No. 97-1390

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 REPUBLIC OF ARGENTINA, REPUBLIC OF BRAZIL, REPUBLIC OF ECUADOR, AND REPUBLIC OF MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**MISCELLANEOUS**

## I.
## INTEREST OF AMICI CURIAE

Amici nations[1] have a vital interest in ensuring compliance with the Vienna Convention on Consular Relations[2] by the United States and its political subdivisions. The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign nation has always been a critical function of consular officials. Thousands of nationals of amici nations travel to the United States each year or reside in this country, and it is incumbent on the consular officials of amici nations to assist and protect those that become involved with the criminal justice system here. Consuls can discharge that responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions. Those functions can include addressing appropriate authorities on behalf of the detained national, assisting in discovery and collection of mitigating evidence, monitoring of proceedings and incarceration, and advising detained nationals about the United States justice system and differences between that system and the justice system in the accused's country of origin.

The United States is the only Western industrialized nation that still imposes the death penalty.[3] Because of the severity of the potential punishment, a consul has a special interest in assisting a national who faces a capital charge. The failure of law enforcement

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[1]Pursuant to the disclosure requirement of Rule 37.6 of the Rules of this Court, Amici make the following disclosures: This Brief was not authored in whole or in part by counsel for any party, and no monetary contribution to the preparation or submission of the Brief was made by any person or entity other than Amici or their counsel.

[2]April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77 [hereinafter "Vienna Convention," "Convention," or "VCCR"].

[3]*See* Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries,* at 5 (1996).

officials in the United States to comply with Article 36's consular notification provision eviscerates consuls' right to assist, protect, and ensure the fair treatment of their nationals. Indeed, the case of Angel Breard, from which the instant action by Paraguay arises, is by no means unique. In several other capital cases, a foreign state or national has raised the issue of non-compliance with the Vienna Convention in the federal courts.[4] Courts, while recognizing the existence of recurring violations of the Vienna Convention, have considered themselves unable to grant relief.

Thus, amici nations have a vital interest in persuading this Court to hear Paraguay's case.[5] A decision by this Court would establish a nationwide precedent that would extend beyond the particular action to every instance in which authorities arrest a foreign national. Further, as the United State has itself recognized, the continuing vitality of the Vienna Convention depends upon reciprocity of enforcement between foreign nations. Thus, the resolution of this case will have a direct effect on each amicus nation. In the absence of a decision by this Court, violations of the Vienna Convention will continue unabated and amici nations will be denied their rights under United States and international law.[6]

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[4]For examples of capital cases in which the issue of non-compliance with the Vienna Convention has arisen, *see, e.g.*, *United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997) (Arizona); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (Virginia); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (Texas).

[5]Because of the substantial importance it attaches to consular notification, the Republic of Mexico has requested an advisory opinion before the Inter-American Court of Human Rights of the Organization of American States on this issue.

[6]Argentina's interest in this action is based not only on the respect that all states owe to the Vienna Convention, but also upon the fact that Mr. Breard was born in Argentina and is of Argentine origin.

## II.
## RESERVATION OF IMMUNITY

Nothing in this Brief shall be construed as a waiver of the immunity to which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico is entitled by virtue of international law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, any immunity or privilege established by the Vienna Convention or of any defense, right, or immunity which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico may have a right to assert. It also shall not imply a submission to the jurisdiction of the United States by the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico.

## III.
## STATEMENT OF CONSENT OF PARTIES

The written consents of Petitioner and Respondents to the filing of this Brief of Amicus Curiae are filed concurrently and attached hereto.

## IV.
## SUMMARY OF ARGUMENT

The Vienna Convention plays a vital role in the protection and fair treatment of foreign nationals present in another state by requiring, among other things, that arresting authorities promptly notify a foreign national of his or her right to contact a consular official. The right to contact a consular official is a critical one, as the United States has repeatedly recognized in actions and statements by the Departments of State and Justice. In fact, the United States is one of the most vociferous advocates of the Convention and insists upon strict compliance with it when an American is detained abroad. However, the viability of the Vienna Convention depends on reciprocal compliance by signatory states. Failure to comply by one nation imperils the entire structure established by the Convention. By failing to inform arrested foreign nationals of their rights, officials of Virginia and other states have imperiled the continuing viability of the Vienna Convention.

