's conviction and directing defendants to abide by the treaties during any future proceedings against Breard.

Defendants have filed a motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Defendants' arguments fall into two general categories: (1) that this Court does not have subject matter jurisdiction over the claims presented and (2) that the plaintiffs' claims are otherwise non-justiciable.

II. *SUBJECT MATTER JURISDICTION*

A. *ELEVENTH AMENDMENT IMMUNITY*

The Eleventh Amendment places constitutional limits on federal court subject matter jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). The text of the amendment divests this Court of jurisdiction over actions against a state by "Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const. Amend XI. This language was soon interpreted to prohibit other actions against a state in federal court. *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890) (Eleventh Amendment bars suits against a state by one of its citizens); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781, 111 S. Ct. 2578, 2582, 115 L. Ed. 2d 686 (1991) (Eleventh Amendment bars suits against a state by an Indian Tribe). In particular, the Eleventh Amendment bars suits by a foreign government against a state government in federal court. *Seminole Tribe of Florida v. Florida*, --- U.S. ----, ---- - ----, 116 S. Ct. 1114,

1136-37, 134 L. Ed. 2d 252, 283 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934).

The Eleventh Amendment also bars suits against state officials that are in fact suits against a state. *Pennhurst*, 465 U.S. at 101-02, 104 S. Ct. at 908-09. However, there is a narrowly crafted exception to this rule. A party at risk of or suffering from a violation of federally protected rights may seek to enjoin the offending state officers. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Before issuing an Ex parte Young type injunction, the plaintiffs must satisfy two criteria: (1) they must show that they seek a remedy for a continuing violation of federal law and (2) they must show that the relief is prospective. *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 425-26, 88 L. Ed. 2d 371 (1986).

Much of the debate over the doctrine of *Ex parte Young* has involved the second criterion. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (allowing award of attorney's fees as ancillary to the grant of prospective relief); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (discussing the distinction between retroactive and prospective relief). Here, however, the Court must determine if Paraguay is the victim of a continuing violation of federal law. The Supreme Court has considered this issue on at least two occasions. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977). In *Papasan*, the Court distinguished those cases properly reviewable under the doctrine of *Ex parte Young* from those that "stretch that case too far." "Young has been focused on cases in which a violation of federal law by a state is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." Id. at 277-78, 106 S. Ct. at 2940. For example, in *Milliken*, the defendants were perpetuating a system of de jure segregation. They were in violation of federal law at the precise moment when the case was filed.

That is not the case here. The complaint does not state that defendants continue to deny plaintiffs access to Breard. There is no allegation that defendants refuse to allow plaintiffs to give Mr. Breard legal assistance. In fact, officials from the Republic of Paraguay

assisted in the preparation of Breard's habeas petition filed before this Court. Now that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties.

Plaintiffs urge that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today. Assuming the validity of this assertion, it is a tragic consequence of Virginia's failure to abide by the law. Nonetheless, it is still a consequence of the violation and not a continuing wrong. Although this Court is disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief. *Papasan*, 478 U.S. at 278, 106 S. Ct. at 2940; *Cory v. White*, 457 U.S. 85, 90, 102 S. Ct. 2325, 2328-29, 72 L. Ed. 2d 694 (1982); *Edelman*, 415 U.S. at 666-69, 94 S. Ct. at 1357-59.

B. *DISTRICT COURT REVIEW OF STATE COURT PROCEEDINGS*

Federal district courts are courts of limited jurisdiction. With the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841-42, 36 L. Ed. 2d 439 (1973). The Fourth Circuit has stated the precise limits of this Court's powers. "If the ... claims presented to a United States district court are inextricably intertwined with the merits of a state court judgment, then the district court is in essence being called upon to review the state-court decision. This the district court cannot do." *Leonard v. Suthard*, 927 F.2d 168, 169-70 (4th Cir. 1991) (internal citations and quotations omitted).

Yet, this is precisely what the plaintiffs request. They implore the Court to vacate Breard's conviction. Plaintiffs argue that this case is distinguishable from the cases above because this case is not an appeal. Paraguay and its officials do not request that the Court vacate Breard's sentence because of trial defects. Instead, plaintiffs are suing to vindicate their own rights under the treaties. Furthermore,

this is the first forum in which plaintiffs have sought relief. This is an accurate statement of the procedural posture of this case. Nevertheless, it does not vitiate the legal principles enunciated by the Supreme Court and the Fourth Circuit. Simply stated, this Court has no authority to disturb a state court ruling regardless of the procedural posture of the litigants. That power rests solely with the Supreme Court of the United States. *Feldman*, 460 U.S. at 476, 103 S. Ct. at 1311-12.

