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

BRIEF OF AMICI CURIAE FOR THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION and THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Vienna Convention on Consular Relations, a duly signed and ratified treaty obligation, is binding upon state and local law enforcement officials?

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INTERESTS OF THE *AMICI CURIAE*

This *amicus* brief is respectfully submitted jointly by the Human Rights Committee of the American Branch of the International Law Association and the Lawyers Committee for Human Rights.[1]

The Human Rights Committee of the American Branch of the International Law Association (hereinafter "Human Rights Committee") is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law.[2] Members of the Committee have taught subjects such as international law, human rights law, foreign relations law, and constitutional law and have written extensively in these fields. They have litigated cases at the trial and appellate court levels, including the Supreme Court. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate and have submitted reports on a variety of issues including human rights and international law. The Human Rights Committee has a longstanding interest in the progressive development of international human rights law. It is committed to the international legal order, the rule of law and the protection of fundamental human rights.

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[1]All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity, other than *amici*, their members or counsel, have made a monetary contribution to the preparation or submission of the brief.

[2]The Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The American Branch is one of 40 branches of the International Law Association. The views expressed herein represent only those of the Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in the preparation of this *amicus* brief.

The Lawyers Committee for Human Rights (hereinafter "Lawyers Committee") was established in 1978 and is the largest legally focused non-governmental human rights organization in the United States. Its work is impartial, holding all governments including the United States to the standards set forth in the International Bill of Rights and advocating for domestic implementation of international human rights law. Working in close collaboration with volunteer attorneys throughout the United States and lawyers and human rights advocates in other countries, the Lawyers Committee seeks to develop legal principles and to build legal institutions and structures that will guarantee human rights in the long term. The Lawyers Committee testifies before Congress and regularly consults with the Department of State, the National Security Council and various administrative agencies to ensure that the United States complies with its obligations under international human rights treaties. The Lawyers Committee also participates in litigation, most often as amicus curiae, to provide expert legal analysis on important aspects of international human rights and refugee law.

The *amici* are deeply concerned by the consistent disregard of the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (hereinafter "Vienna Convention") by the Commonwealth of Virginia as well as other states.[3] The *amici* are also troubled by the Fourth Circuit's refusal

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[3] This case also involves the 1859 Treaty of Friendship, Commerce and Navigation between the United States and Paraguay, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091. The Treaty of Friendship contains a most-favored nation clause with respect to consular and diplomatic agents. Article XII 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, granted to Agents of any other Nation whatever." Under the terms of the most-favored nation clause, both countries gain the benefits of other consular agreements which may contain more favorable provisions. While this

(continued...)

to act upon these violations. The failure of state officials to comply with the obligations set forth in the Vienna Convention has given rise to several complaints by foreign governments against the United States in international tribunals.[4] Violations have also given rise to lawsuits by foreign governments against individual states in U.S. courts.[5] It is precisely these sorts of consequences that the Framers of the Constitution sought to avoid by recognizing the importance of treaties in our constitutional scheme. Compliance with international obligations cannot be held hostage to the parochial interests of the states. Indeed, the primacy of treaty obligations over inconsistent state practice has long been recognized by the Supreme Court.

Consular access serves an integral role in the protection of human rights, including due process rights. Foreign nationals, who are often unfamiliar with the language, culture or legal system of the detained state, benefit from prompt communication with consular officials. At the same time, foreign governments are able to monitor the safety and fair treatment of their nationals. Thus,

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(...continued)
brief focuses on the Vienna Convention, the arguments made throughout the brief apply with equal force to the Treaty of Friendship.

[4]*See* Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Carlos Santana, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993); Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Cesar Fierro, Case 11.331, Inter-Am. C.H.R. (July 21, 1994).

[5]In addition to the present case, the Mexican government initiated a lawsuit against Arizona officials due to their failure to comply with the Vienna Convention on Consular Relations. *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997) *pet. for cert. filed* (Feb. 18, 1998)(No. 97-1365).

consular access ensures that foreign nationals in all countries are treated fairly and without prejudice to their nationality.

Failure to abide by these well-established principles will have a deleterious effect on U.S. foreign policy interests as well as the safety of U.S. citizens abroad. It also raises serious questions about the U.S. commitment towards the rule of law. For these reasons, the *amici* have respectfully filed this amicus brief and urge the Court to grant review.