Adherence to the Vienna Convention ensures that consuls can continue to provide substantial and meaningful assistance to their nationals. That assistance can include addressing local authorities on behalf of an accused national, assistance in the discovery and collection of mitigating evidence, and monitoring of concerning proceedings and incarceration.

The Fourth Circuit's decision, *Paraguay v. Allen*, No. 96-2770, ___F. 3d ___ (4th Cir. Jan. 22, 1998) (reproduced in the Petition for Certiorari, at A1-A12), holding that the Eleventh Amendment bars federal judicial review of Paraguay's claims, ignores the continuing interests of sovereign nations in the welfare of their citizens and effectively condones ongoing violations of the Vienna Convention by state officials. That decision would deprive the amici nations of the natural and appropriate forum for redressing those ongoing violations of their international treaty rights: the federal courts, which are constitutionally charged with redressing treaty violations. The Fourth Circuit, in simultaneously ruling that Breard cannot raise the Vienna Convention violation in his habeas proceeding and that Paraguay is too late to obtain a remedy for Virginia's wholesale disregard of the Convention, has ruled that the federal courts can afford no remedy for the violation of rights accruing under a treaty ratified by the President with the advice and consent of the United States Senate, and having the force of federal law. By denying an effective remedy for violations of the Vienna Convention — a treaty which, as the United States has recognized, depends upon reciprocity between nations — the decisions of the Fourth Circuit thus imperil the continuing viability of an international treaty that the United States itself views as a vital component of international law. Because the continuing vitality of the Vienna Convention may depend upon its outcome, this case presents an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

## V.
## ARGUMENT

### A. The Vienna Convention Plays A Vital Role In Ensuring The Protection And Fair Treatment Of Nationals Of One State Who Are Present in Another State.

Nations entered into the Vienna Convention to affirm and codify consular practice, which had existed in various forms since ancient times. *See* Luke T. Lee, *Consular Law and Practice* 23 (2d ed. 1991); VCCR, Preamble. The United Nations Conference on Consular Relations promulgated the Convention on April 24, 1963, and the United States ratified it on November 24, 1969. T.I.A.S. 6820, 21 U.S.T. 77. As stated in its preamble, the Convention was established in order to "contribute to the friendly relations among nations, irrespective of their differing constitutional and social systems" and to "ensure the efficient performance of functions by consular posts on behalf of their respective States." VCCR, Preamble. The Vienna Convention has been described as "the single most important event in the history of the entire consular institution." Lee, *supra*, at 26. Moreover, "after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaties or national legislation, without reference or recourse to the Vienna Convention." *Id.* In sum, the Vienna Convention establishes the framework for consular law and practice throughout the world and serves as a cornerstone of international law and international relations.

The Vienna Convention addresses many matters of consular law and practice, including establishment of consular posts, appointment of consuls, inviolability of consular officers, posts, and records, and exemption of consular posts from taxation. *See, e.g.*, VCCR, Arts. 4, 10, 41, 31, 33, 32. Included in the list of matters addressed by the Convention is the right of communication between a consul and a detained national of the consul's state. *See* VCCR, Art. 36. To secure that right, Article 36 requires that authorities of the "Receiving State" notify a foreign national,

"without delay," of that national's right to contact a consular official of the "Sending State."[7] Article 36 provides:

> 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. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officials 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 officials shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

*Id.*

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[7]In the terminology of the Vienna Convention, "Receiving State" refers to the country which detains a foreign national, and "Sending State" refers to the country of origin of the detained person.

The importance of the consular functions secured by Article 36 cannot be overstated. As nations of the world have recognized, consular assistance can be critical to the well-being of a national detained in a foreign country. *See, e.g.*, S.A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 721 (1995) ("To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access"); Lee, *supra*, at 134 ("Essential to the fulfillment of a consul's protective functions are his right to be informed immediately of a detention of nationals . . . ."). In fact, this Court need look no further than the concurring opinion in Angel Breard's own habeas corpus action to see the importance of Vienna Convention and the right to consular notification that it secures. As Judge Butzner stated in that opinion:

> The protections afforded by the Vienna Convention go far beyond Breard's case. . . .
>
> . . .
>
> 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.

*Breard v. Pruett*, No. 96-25, __ F. 3d ___ (4th Cir. Jan. 22, 1998) (Butzner, J., concurring) (reproduced in the Petition for Certiorari, at A23-A34).