III. *JUSTICIABILITY*

A. *PARAGUAY'S STANDING UNDER THE TREATIES*

Defendants argue that Paraguay does not have standing. A plaintiff has standing to sue in federal court if: (1) the plaintiff has suffered an injury; (2) the defendants caused the injury; and (3) the injury is redressable by the Court. *Finlator, et al. v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). First, defendants insist that this Court has no power to redress the alleged treaty violations because the treaties do not provide a mechanism for litigation in federal court. Defendants have cited no authority for the proposition that the language of a treaty, or of any other contract, must set forth all applicable remedies. "Treaties are contracts between sovereigns." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). They have the same force as federal law. *United States v. Alvarez-Machain*, 504 U.S. 655, 668, 112 S. Ct. 2188, 2195-96, 119 L. Ed. 2d 441 (1992). As a party to the treaties, Paraguay has standing to seek redress for violations. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.) (treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress"), cert. denied, 498 U.S. 878, 111 S. Ct. 209, 112 L. Ed. 2d 169 (1990). Absent any other limitations, this Court has the power to interpret the treaties and fashion an equitable remedy. *See, e.g., Tabion*, 73 F.3d 535 (4th Cir. 1996) (construing the Vienna Convention); *In re Grand Jury*, 817 F.2d 1108 (4th Cir. 1987) (same); *U.S. v. Chindawongse, et al*, 771 F.2d 840 (4th Cir. 1985) (same).

Similarly, defendants maintain that this Court may not enforce the treaties because they are not "self-executing." The term "self-executing" has two distinct meanings in international law. Committee of *U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (citations omitted). Most frequently, the term is used to refer to a treaty that does not require implementing legislation before becoming federal law. *Id.* The parties agree that the treaties are "self-executing" under this definition. However, the term "self-executing" also denotes a treaty that confers rights of action on private individuals. *Id.* Absent such language, a private party may not seek redress for treaty violations. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442, 109 S. Ct. 683, 692-93, 102 L. Ed. 2d 818 (1989) (Geneva Convention on High Seas does not provide rights to private persons); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.) (Hague Convention on War on Land does not provide rights to private persons), cert. denied, 506 U.S. 955, 113 S. Ct. 411, 121 L. Ed. 2d 335 (1992). Defendants correctly note that the Vienna Convention and the Friendship Treaty are not "self-executing" in this sense. However, this observation has no bearing on the issues before this Court. Paraguay is not a private individual seeking enforcement of the treaty. It is an actual party to the contract and it has standing based on this status. *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("[u]nder international law, it is the contracting foreign government that has the right to complain about a violation"), cert. denied 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987).

Finally, defendants argue that this action is an impermissible attempt to assert third-party standing. A third-party may not assert the rights of another unless the third party demonstrates that the real party in interest is unable to litigate by virtue of "inaccessibility, mental incompetence, or other disability." *Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S. Ct. 1717, 1727-28, 109 L. Ed. 2d 135 (1990); *see also Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411 (1991). Although Paraguay seeks relief that would also benefit Mr. Breard, it is not asserting Mr. Breard's rights. As indicated above, Paraguay is a signatory to the treaties. It is the real party in interest in this matter and it has

standing to seek redress. *Matta-Ballesteros*, 896 F.2d at 259; *Rosenthal*, 793 F.2d at 1232.

B. *MR. DOS SANTOS' STANDING UNDER § 1983*

Only Jose Dos Santos, Consul General of the Republic of Paraguay, has asserted a claim under § 1983. In their motion to dismiss, defendants assume that Mr. Dos Santos, a Paraguayan official, is not a "person" within the meaning of the statute. This assumption is erroneous. *See, e.g., United States v. Wong Kim Ark*, 169 U.S. 649, 678-81, 18 S. Ct. 456, 468-69, 42 L. Ed. 890 (1898) (consul is person "subject to the jurisdiction" of the United States); *see also, Plyler v. Doe*, 457 U.S. 202, 211-213, 102 S. Ct. 2382, 2391-93, 72 L. Ed. 2d 786 (1982) (explaining that the term "within the jurisdiction of the United States" encompasses all persons within the territorial jurisdiction of the United States). Mr. Dos Santos is a proper plaintiff. Thus, his cause of action is not susceptible to a motion to dismiss for failure to state a claim based on defendants' theory.

C. *APPROPRIATENESS OF DECLARATORY RELIEF*

In defendants' opinion, this case is moot because they are no longer violating the treaties. As of April 1996, plaintiffs have been granted unfettered access to Mr. Breard. This turn of events does not render the case moot. "Voluntary cessation of allegedly illegal conduct does not deprive [a] tribunal of the power to hear and determine [a] case." *Commonwealth of Virginia ex. rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953)). In such cases, defendants have the burden of showing that they will not repeat the wrong. *Id.* Although defendants urge the Court to deny declaratory relief, they have not set forth one piece of

evidence to support their heavy burden.[8] Thus, absent any jurisdictional limitations, this case is suitable for declaratory relief.

IV. *CONCLUSION*

For the reasons stated above, this Court lacks subject matter jurisdiction over the issues presented. Accordingly, the Court GRANTS defendants' motion to dismiss.

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8 In fact, there is evidence that the Commonwealth has disregarded the Vienna Convention on at least one other occasion. *See, Murphy v. Netherland*, No. 3:95cv856, Memorandum Opinion at 6-8 (E.D.Va. July 26, 1996) (discussing Virginia's failure to notify Mexico when Mr. Murphy was detained, tried, and convicted).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL FRANCISCO BREARD,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, WARDEN,
MECKLENBURG CORRECTIONAL CENTER,
Respondent-Appellee.

THE HUMAN RIGHTS COMMITTEE OF
THE AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION,
Amicus Curiae.

No. 96-2

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-96-366-3)

Argued: October 1, 1997
Decided: January 22, 1998

Before HAMILTON and WILLIAMS, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Williams joined. Senior Judge Butzner wrote a concurring opinion.