SUMMARY OF ARGUMENT

This case involves the Vienna Convention on Consular Relations and its application in the United States. The United States has signed and duly ratified the Vienna Convention. The treaty and its provisions on consular access have been recognized to be self-executing. Under the Supremacy Clause of the United States Constitution and based upon well-established Supreme Court precedent, such treaty obligations are binding in the United States and take precedence over inconsistent state law and practice.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS ESTABLISHES A FOREIGN NATIONAL'S RIGHT TO CONSULAR ACCESS

The importance of consular relations has long been recognized. Indeed, its roots can be traced back to the city-states of ancient Greece. Luke Lee, CONSULAR LAW AND PRACTICE 3-7 (2nd ed. 1991). As an effective political institution, however, the consul did not truly develop until the dawning of the commercial age during the Middle Ages. Gradually, nation-states began entering consular agreements to regulate consular relations. By the twentieth century, consular agreements had been adopted by most countries.

It was not until 1963 that the rules and norms on consular relations were formally codified. On April 24, 1963, the United

Nations Conference on Consular Relations adopted the Vienna Convention on Consular Relations and two optional protocols. The Vienna Convention entered into force on March 19, 1967. According to its Preamble, the Vienna Convention was established to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." The Preamble adds that the purpose of consular privileges and immunities is "to ensure the efficient performance of functions by consular posts on behalf of their respective states."

The Vienna Convention defines and guarantees consular rights, privileges and duties. Article 5 of the Convention lists a number of consular functions. These cover a wide variety of responsibilities including: furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state; issuing passports and travel documents; serving as a notary and civil registrar; transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state; and exercising rights of supervision and inspection of vessels and aircraft of the sending state. One of the most important responsibilities of the consul is to protect the nationals of the sending state. Accordingly, Article 5(e) provides that consular functions include "helping and assisting nationals, both individuals and bodies corporate, of the sending State."

The Vienna Convention recognizes that communication is essential for facilitating the exercise of consular functions relating to nationals of the sending state. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, nationals of the sending state. Similarly, nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state.

A particularly sensitive issue arises when a national is detained by the receiving state. Article 36(1)(b) provides that the competent authorities of the receiving state shall, without delay,

inform a national of his right to notify the consular post that he has been detained:[6]

> (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;

Article 36(1)(c) grants consular officers the right to visit, converse and correspond with a national who is in detention and to arrange for his legal representation:

> (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.

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[6]Due to the most-favored nation clause contained in the Treaty of Friendship, there is also an affirmative obligation to notify consular officials when a foreign national is detained even if the foreign national makes no request for consular access.

Finally, Article 36(2) provides that the laws and regulations of the receiving state must enable full effect to be given to these rights:[7]

> 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.

Similarly, Article 14 declares that the receiving state shall "ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention."

Essentially, consular access serves two functions. It serves the needs of foreign nationals who benefit from prompt communication with consular officials as well as their intervention during legal proceedings. It provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. It also serves the needs of foreign governments. It enables foreign governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained nationals.

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[7]Prior to the approval of Article 36(2), the Soviet Union proposed an amendment which would have permitted a country's domestic law to impair the rights set forth in Article 36(1). According to the Soviet delegate, Article 36(2) could force states to alter their criminal laws and allow consular officials to interfere with the legal process in order to protect aliens. U.N. GAOR, Conference on Consular Relations, 12th Plenary Meeting, Agenda Item 10, para. 2-9, U.N. Doc. A/CONF.25/SR.12, 17 (1963), at 1. The amendment was defeated.

II. THE VIENNA CONVENTION RIGHT TO CONSULAR ACCESS APPLIES BOTH TO UNITED STATES CITIZENS ABROAD AND TO FOREIGN NATIONALS IN THE UNITED STATES

The United States signed the Vienna Convention on April 24, 1963. The Senate subsequently approved the Convention on October 22, 1969, and it was formally ratified by the President on November 12, 1969. The ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969.

A. The United States Has Consistently Relied on the Vienna Convention to Protect Its Citizens Abroad

Following the adoption of the Vienna Convention by the United States, the State Department stressed the importance of consular access as codified in Article 36. In an October 1973 memorandum, the State Department noted that:

> [i]n the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly. Article 36, paragraph 1(b) requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or commitment of a national of the sending state, if that national so requests. While there is no precise definition of 'without delay,' it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days.

Dept. of State File L/M/SCA, *reprinted in* Arthur Rovine, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1974).

The State Department has regularly referred to the Vienna Convention when discussing the right of consular access with foreign governments.