The United States Government has itself, on numerous occasions, recognized the critical nature of the rights accorded by Article 36. In 1973, the Department of State stated:

> In 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*.

Arthur W. Rovine, Dep't. of State, *Digest of United States Practice in International Law*, 1973, at 161 (emphasis added). Indeed, the State Department had recognized the importance of consular access to a detained individual even prior to the United States' accession to the Vienna Convention,[8] and even after worldwide adoption of the Convention, the United States remains a signatory to bilateral treaties that require notification to consular officials within a specific number of days.[9]

In fact, the State Department has on several occasions taken action in response to other nations' failure to comply with Article 36 or, more generally, to notify United States consular officials directly of the detention of American citizens abroad. In what was perhaps its most celebrated action on the subject, the State Department chastised the Syrian government for failing to notify, in accordance with the requirements of a bilateral agreement and

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[8]Numerous bilateral treaties that predate the Convention contain provisions for consular notification in the event of an arrest. *See* E. Kerley, *Contemporary Practice of the United States Relating to International Law*, 57 Am. J. Int'l L. 403, 411-18 (1963) (listing United States' treaty provisions in effect as of January 1, 1963, that required notification to consuls upon arrest of a foreign national).

[9]*See* 8 C.F.R. § 236.1(e) & n.1 (listing those countries that have agreements with United States requiring notification of an arrest within seventy-two hours).

customary international law,[10] the United States consul in Damascus of the detention of two Americans:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations. . . . Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar . . . . The consul, while fully complying with the law of the detaining state, is able to assist these nationals in securing and preserving their rights, often by helping them to obtain local counsel. The consul's presence may also help assuage the distress of detained nationals.

Lee, *supra*, at 145 (quoting Department of State, *Telegram 40298 to Embassy Damascus*, Feb. 21, 1975). Shortly after the State Department made that representation to the Syrian government, the consul was granted access to the American prisoners. *Id.*

In a subsequent incident involving the detention of American citizens in El Salvador, the State Department specifically

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[10]The bilateral agreement in question was a September 1924 "exchange of notes" between the United States and France, with which the Syrian government agreed to comply upon recognition of its independence in 1944. *See* Lee, *supra*, at 145-46. Under that agreement, the Syrian government had an obligation to notify the American consulate upon the arrested person's declaration of American citizenship. Although this obligation differs in form from Article 36, the quoted text indicates that, in the State Department's view, it served the same purpose as Article 36 — the facilitation of consular assistance. Indeed, in the telegram to the Syrian government, the State Department specifically referred to the Vienna Convention as relevant to establishing Syria's obligation to notify, because the Convention sets forth the "accepted . . . standard of international practice of civilized nations, whether or not they are parties to the Convention." *Id.*

protested the very same violation of Article 36 claimed by Paraguay in this case — the failure to notify the arrested national of his right to contact a consular representative. Two Americans were detained by Salvadoran authorities for taking a photograph of a police station, which was deemed a "national security installation," during a "state of siege." Although the authorities released the individuals after 32 hours of detention, the State Department nevertheless lodged a protest note requesting the Salvadoran Minister of Foreign Relations "elaborate expeditiously" as to

> [w]hy the [first mentioned] two United States citizens were not informed of their right to contact the Consulate as provided under article 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterward.

Lee, *supra*, at 149 (quoting, Dep't. of State, *Digest of United States Practice in International Law*, 1977, at 290).

Paraguay complains of the very same violation that the State Department did — the failure to notify a detained foreign national of his right to contact a consular representative. Moreover, in contrast to the 32-hour detention of Americans in El Salvador, Virginia authorities detained Angel Breard for months and tried him for murder without ever informing him of his right to contact the Paraguayan consulate. The violation of Article 36 that occurred in the Breard case was far more severe that the violation protested by the State Department to the government of El Salvador in the instance mentioned above. Virginia officials knew of their obligations under the Vienna Convention because the State Department had advised them (and all other state officials) to facilitate consular access of foreign detainees. *See Breard*, *supra*, at A34 (Butzner, J., concurring); *see also* Kerley, *supra* n. 4, at 411.