COUNSEL

ARGUED: WILLIAM GRAY BROADDUS, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellant. DONALD RICHARD CURRY, *Senior Assistant Attorney General*, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

ON BRIEF: ALEXANDER H. SLAUGHTER, DOROTHY C. YOUNG, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia; MICHELE J. BRACE, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellant. Jeffrey L. Bleich, San Francisco, California, for Amicus Curiae.

OPINION

HAMILTON, *Circuit Judge:*

Following a jury trial in the Circuit Court for Arlington County, Virginia, Angel Francisco Breard, a citizen of both Argentina and Paraguay, was convicted and sentenced to death for the murder of Ruth Dickie. He now appeals the district court's denial of his petition for writ of habeas corpus. *See* 28 U.S.C.§ 2254. We affirm.

I

In February 1992, Ruth Dickie resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County, Virginia. At about 10:30 or 10:45 p.m. on February 17, 1992, Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, Isch called Joseph King, the maintenance person for the apartment complex. Upon arriving at Dickie's apartment, King knocked on the door and heard a noise that sounded like someone was being dragged across the floor. After receiving no response to his knocking, King called the police.

When the police arrived, they entered Dickie's apartment with a master key that King provided. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread. She was bleeding and did not appear to be breathing. The police observed body fluid on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. A telephone receiver located near her head was covered with blood.

An autopsy revealed that Dickie had sustained five stab wounds to the neck; two of which would have caused her death. Foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to hair samples taken from Breard. Hairs found clutched in Dickie's hands were Caucasian hairs microscopically similar to Dickie's own head hair and bore evidence that they had been pulled from her head by the roots. Semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects, and his DNA profile matched the DNA profile of the semen found on Dickie's body.

Breard was indicted on charges of attempted rape and capital murder. Following a jury trial, he was convicted of both charges. The jury fixed Breard's punishment for the attempted rape at ten years' imprisonment and a $100,000 fine. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder charge. Based upon findings of Breard's future dangerousness and the vileness of the crime, the jury fixed Breard's sentence at death. The trial court sentenced Breard in accordance with the jury's verdicts.

Breard appealed his convictions and sentences to the Supreme Court of Virginia, and that court affirmed. *See Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994). On October 31, 1994, the United States Supreme Court denied Breard's petition for a writ of certiorari. *See Breard v. Virginia*, 513 U.S. 971 (1994).

On May 1, 1995, Breard sought state collateral relief in the Circuit Court for Arlington County by filing a petition for writ of habeas corpus. On June 29, 1995, the circuit court dismissed the petition. On

January 17, 1996, the Supreme Court of Virginia refused Breard's petition for appeal.

Breard then sought federal collateral relief in the United States District Court for the Eastern District of Virginia by filing a petition for writ of habeas corpus on August 30, 1996. On November 27, 1996, the district court denied relief. *See Breard v. Netherland*, 949 F. Supp. 3 1255 (E.D. Va. 1996). On December 24, 1996, Breard filed a timely notice of appeal. On April 7, 1997, the district court granted Breard's application for a certificate of appealability as to all issues raised by Breard in his application. *See* 28 U.S.C.§ 2253; Fed. R. App. P. 22.

II

A

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended, among other things, 28 U.S.C. § 2244 and §§ 2253-2255, which are parts of the Chapter 153 provisions that govern all habeas proceedings in federal courts. The AEDPA, which became effective on April 24, 1996, also created a new Chapter 154, applicable to habeas proceedings against a state in capital cases. The new Chapter 154 applies, however, only if a state "opts in" by establishing certain mechanisms for the appointment and compensation of competent counsel. In *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), the Supreme Court held that § 107(c) of the AEDPA, which explicitly made new Chapter 154 applicable to cases pending on the effective date of the AEDPA, created a "negative implication . . . that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.* at 2068. Thus, under *Lindh*, if a habeas petition was filed before April 24, 1996, the pre-AEDPA habeas standards apply. *See Howard v. Moore*, 1997 WL 755428, at *1 (4th Cir. Dec. 9, 1997) (*en banc*) ("Howard filed his habeas petition in the district court prior to April 26, 1996, the effective date of the AEDPA. We, therefore, review Howard's claims under pre-AEDPA law." (Footnote omitted)). For habeas petitions filed after April 24, 1996, then, the Chapter 153 provisions apply, *see Murphy v. Netherland*,

116 F.3d 97, 99-100 & n.1 (4th Cir. 1997) (applying amended § 2253 in case where state prisoner filed federal habeas petition after the effective date of the AEDPA), and the Chapter 154 provisions apply if the state satisfies the "opt-in" provisions.

Breard filed his federal habeas petition on August 30, 1996. Accordingly, the Chapter 153 provisions apply. *See Howard*, 1997 WL 755428, at *1. With respect to the Chapter 154 provisions, the district court held that they did not apply because the Commonwealth of Virginia did not satisfy the "opt-in" provisions of the AEDPA. *See Breard v. Netherland*, 949 F. Supp. at 1262. Because the Commonwealth of Virginia has not appealed this ruling and the record is not developed on this point, we decline to address whether the Commonwealth of Virginia's mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfies the "opt-in" provisions of the AEDPA. *Cf. Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (declining to decide whether the procedures established by the Commonwealth of Virginia for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfy the "opt-in" requirements, which would render those provisions applicable to indigent Virginia prisoners seeking federal habeas relief from capital sentences if an initial state habeas petition was filed after July 1, 1992), *cert. denied*, 117 S. Ct. 503 (1996). However, we are confident that the "opt-in" provisions are of no help to Breard.