For example, in 1975, two American citizens were detained by Syrian security forces. Despite repeated requests, Syrian officials refused U.S. consular officials access to the detained nationals. The State Department ordered the U.S. Embassy in Damascus to inform the Syrian government of the importance of consular access. Eleanor McDowell, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 249-250 (1975). According to the State Department, the right of consular access is well established under the Vienna Convention, customary international law, bilateral agreements between the United States and Syria and by humanitarian considerations. Dept. of State telegram 40298 to Embassy Damascus Feb. 21, 1975, *reprinted in* MCDOWELL, at 249-250. The State Department added that:

> The recognition of these rights is prompted in part by considerations of reciprocity. States accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded equivalent rights to protect their nationals. The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.

Id. at 250. Following its formal request to the Syrian government, American consular officials were granted proper access to the detained nationals. Embassy Damascus telegram 925 to Dept., March 10, 1975, *reprinted in* MCDOWELL, at 251.

In November 1979, following the seizure of the U.S. Embassy in Tehran and the detention of U.S. citizens, the United States instituted proceedings against Iran in the International Court of Justice (hereinafter "ICJ"). In its application to the ICJ, the United States noted that the Government of Iran had violated the

Vienna Convention by, *inter alia*, failing to allow U.S. consular personnel to communicate and contact detained U.S. nationals. In its Order of Provisional Measures of December 15, 1979, the ICJ acknowledged the importance of the Vienna Convention. It noted that:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law . . . .

Case Concerning United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures), 1979 I.C.J. Rep. 7, 19-20 *reprinted in* 19 I.L.M. 139, 145-146 (1980). In its Final Judgment, the ICJ held that Iran had violated several international conventions, including the Vienna Convention, as well as customary international law. It called upon Iran to make reparations to the United States for these violations.

To ensure that consular access is upheld by foreign governments, the State Department has issued instructions to all Foreign Service posts regarding their obligation to protect detained U.S. citizens abroad. U.S. Dep't of State, FOREIGN AFFAIRS MANUAL (1980). Chapter 400 of the Foreign Affairs Manual concerns the arrest and detention of U.S. citizens abroad. The introduction notes that "one of the basic functions of a consular officer is to provide a 'cultural bridge' between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail." 7 FOREIGN AFFAIRS MANUAL, at § 401.

The Foreign Affairs Manual recognizes that the Vienna Convention as well as numerous bilateral agreements require host governments to notify foreign nationals of their right to communicate with consular officials. *Id.* at § 402. "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." *Id.* at § 411.1.

In addition, the Foreign Affairs Manual recognizes an additional obligation found in numerous bilateral agreements to notify consular officials whenever a national is detained:

> In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee.

Id. at § 411. Indeed, the Foreign Affairs Manual adds that U.S. consular officials should file a formal protest whenever a host government fails to inform the consular officials of the arrest of a U.S. citizen within 72 hours of the arrest. *Id.* at § 415.4-1.

The Foreign Affairs Manual also describes the importance of prompt consular access to detained nationals. *Id.* at § 412. Access assures both the national and the host government of the serious interest of the U.S. government in the case. It allows consular officials to document potential instances of abuse. It also allows consular officials to provide detained nationals with information pertaining to the legal system of the host government and with a list of lawyers. Finally, it allows consular officials to ensure that detained nationals are treated fairly and without prejudice to their national origin. The Foreign Affairs Manual requires U.S. consular officials to file a formal protest whenever a host government fails to provide consular access to detained nationals. *Id.* at § 415.4-3.

B. The Vienna Convention Was Designed to Protect Foreign Nationals within the United States

The Vienna Convention also applies within the United States. Indeed, the federal government enacted regulations in 1967 to establish a uniform procedure for consular notification when nationals of foreign countries are arrested by officers of the Department of State or the Immigration and Naturalization Service. 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. The regulations were enacted to implement the provisions on consular notification and access contained in existing bilateral consular agreements as well as the pending Vienna Convention.

The legislative history surrounding the Senate ratification of the Vienna Convention clearly indicates that the agreement was intended to apply in the United States and that it would not require further legislative action. Upon submitting the Vienna Convention to the Senate, the Executive branch indicated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser) (1969).