Like the State Department, the United States Department of Justice has taken action that underscores the importance of consular notification under the Vienna Convention: the enactment of regulations compelling federal law enforcement authorities to

comply with the consular notification provisions of the Vienna Convention. *See* 28 C.F.R. § 50.5, 50.5(a); 8 C.F.R. § 236.1(e). Any federal officer arresting a foreign national must inform the national that a consul will be notified of the arrest, unless the arrested person does not wish it. *See id.* § 50.5(a)(1); *see also* 8 C.F.R. § 236.1(e) & n.1. In the case of aliens detained for criminal, rather than immigration law violations, the arresting officer must notify the United States Attorney, who, in turn, has the obligation of notifying the consul of the arrested person's state. *See id.* § 50.5(a)(2). These regulations demonstrate the high priority that the federal government places upon compliance with Article 36 and other similar provisions.

One federal court has set aside a conviction for illegal entry after deportation, as a result of immigration authorities' failure to comply with 8 C.F.R. § 242(e) (1978), the predecessor to present-day § 236.1(e). In *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980), the court reversed a conviction on the ground that the underlying order of deportation was invalid, because the arresting authorities had failed to notify the defendant, at the time of his initial detention, of his right to contact a consular official under § 242(e), and this failure had prejudiced the defendant. The court determined that prejudice was present because the defendant would have contacted consular officials if he had known of his right and such contact "may well have led not merely to the appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge." 617 F.2d at 531. *Rangel-Gonzales* built upon the court's earlier decision in the same case, *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), in which the court held that an alien could obtain a reversal of a conviction for violation of § 242(e) at the time of detention, if the alien could show that the violation resulted in prejudice.

## B. As the United States Has Recognized, The Continuing Viability Of Article 36 Depends On Reciprocal Compliance.

As this Court recognized more than a century ago, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). As a result, the "freedom and safety" of Americans abroad "are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard*, *supra*, at A34 (Butzner, J., concurring). In fact, the State Department emphasized the importance of nations' reciprocal compliance with consular notification provisions in the protest to the Syrian government that was mentioned earlier:

> The recognition of these rights [consular access and notification] 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 those nationals.*

Lee, *supra*, at 145 (quoting Department of State, *Telegram 40298 to Embassy Damascus*, Feb. 21, 1975) (emphasis added).

Virginia's actions in this case flatly contradict the State Department's assurances. The ongoing failure by states throughout the Union to comply with Article 36[11] threatens to undermine the Convention's continued viability for the very reason identified by the State Department in the foregoing declaration: the right of consular notification depends upon "considerations of reciprocity" among nations. On another occasion, the State Department

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[11] *See* Amnesty International, *Violation of the Rights of Foreign Nationals Under Sentence of Death* (Jan. 1998) at 1.

likewise recognized the impact on international relations of a state's failure to comply with Article 36. In the case of Mario Murphy, a Mexican national, the Department issued a formal apology to the government of Mexico for Virginia's failure to comply with Article 36 — on the day *after* Murphy's execution. *See* Amnesty International, *Violation of the Rights of Foreign Nationals Under Sentence of Death* (Jan. 1998) at 3.

Thus, the resolution of this case may have a substantial effect on continued worldwide compliance with Article 36. If states of the United States can continue to disregard their obligations under the Vienna Convention with impunity — the effective result of a decision in favor of Virginia state officials — then the reciprocal compliance structure upon which Article 36 is built will be undermined. If violations of Article 36 are not remediable in the federal courts, the State Department, in seeking compliance with that Article by other nations, will have no rightful basis to assure reciprocity from the United States.

### C. When A Consulate Knows That One Of Its Nationals Has Been Detained, It Can Provide A Wide Array Of Assistance That The Individual Would Not Otherwise Receive.

Consular notification does not exist for merely informational purposes. Rather, upon learning of the detention of a national, a consul can provide a wide array of assistance that the individual would not otherwise receive. Among other functions, the consul may address authorities of the Receiving State on behalf of the accused both prior to and after trial, assist in the discovery and collection of mitigating evidence, assist in obtaining more effective legal representation, monitor legal proceedings and incarceration to ensure fairness and compliance with international standards, and advise the national concerning the criminal justice system in his or her native state and the similarities to and differences from the criminal justice system in the arresting state. The United States and many other nations consider an accused person's access to these functions essential to the fair administration of justice. The reason for the importance the United States and other nations place upon consular functions becomes clear upon a detailed examination of those functions and their possible effect.