B

Initially, Breard contends that his convictions and sentences should be vacated because, at the time of his arrest, the Arlington County authorities failed to notify him that, as a foreign national, he had the right to contact the Consulate of Argentina or the Consulate of Paraguay pursuant to the Vienna Convention on Consular Relations, *see* 21 U.S.T. 77. The Commonwealth of Virginia argues that Breard did not raise his Vienna Convention claim in state court and thus failed to exhaust available state remedies. Furthermore, because Virginia law would now bar this claim, the Commonwealth of Virginia argues that Breard has procedurally defaulted this claim for

purposes of federal habeas review. The district court held that, because Breard had never raised this claim in state court, the claim was procedurally defaulted and that Breard failed to establish cause to excuse the default. *See Breard v. Netherland*, 949 F. Supp. at 1263. Breard's failure to raise this issue in state court brings into play the principles of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1.

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner

had knowledge at the time of filing any previous petition."). Breard contends that he had no reasonable basis for raising his Vienna Convention claim until April 1996 when the Fifth Circuit decided *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied*, 117 S. Ct. 487 (1996). In that case, the court held that an arrestee's rights under the Vienna Convention were violated when Texas officials failed to inform the arrestee of his right to contact the Canadian Consulate. *Id.* at 520. Breard further maintains that he could not have raised his Vienna Convention claim in his state habeas petition because the Commonwealth of Virginia failed to advise him of his rights under the Vienna Convention. These allegations, however, are inadequate to demonstrate that the facts upon which Breard bases his Vienna Convention claim were unavailable to him when he filed his state habeas petition.

In *Murphy*, we rejected a state habeas petitioner's contention that the novelty of a Vienna Convention claim and the state's failure to advise the petitioner of his rights under the Vienna Convention could constitute cause for the failure to raise the claim in state court. *See* 116 F.3d at 100. In reaching this conclusion, we noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention have been raised:

> The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention. Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since Murphy's state proceedings, apparently had and have had no difficulty whatsoever learning of the Convention. *See, e.g.*, *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Mami v. Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States v. Rangel-Gonzales* , 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591

F.2d 529 (9th Cir. 1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979). *Id.*

Murphy forecloses any argument that Breard could not have raised his Vienna Convention claim at the time he filed his initial state habeas petition in May 1995. Accordingly, Breard's Vienna Convention claim would be procedurally defaulted if he attempted to raise it in state court at this time. Having reached this conclusion, we can only address Breard's defaulted Vienna Convention claim if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In order to demonstrate "cause" for the default, Breard must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Murphy*, 116 F.3d at 100 (applying *Murray* and finding that petitioner failed to establish cause to excuse the default of his Vienna Convention claim). For the same reasons discussed above, Breard asserts that the factual basis for his Vienna Convention claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause. But, under *Murphy*, Breard's showing is insufficient to allow this court to conclude that the factual basis for his Vienna Convention claim was unavailable. Consequently, there is no cause for the procedural default. Accordingly, we do not discuss the issue of prejudice. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995) (noting that once court finds the absence of cause, court should not consider the issue of prejudice to avoid reaching alternative holdings), *cert. denied*, 116 S. Ct. 1575 (1996).

Finally, we find it unnecessary to address the issue of whether the AEDPA abrogated the "miscarriage of justice" exception to the procedural default doctrine. Assuming *arguendo* that the AEDPA has not eliminated the miscarriage of justice exception articulated in *Murray*, 477 U.S. at 495-96 (miscarriage of justice exception available to those who are actually innocent), and *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992) (miscarriage of justice exception available to those who are actually innocent of the death penalty, *i.e.*, those

habeas petitioners who prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty), no miscarriage of justice occurred here. In no set of circumstances has Breard made a showing that he is actually innocent of the offense he committed, *see Murray* , 477 U.S. at 49596, or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty, *see Sawyer*, 505 U.S. at 350. Accordingly, Breard is entitled to no relief on his Vienna Convention claim.

C

Breard also contends that his death sentence violates *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. In asserting this claim, Breard argues that: (1) given the prosecutor's alleged offer to forego the death penalty if Breard would plead guilty, the prosecutor violated his constitutional rights by seeking and obtaining a death sentence once Breard insisted upon pleading not guilty; (2) the Commonwealth of Virginia imposes the death penalty arbitrarily in capital murder cases; and (3) his death sentence is unconstitutionally disproportionate. The first two claims mentioned above were never raised in state court. The remaining claim was raised on direct appeal, but only as a state law claim, and on the appeal from the denial of state habeas relief the Virginia Supreme Court found this claim procedurally barred under the rule of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (holding that issues not properly raised on direct appeal will not be considered on state collateral review). Because Breard has not established cause for the obvious procedural default of these claims or that a miscarriage of justice would result by our failure to consider any one of these claims, we cannot address the merits.