In addition, the legislative history also indicates that the agreement was intended to affect federal, state and local law enforcement procedures. During Senate consideration of the Vienna Convention, Senator William Fulbright asked the Executive branch whether the agreement would affect federal legislation or state laws. *Id.* at 18. In response, the State Department indicated that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions. *Id.* It added, however, that "[t]o the extent that there are conflicts in Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions." *Id.* Moreover, the Senate fully recognized that state and local jurisdictions were required to provide consular notification when a foreign national was detained. *Id.* at 24. To better understand the impact of the Vienna

Convention on state and local jurisdictions, the Senate requested information from the Executive branch regarding the manner in which the State Department notifies state and local jurisdictions regarding consular agreements so that they know which consuls "to notify when they arrest a foreign national." *Id.*

In 1969, the Department of State began issuing notices to state and local law enforcement officials regarding the detention of foreign nationals. The notice is mailed to the governor and attorney general of each of the fifty states and mailed to the mayors of cities with populations exceeding 100,000 people. U.S. Dep't of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals* (1993). The notice provides in pertinent part:

> The U.S. Department of State wishes to remind all law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be legal obligation to notify diplomatic or consular representatives of that person's government in this country. Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad.

Id. at 1. The notice then sets forth the obligations for law enforcement officials with respect to the detention of foreign nationals and the right of consular access. It provides that all detained nationals must be notified of their right to contact and communicate with consular officials. It indicates that this requirement is provided by the Vienna Convention and customary international law. In addition, the notice recognizes that the United States has entered bilateral agreements with certain countries that require notification of consular officials even if the alien requests that no such notification take place. Finally, the notice provides a current list of embassies and consulates in the United States, including their address and telephone number.

Despite the existence of these obligations, there appears to be a pervasive disregard of the Vienna Convention in the United States. Few states have heeded the state Department notice and the obligation on consular access. It is particularly troubling that a recent survey identified as many as 100 foreign nationals on death row who were never notified of their right to consular access. William Aceves, *Murphy v. Netherland*, 92 AM. J. INT'L L. 87, 90 (1998).

III. THE VIENNA CONVENTION IS THE SUPREME LAW OF THE LAND AND APPLIES TO FEDERAL, STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

As a duly ratified and self-executing agreement, the Vienna Convention is the supreme law of the land and applies to federal, state and local law enforcement officials.

A. The Vienna Convention is the Supreme Law of the Land

It is well settled that international agreements of the United States are the law of the United States and supreme over the laws of the several states. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) (hereinafter "RESTATEMENT (THIRD)"). Under the Supremacy Clause of the U.S. Constitution, "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." U.S. Const. art. VI, cl. 2.

Accordingly, courts are bound to give effect to international agreements. However, the Supreme Court has limited the application of treaty obligations within the United States. In *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829), the Supreme Court found that a treaty is only enforceable in U.S. courts if it does not require further congressional action or if Congress enacts legislation implementing the treaty provisions. "Our constitution

declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." In the *Head Money Cases*, 112 U.S. 580, 598-599 (1884), the Supreme Court stated that "[a] treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." This principle has been affirmed on numerous occasions. *See also* RESTATEMENT (THIRD) § 111(3).

In addition to creating domestic obligations, treaties create international obligations. The United States is also responsible for complying with these obligations. International law provides that a state is obligated to comply with a treaty that has been ratified and has entered into force. This obligation is codified at Article 26 of the Vienna Convention on the Law of Treaties which provides that "[e]very treaty in force is binding upon the parties and must be performed by them in good faith." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). Indeed, this principle represents one of the most important obligations in international law: *pacta sunt servanda* - treaties must be observed. RESTATEMENT (THIRD), at § 321 cmt. a. It is considered to be a *jus cogens* norm, a fundamental standard of conduct that cannot be set aside by treaty or acquiescence.

Moreover, a rule of international law or a provision of an international agreement that is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation. This principle of international responsibility is codified in Article 27 of the Vienna Convention on the Law of Treaties, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." It has also been recognized in our own legal system. As noted in the RESTATEMENT (THIRD), at § 115(1)(b), "that a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."

In sum, international agreements create both domestic and international obligations. It is necessary to recognize this distinction when examining the application of treaty obligations in the United States as well as the consequences that result from treaty violations.

B. The Vienna Convention Applies to State and Local Governments

Treaty obligations are not limited to the federal government. They also apply to state and local governments. Indeed, international agreements take precedence over inconsistent state laws under the Supremacy Clause.[8] This fundamental principle of federalism has been affirmed on numerous occasions by the Supreme Court.