***Addressing Authorities of the Receiving State Before and after Trial***: The existence of prosecutorial discretion, particularly in whether to seek the death penalty,[12] creates a unique opportunity for the provision of consular assistance that a state may or may not choose to exercise in a particular case. If officials of the arrested foreign national's native state decide that the case is a proper one for doing so, those authorities may decide to request that prosecuting authorities not seek the death penalty. Consular representatives, moreover, are uniquely well positioned to provide information bearing on a prosecutor's exercise of discretion. That exercise will depend in part on mitigating factors, such as the defendant's criminal history and personal circumstances. *See* Dep't of Justice, *Principles of Federal Prosecution, U.S. Attorney's Manual*, at 9-27.230(B)(5), (7). As this Court has noted before, "the strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or to go to trial." *McCleskey*, 481 U.S. at 307 n.28. The evidence that bears upon discretionary factors will often be in the defendant's home country rather than in the United States, and the participation of consul therefore is an invaluable aid in gathering such evidence. *See* Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771, 772-73 n.6 (1994) (citing guidelines for Canadian consuls, which state that "a Canadian consul . . . will attempt to obtain case related information" on behalf of a charged national) (emphasis omitted).

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[12]Prior to trial, prosecutors in the United States traditionally have, as a matter of policy, "wide discretion" when deciding whether to seek the death penalty. *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987); Shank & Quigley, *supra*, at 740. More often than not, prosecutors will exercise that discretion against seeking the death penalty. *See id.* (citing Amnesty International, *United States of America: The Death Penalty* 29 (1987)); Mark Ballard, *Death's Right-Hand Man, Texas Lawyer*, May 29, 1995, at [*4] (*available in* LEXIS, LEGNEW library, TXLAWR file) (in Harris and Dallas, the two largest counties in Texas, prosecutors decided *not* to seek the death penalty in 90% and 94% of eligible cases, respectively). However, as this Court has acknowledged, that discretion leads to circumstances in which similarly situated persons will not receive similar punishment. *See McKleskey*, 481 U.S. at 307 n.28.

*Discovery and Collection of Mitigating Evidence*: A consul's role in the discovery and collection of mitigating evidence is not limited to attempts to influence prosecutorial discretion in the pre-trial stage. Instead, the presentation of mitigating evidence becomes particularly essential after conviction, during sentencing proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Constitution requires consideration by sentencer, "*as a mitigating factor*, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death") (emphasis added). At that stage, consular assistance is essential to effective presentation of mitigating evidence because much of the mitigating evidence in the case of a foreign national defendant may be in the national's home country rather than in the United States. *See* Shank & Quigley, *supra*, at 723.

The types of assistance a consul may provide in the discovery and collection of mitigating evidence may vary. For example, a consul may assist the defendant's attorney by bringing witnesses to the United States for sentencing proceedings. Or, if those witnesses come to the United States on their own or at the behest of the defendant's attorney, the consul may provide assistance to the witnesses while they remain in the United States. The consul may also provide assistance by investigating the very existence of mitigating evidence in the defendant's home country. *See Strangers in a Strange Land, supra*, at 772 & n.5 (noting that in the case of Stanley Joseph Faulder, a Canadian sentenced to death in Texas, Faulder's attorney, with consular assistance, might have obtained favorable testimony from the defendant's family, all of whom were in Canada).

This Court has repeatedly emphasized the vital importance of the presentation of mitigating evidence to the fairness and constitutionality of capital sentencing procedures. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 368 (1993) (jury was properly told it "could consider all the mitigating evidence"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett*, 438 U.S. at 604. In order for a sentencing procedure to be constitutional, the jury (or judge) must consider all mitigating evidence. *See Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (requiring consideration of *all* mitigating evidence prior to sentence); *Eddings*, 455 U.S. at 113-14. Because much of the mitigating evidence in many cases can be

obtained only if the defendant's attorney works in conjunction with the foreign national's consul, consular assistance — and, by extension, consular knowledge — is essential to the fairness of sentencing proceedings.

***Assistance in Obtaining More Effective Representation*:** Many countries require their consuls to provide a detained national with various levels of assistance in obtaining more effective legal representation. In fact, the Vienna Convention itself lists this type of assistance as a consular function: "Consular functions consist in . . . representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." VCCR, Art. 5(i); *see also id.* Art. 36(1)(c). Several states require their consuls to provide a detained national with a list of local lawyers who can provide competent representation.