D

Finally, Breard argues that the aggravating circumstances instructions given by the trial court are unconstitutionally vague. This claim is not procedurally barred because the Supreme Court of

Virginia rejected it on direct appeal. *See Breard v. Commonwealth*, 445 S.E.2d at 675. In his brief, Breard concedes that we have upheld similar instructions in the recent cases of *Bennett*, 92 F.3d at 1345 (rejecting vagueness challenge to the Commonwealth of Virginia's vileness aggravating circumstance), and *Spencer v. Murray*, 5 F.3d 758, 76465 (4th Cir. 1993) (rejecting vagueness attack on the future dangerousness aggravator). Furthermore, Breard states that he is raising this claim on appeal only "to preserve this claim for future review should such be necessary." *See* Petitioner's Br. at 37. As a panel of this court, we are bound by *Bennett* and *Spencer*, *see Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (one panel of this court may not overrule another panel's decision); therefore, we must reject Breard's attack on the constitutionality of the aggravating circumstances instructions given by the trial court.

III

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

BUTZNER, *Senior Circuit Judge*, concurring:

I concur in the denial of the relief requested by Angel Francisco Breard. I write separately to emphasize the importance of the Vienna Convention.

I

The Vienna Convention facilitates "friendly relations among nations, irrespective of their differing constitutional and social systems." The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 78, 79 (*ratified by the United States* Nov. 12, 1969). Article 36, provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

* * *

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. *Id.* at 101.

II

The Vienna Convention is a self executing treaty--it provides rights to individuals rather than merely setting out the obligations of signatories. *See Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (assuming the same). The text emphasizes that the right of consular notice and assistance is the citizen's. The language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government.

The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. *See Head Money Cases*,

112 U.S. 580, 598-99 (1884). The Supremacy Clause mandates that rights conferred by a treaty be honored by the states. United States Const. art. VI, cl. 2. The provisions of the Convention should be implemented before trial when they can be appropriately addressed. Collateral review is too limited to afford an adequate remedy.

III

The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world--as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).

The State Department has advised the states, including Virginia, of their obligation to inform foreign nationals of their rights under the Vienna Convention. It has advised states to facilitate consular access to foreign detainees. Prosecutors and defense attorneys alike should be aware of the rights conferred by the treaty and their responsibilities under it. The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

U.S. CONST. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls * * *

U.S. CONST. art. VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

* * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to

communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091

* * *

Article XII

* * *

The diplomatic agents and consuls of the United States of America in the territories of the Republic of Paraguay shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to the diplomatic agents and consuls of any other nation whatever; and, in like manner, the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever.

Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426

* * *

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018

* * *

Article 12

* * *

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

* * *

PROTOCOL
To the Consular Convention Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

* * *

Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, 30 U.S.T. 17

* * *

5. If a citizen of the sending country is arrested or detained in any manner, the authorities of the receiving country shall, without delay, notify the consular post or embassy accordingly of the arrest or detention of the person and permit access by a consular officer of the sending state to the citizen who is under arrest or detained in custody.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853 (October 19, 1996) (WESTLAW through all 1996 legislation).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs,

-against-

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; JAMES S. GILMORE III, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; J.D. NETHERLAND, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; and WILLIAM K. STOVER, Chief of Police for the County of Arlington,

Defendants.

Civil Ac

COMPLAINT

(For Declaratory And Other Relief For Defendants' Violations Of Two Treaties Of The United States)

This action is brought by plaintiffs Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José Antonio Dos Santos, as Consul General of the Republic of Paraguay to the United States, for the defendants' violations of their duties to the plaintiffs under two treaties of the United States of America.

NATURE OF THE ACTION

1. Plaintiffs bring this action for declaratory and injunctive relief preventing the defendants from continuing their violations of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention") and the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty").

2. In addition, plaintiff Dos Santos seeks equitable relief, pursuant to this Court's powers under 42 U.S.C. § 1983, requiring the defendants to accord plaintiffs the rights under those treaties that wrongfully have been withheld and reinstating the status quo as of the time plaintiffs' rights were violated.

3. In violation of treaty obligations binding on defendants as the law of the United States and owed directly to the Republic of Paraguay and its consular officers, the defendants and their predecessors, employees, officers and agents (*I*) failed to inform a Paraguayan citizen, Angel Francisco Breard, after he was arrested of his right to seek the assistance of Paraguayan consular officers, as

required by article 36, section 1(b) of the Vienna Convention, (*2*) failed to notify Paraguayan consular officers directly that a Paraguayan citizen had been arrested, as required by article XII of the Friendship Treaty, and (*3*) failed to provide plaintiffs a meaningful opportunity to provide consular assistance to Mr. Breard during the proceedings against him, as required by those two treaties.

JURISDICTION AND VENUE

4. This is a case "affecting Ambassadors . . . and Consuls" within the original jurisdiction of the United States Supreme Court under article III, section 2 of the United States Constitution. Under 28 U.S.C. § 1251(b)(1), however, the original jurisdiction of the United States Supreme Court is not exclusive. This action may properly be brought in this Court.

5. This action arises under two treaties of the United States, the Vienna Convention and the Friendship Treaty, and under 42 U.S.C. § 1983. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

6. The defendants reside in this district. The acts complained of herein have all taken place, and continue to take place, in this district. The claims arose in this district. Venue is proper under 28 U.S.C. § 1391(b).