In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Supreme Court examined the relationship between a treaty and state law. The Court determined that the Treaty of Peace between the United States and Great Britain took precedence over inconsistent state law. According to Justice Chase, "[t]he treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator." *Id.* at 237. Justice Chase went on to add that it was the responsibility of the judiciary, both federal and state, to uphold the treaty over inconsistent state law. *Id.*

In the seminal case of *Missouri v. Holland*, 252 U.S. 416, 431 (1920), the Supreme Court examined the validity of a treaty and subsequent implementing legislation against charges by Missouri that they were "an unconstitutional interference with the

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[8] The RESTATEMENT (THIRD) § 115 cmt. e indicates that "[e]ven a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy." *See also* Jordan Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51-57, 62-64, 92 (1996).

rights reserved to the States by the Tenth Amendment," and that they threatened to "invade the sovereign right of the State and contravene its will manifested in statutes." The 1916 treaty between the United States and Great Britain sought to protect migratory birds traversing between the United States and Canada. Congress subsequently enacted legislation implementing the treaty, and regulations were promulgated soon thereafter by the Secretary of Agriculture. In a typically terse holding, Justice Holmes determined that the treaty and legislation were valid exercises of federal power. The opinion emphasized the important role played by the federal government in regulating matters of national concern. *Id.* at 435.

The Supreme Court's ruling in *United States v. Belmont*, 301 U.S. 324, 331 (1937) is also instructive. "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. . . ."

Indeed, international law recognizes the liability of the central government for violations of international law committed by any entity empowered to exercise governmental authority. Thus, the RESTATEMENT (THIRD), at § 321 cmt. b. provides that "[a] state is responsible for carrying out the obligations of an international agreement. A federal state may leave implementation to its constituent units, but the state remains responsible for failure of compliance." According to Sir Ian Brownlie, the law in this respect is well-settled. "A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the Legislature and other sources of internal rules and decision-making are not to be regarded as acts of some third party for which the state is not responsible, and any other principle would facilitate evasion of obligations." Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 35 (4th ed. 1990).

CONCLUSION

The Fourth Circuit's ruling is troubling because it prevents foreign governments from enforcing valid treaty obligations in U.S.

courts. The United States signed and duly ratified the Vienna Convention. It is undisputed that the Vienna Convention is self-executing. Despite the existence of clearly defined treaty obligations that set forth specific rights for consular officials, the actions of Virginia officials, combined with the rulings of the Fourth Circuit, have emasculated a self-executing treaty obligation and have ignored the Supremacy Clause.

Consular access is a fundamental right of due process designed to ensure the fair and impartial treatment of foreign nationals.[9] It serves the needs of foreign nationals who benefit from prompt communication with consular officials as well as their intervention during legal proceedings. Foreign nationals are at a distinct disadvantage when they are first detained by law enforcement officials. They are often unfamiliar with the language or culture of the detaining state. They are certainly unfamiliar with the legal system of the detaining state. As a result, they will not have the ability to fully understand what is taking place, particularly at the early stages of the legal process when it is essential to fully understand one's rights. Through prompt intervention, a consular official can provide a foreign national with critical information about their case and the legal process. Consular access enables foreign governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons. It is for these very reasons that the consular institution was created.

There are several reasons for ensuring that the United States fully complies with the obligations set forth in the Vienna Convention as well as in other consular agreements. Reciprocity plays an important role in international relations. As the Supreme Court noted in *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), "international law is founded upon mutuality and reciprocity."

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[9] The RESTATEMENT (THIRD) § 711, rpt. 2 indicates that the refusal of a government to allow a detained foreign national to communicate with government representatives is a denial of due process and gives rise to state liability under international law.

Indeed, the Executive branch has long noted the reciprocal nature of the obligations set forth in the Vienna Convention. In order to ensure proper treatment of U.S. nationals abroad, the United States must make comparable efforts at home. Otherwise, foreign governments will have little incentive in complying with these obligations. More broadly, failure to adhere to the obligations on consular access may lead to violations of other diplomatic and consular obligations such as diplomatic immunity. Effective diplomatic and consular relations are imperative for stable relations between states. Political and economic relations cannot fully develop without effective diplomatic and consular relations. Accordingly, proper compliance with the Vienna Convention as well as other consular and diplomatic agreements is essential as a practical matter.

The federal courts have consistently expressed a concern over the persistent violation of the Vienna Convention by the states and the long-term consequences of such action on U.S. interests abroad. Concurring in *Breard v. Pruett*, a companion case, Judge Butzner wrote:

> 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 . . . ." (citation omitted)
>
> . . . .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.

Breard v. Pruett, No. 96-25, slip op. at 11-12 (4th Cir. Jan. 22, 1998) (Butzner, J., concurring).

Quite simply, the United States signed and duly ratified the Vienna Convention. If the United States seeks to affirm and rely on the rule of law, it must fully implement its international obligations. It is up to the courts to ensure that these obligations are fulfilled.

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Respectfully submitted,

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Human Rights Committee of the American Branch of the International Law Association

Lawyers Committee for Human Rights