For example, the State Department's consular instructions require a consul to provide a detained American with a list of attorneys that is tailored to the needs of the detained person by listing only those attorneys who are familiar with the type of law relevant to the detainee's case and by removing the names of "dishonest, incompetent, or inattentive" attorneys. Lee, *supra*, at 166 (quoting United States Dep't. of State, *Consular Instruction* 413.3). Similarly, the United Kingdom requires its consuls "to provide a list of lawyers for persons requiring legal aid." *Id.* at 125 (quoting United Kingdom *Foreign Service Instruction* VIII-16(iv)). Mexico requires its consuls "to assist and advise Mexicans in their dealings with local authorities" and "to represent Mexicans who are absent or otherwise incapable of handling their own affairs." Lee, *supra*, at 127 (quoting *Ley Organica del Servicio Exterior Mexicano y su Reglamento*, Art. 88).

***Monitoring Proceedings and Incarceration*:** Consuls also can play an essential role in monitoring proceedings against the national to ensure fairness and compliance with international standards and monitor the pre- and post-trial conditions of incarceration. For example, the United States requires its consuls to monitor the well being of incarcerated American citizens, protest discrimination against detained citizens, and attend the trial of any American, even in the absence of discrimination, *see* Lee, *supra*, at 169-71 (quoting Dep't. of State, *Consular Instructions* 421.3,

431.2, 431.3), and the United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prima-facie miscarriage or denial of justice" or "the futility of appeal to a higher authority." Lee, *supra*, at 125 (quoting *United Kingdom Foreign Service Instructions* VIII-16 (vi)). Consuls cannot perform the monitoring function unless they know of the proceedings against a national. In most cases, they will become aware of those proceedings only when the Vienna Convention is complied with by authorities of the Receiving State.

Moreover, the monitoring function does not exist simply to provide comfort or reassurance to the accused foreign national. Rather, it increases the chances that the defendant will receive a truly fair trial. The possibility of discrimination is substantial in a proceeding against a foreign national, especially in a capital cases. *See* Shank & Quigley, *supra*, at 741. Consular monitoring and presence during the course of proceedings can reduce the possibility of discrimination. *See id.* at 744. Thus, an accused foreign national can suffer substantial harm, in the form of discrimination, when a consul is not monitoring the proceedings. That harm is suffered in every case where authorities fail to comply with the Vienna Convention, because those cases will not have any monitoring of the proceedings to ensure the absence of discrimination.

## VI.
## CONCLUSION

As the United States has itself emphasized, the continuing vitality of the Vienna Convention depends upon reciprocity among its signatories. Therefore, violations of Article 36 by state officials undermine treaty provisions that form a cornerstone of consular relations and that are essential to the fair treatment both of foreign nationals detained in this country and of United States citizens who are detained abroad. Yet in the face of an admitted violation of Article 36, committed in the gravest of cases — one in which a political subdivision of the United States seeks to put a foreign national to death — the Fourth Circuit has ruled that it can afford no relief either to the accused or to Paraguay, his nation of origin.

Because violations of Article 36's notice provisions typically come to light only after an accused has been convicted and sentenced — as did the violation here — the Fourth Circuit's interpretation of the Eleventh Amendment means that federal courts will virtually always be powerless to remedy Article 36 violations. Yet it is to the federal courts that sovereign nations must be able to turn effectively to redress violations of their rights under Article 36. No less a document than the United States Constitution charges the federal courts with the responsibility for such cases. *See* U.S. Const., Art. 3, § 2 (judicial power of federal courts extends to cases arising under United States' treaties); *see also* 28 U.S.C. § 1331 (same). While foreign sovereigns might choose to bring state court actions to redress violations of the Vienna Convention, it would be an odd result indeed if foreign nations — complaining of the violation of rights arising under a treaty ratified by the President with the advice and consent of the Senate, enforced by federal regulation, and repeatedly invoked by the State Department in the conduct of this nation's foreign affairs — must resort to courts of the state whose officials have perpetrated the treaty violation.

The consular notice provisions of Article 36 confer rights that both the United States and amici view as being of the highest order. The Fourth Circuit's decision, closing the doors of the federal courts to sovereign nations complaining of Article 36 violations, effectively sanctions recurring violations of the Vienna

Convention that threaten to undermine its continuing vitality. The decision below, viewed in light of the reciprocal nature of Article 36 and its fundamental significance for the conduct of foreign relations, therefore raises "important question[s] of federal law that [have] not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Amici accordingly urge this Court to grant Paraguay's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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Respectfully submitted,

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