7. All defendants reside in the Commonwealth of Virginia and at least one defendant resides within this division. A substantial part of the events or omissions giving rise to the claims asserted herein occurred in this division. Suit may properly be instituted in this division pursuant to Local Rule 4 and 28 U.S.C. § 1391(b)(1).

THE PARTIES AND OTHER RELEVANT PERSONS

8. Plaintiff Republic of Paraguay is a foreign state.

9. Plaintiff Jorge J. Prieto is the Ambassador of the Republic of Paraguay to the United States. At all relevant times, he had supervisory authority over the consular officers of the Republic of Paraguay in the United States, including consular officers based in the Embassy of Paraguay in Washington, D.C.

10. Plaintiff José Antonio Dos Santos is the Consul General of the Republic of Paraguay to the United States with jurisdiction over the consular district encompassing the Commonwealth of Virginia.

11. Plaintiffs Prieto and Dos Santos bring this action in their capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay.

12. Angel Francisco Breard is a citizen of Paraguay and, on information and belief, also of Argentina. His dominant citizenship is Paraguayan. Mr. Breard is not a citizen of the United States. He is currently a prisoner of the Commonwealth of Virginia and has been sentenced to death. But for the defendants' violations of the Vienna Convention and the Friendship Treaty, Mr. Breard would not currently face the death penalty.

13. Defendant George F. Allen is the Governor of the Commonwealth of Virginia. Pursuant to article V, section 7 of the Constitution of Virginia, the Governor is responsible for "tak[ing] care that the laws be faithfully executed." That responsibility, by virtue of the Supremacy Clause of the United States Constitution, extends to treaties signed by the United States and ratified by the United States Senate. U.S. Const. art. VI.

14. Defendant James S. Gilmore III is the Attorney General of the Commonwealth of Virginia. He is "the chief executive officer of the Department of Law, and as such shall perform such duties as may be provided by law," including, together with the Commonwealth's Attorney, notifying the trial court that an execution date is to be set when all appeals and collateral proceedings in a death penalty case are completed. Va. Code Ann. §§ 2.1-117, 53.1-232.1 (1996).

15. Defendant Ronald J. Angelone is the Director of Corrections for the Commonwealth of Virginia and is ultimately responsible for carrying out sentences involving a felony in the Commonwealth of Virginia. Va. Code Ann. §§ 19.2-310, 53.1-17, 53.1-20 (1996).

16. Defendant David A. Garraghty is the Warden of the Greensville Correctional Facility in Jarratt, Virginia, and is responsible for executing prisoners sentenced to death in the Commonwealth of Virginia.

17. Defendant J.D. Netherland is the Warden of the Mecklenburg Correctional Facility in Boydton, Virginia, and is responsible for incarcerating prisoners held in that facility, including Mr. Breard.

18. Defendants Paul F. Sheridan, Benjamin N.A. Kendrick, William Newman, Jr. and William L. Winston are Judges of the Circuit Court of Arlington County, Virginia. Under the Virginia Code, Judges of the Circuit Court of Arlington County have administrative responsibility for setting an execution date for Mr. Breard. Va. Code Ann. §§ 53.1-232.1, 53.1-232, 53.1-234 (1996).

19. Defendant Richard E. Trodden is the Commonwealth's Attorney for the County of Arlington and is responsible, together with the Chief of Police, for law enforcement activities in the County of Arlington. Va. Code Ann. §§ 15.1-643, 15.1-8.1 (1996).

20. Defendant William K. Stover is the Chief of Police for the County of Arlington and is responsible, together with the Commonwealth's Attorney, for law enforcement activities in the County of Arlington. Va. Code Ann. § 15.1-769 (1996).

FACTS

The Vienna Convention

21. On April 24, 1963, exercising the exclusive power to conduct foreign relations granted to the President of the United States, an officer of the executive branch of the United States signed the Vienna Convention. U.S. Const. art. I, sec. 10; *id.* art. II, sec. 2. The Senate ratified the Vienna Convention on October 22, 1965. The Vienna Convention is part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

22. Paraguay deposited its instrument ratifying the Vienna Convention on December 23, 1969. The Vienna Convention entered into force as between Paraguay and the United States thirty days thereafter. The Vienna Convention is in force as between the United States and Paraguay.

23. The Vienna Convention is a self-executing treaty. No legislation is required to implement its provisions.

24. The Vienna Convention recognizes that sovereign states, such as the Republic of Paraguay, have an interest in protecting the life, liberty and property of their citizens abroad, and that that interest can only be safeguarded by protecting the functions of consular officers.

25. Among the consular functions protected by the Vienna Convention are

> (a) protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state; . . .
>
> (i) . . . representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests; . . .

Vienna Convention art. 5.

26. In the context of the arrest or detention of foreigners, the Vienna Convention defines the functions of the foreign prisoner's consulate. If an arrested foreigner so requests:

> the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or

detention shall also be forwarded by the said authorities without delay.

Id. art. 36, sec. 1(b).

27. It is the express obligation of the host authorities to "inform the person concerned without delay of his rights under this subparagraph [article 36, section 1 of the Vienna Convention]." *Id.*

28. The obligation imposed by article 36, section 1 of the Vienna Convention, and the attendant right granted thereby, is owed separately and independently to the arrested foreigner and to the consular officers of the relevant state party to the Vienna Convention.

The Friendship Treaty

29. On February 4, 1859, the Governments of Paraguay and the United States entered into a treaty of Friendship, Commerce, and Navigation. On February 11, 1859, Paraguay ratified the Friendship Treaty.

30. The Senate ratified the Friendship Treaty on February 27, 1860. The Friendship Treaty is in effect between the United States and Paraguay.

31. The Friendship Treaty is self-executing. No legislation is required to implement its provisions.

32. Under article XII of the Friendship Treaty, "the Diplomatic Agents and Consuls of the Republic of Paraguay in the Untied States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever."

33. Under bilateral agreements with numerous other nations, including the United Kingdom and the Russian Federation, the United States has granted to consuls of those nations the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals. *E.g.*, Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2) & sec. 1 of protocol, 19 U.S.T. 5018; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, sec. 5, 30 U.S.T. 17.

34. Authorities in the United States arresting a citizen of Paraguay are therefore required, pursuant to article XII of the Friendship Treaty, immediately to notify Paraguayan consular officers of the arrest or detention of a Paraguayan citizen.

Defendants' Failure To Comply With
The Treaties' Notification Requirements

35. The United States Department of State informs state officials of the duties of arresting authorities under the Vienna Convention and bilateral treaties through periodic printed notices. These notices place state officials on notice of the requirement that any detained citizen of a nation that has signed the Vienna Convention "must be informed without delay of the right to have his/her government notified" and provide them with the addresses and telephone numbers of the embassies and consulates of nations to which the duties are owed. Paraguay and Argentina are among the nations specifically listed, and for whose embassies and consulates the addresses and telephone numbers are provided.

36. Defendants or their predecessors, employees, officers or agents had received such notices from the United States Department of State before the arrest of Mr. Breard described below.

37. Nevertheless, for an extended period of time, and, in the very least, since 1991, the defendants and their predecessors, employees, officers and agents have adhered to a pattern and practice of disregarding their obligations to notify consular officers under the Vienna Convention and bilateral treaties.

Mr. Breard's Arrest

38. On September 1, 1992, Mr. Breard was arrested by the Arlington County police department for the murder of Ruth Dickie.

39. On information and belief, defendants or their predecessors, employees, officers or agents were aware prior to Mr. Breard's trial that he was a Paraguayan citizen.

40. Neither the defendants, their predecessors, employees, officers or agents, nor any agent of the United States ever informed Mr. Breard of his rights under Article 36 of the Vienna Convention.

41. Mr. Breard was unaware of the Vienna Convention until sometime in May 1996. He had no knowledge of the rights accorded him pursuant to the Vienna Convention.

42. Had the defendants informed Mr. Breard of his rights under Article 36, he would have exercised his right to contact the Argentine and Paraguayan consulates for assistance with his defense.

43. Neither the defendants, their predecessors, employees, officers or agents, nor any agent of the United States has ever informed the Republic of Paraguay or its consular officers at any time that the Commonwealth arrested Mr. Breard.

44. Had Paraguayan consular officers been notified of Mr. Breard's arrest, plaintiffs Prieto or Dos Santos or other such officers would have provided Mr. Breard assistance including consular visits to Mr. Breard; advice on cultural and legal differences between Mr. Breard's countries and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; additional or other legal counsel; the location of family members for assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; and other forms of assistance both legal and non-legal.

Mr. Breard's Court Proceedings In Virginia

45. On October 19, 1992, Mr. Breard was indicted for attempted rape and for the capital offense of murder in the commission of or subsequent to rape or attempted rape. On June 21, 1993, he was arraigned and pleaded not guilty to these charges. He was represented by court-appointed counsel. The plaintiffs were strangers to Mr. Breard's criminal proceedings.

46. Before trial, the Commonwealth of Virginia made clear to Mr. Breard's defense counsel that, if Mr. Breard would agree to plead guilty to the murder, the Commonwealth would not seek the death penalty. Against the advice of his defense counsel, Mr. Breard refused to accept the plea offer.

47. On information and belief, Mr. Breard's refusal to accept the plea offer was based upon a fundamental misunderstanding of the differences between the criminal justice system in the United States and that in Paraguay, which tends to extend leniency to defendants who voluntarily confess to their crimes at trial and renounce their past

criminal conduct. Had Paraguayan consular officers been afforded their right to communicate with Mr. Breard, they would have explained these distinctions to Mr. Breard and been able to review with him the desirability of the proffered plea agreement more effectively than his defense counsel, who were essentially unfamiliar with Paraguay's system of criminal justice and social mores.

48. Mr. Breard's criminal trial took place between June 21 and June 25, 1993. No interpreter was provided for Mr. Breard at any stage of the proceedings in this case. Mr. Breard was not aware that even though he spoke and understood English to a degree, he was nevertheless entitled to an interpreter to assist him.

49. Against the advice of his counsel, Mr. Breard voluntarily took the witness stand, confessed to the crimes charged and renounced his past criminal conduct.

50. On June 24, 1993, the jury returned a verdict of guilty. On June 25, 1993, after hearing evidence related to sentencing, the jury sentenced Mr. Breard to death.

51. As a result of the defendants' failure to respect the consular communication rights provided by the Vienna Convention and the Friendship Treaty, Paraguayan consular officers were unable to assist Mr. Breard in collecting and presenting at the sentencing phase material mitigating evidence that could have been offered in support of a sentence of imprisonment rather than death.

52. On August 22, 1993, the court conducted a sentencing hearing and entered an order in accordance with the verdict, setting Mr. Breard's execution date for February 17, 1994. The court subsequently stayed Mr. Breard's execution to allow the filing of his appeals.

53. Mr. Breard's direct appeals in the courts of the Commonwealth of Virginia were rejected. In addition, Mr. Breard's state habeas corpus proceedings were unsuccessful. There are no further judicial proceedings concerning Mr. Breard pending in the courts of the Commonwealth of Virginia.

54. On August 30, 1996, Mr. Breard filed a petition for a writ of habeas corpus in this Court. Mr. Breard is currently being held on death row at the Mecklenburg Correctional Facility. No date for his execution is scheduled.

55. Unless Mr. Breard's conviction is vacated and the defendants are ordered to comply with applicable treaties in any further proceedings concerning Mr. Breard, plaintiffs will have no meaningful opportunity to exercise the rights guaranteed to them by the Vienna Convention and the Friendship Treaty.

COUNT ONE
(Continuing Violation of the Vienna Convention)

56. Plaintiffs repeat and reallege paragraphs 1 through 55.

57. Defendants, their predecessors, employees, officers and agents violated their legal obligations, pursuant to Article 36 of the Vienna Convention, to inform Mr. Breard after he was arrested on September 1, 1992 of his right to seek the assistance of Paraguayan consular officers.

58. The legal obligations violated by the defendants are owed both to Mr. Breard and to the Republic of Paraguay and its consular officers. The defendants' violations prevented plaintiffs Prieto and Dos Santos and other Paraguayan consular officers from aiding and

advising Mr. Breard in the complex details of his arrest, trial and post-conviction proceedings.

59. On information and belief, the United States and the Republic of Paraguay are in accord on the interpretation and application of the Vienna Convention with respect to Mr. Breard's case.

60. As a result, the defendants' violation of the Vienna Convention rendered Mr. Breard's conviction void.

61. Any further actions by the defendants, their successors, employees, officers or agents based on Mr. Breard's illegal conviction would constitute a continuation of the violation of the Vienna Convention and, therefore, the law of the United States.

COUNT TWO
(Violation of the Friendship Treaty)

62. Plaintiffs repeat and reallege paragraphs 1 through 61.

63. Defendants, their predecessors, employees, officers and agents violated their legal obligations, pursuant to article XII of the Friendship Treaty, immediately to notify Paraguayan consular officers of the fact that a Paraguayan citizen, Mr. Breard, had been arrested within the defendants' jurisdiction.

64. Defendants' failure to abide by the law, as prescribed by the Friendship Treaty, prevented plaintiffs Prieto and Dos Santos and other Paraguayan consular officers from assisting Mr. Breard in the legal processes he was subjected to following his arrest and renders Mr. Breard's conviction void.

65. Any further actions by defendants or their successors, employees, officers or agents based on Mr. Breard's illegal conviction would constitute a continuation of the violation of the Friendship Treaty and, therefore, the law of the United States.

COUNT THREE
(Violation of 42 U.S.C. § 1983)

66. Plaintiffs repeat and reallege paragraphs 1 through 65.

67. Plaintiff Dos Santos is a person within the jurisdiction of the United States.

68. Pursuant to the Supremacy Clause, the Vienna Convention and the Friendship Treaty secured to plaintiffs, under the laws of the United States, the rights and privileges to have Mr. Breard informed of his right to seek the assistance of Paraguayan consular officers after he was arrested, to be notified directly and immediately that Mr. Breard had been arrested within the jurisdiction of the defendants and to provide meaningful consular assistance to Mr. Breard during the course of the proceedings against him.

69. Defendants, and their predecessors, employees, officers and agents, acted under color of state law in failing to inform Mr. Breard of his rights, to notify plaintiffs of Mr. Breard's arrest and to provide plaintiffs a meaningful opportunity to communicate with and otherwise assist Mr. Breard during the course of the proceedings against him.

70. Defendants' acts and omissions constitute violations of plaintiffs' rights and privileges under the laws of the United States and empower this Court to grant equitable relief under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the defendants violated the provisions of the Vienna Convention by failing to notify Mr. Breard of his right to seek the assistance of the Consul General of Paraguay.

B. Declare that the defendants violated the provisions of the Friendship Treaty by virtue of their failing immediately to notify the consular officers of the Republic of Paraguay that Mr. Breard, a citizen of Paraguay, had been arrested.

C. Declare that the defendants violated, and continue to violate, the provisions of both such treaties by failing to afford plaintiffs a meaningful opportunity to provide Mr. Breard consular assistance during the proceedings against him.

D. Declare the conviction of Mr. Breard void.

E. Declare that any future actions taken by defendants based on the illegal conviction of Mr. Breard, including his execution, would constitute continuations of the violations of the Vienna Convention and the Friendship Treaty, and enjoin the defendants from committing any such future violations.

F. Order prospective injunctive relief requiring vacation of Mr. Breard's conviction and mandating that the defendants, in any further proceedings involving Mr. Breard, afford plaintiffs all rights due them under the Vienna Convention and the Friendship Treaty.

G. Grant such other and further relief as to this Court seem just and proper.

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